TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2009/008

BETWEEN:

DAVID SWAIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal

Appearances:

Dr. Joseph Archibald, QC, Patricia Archibald with him, for the Appellant
Ms. Elizabeth Hinds, Director of Public Prosecutions, for the Respondent

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2011: September 28, 29.

Criminal appeal against conviction and sentence – Murder – Withdrawal of the appellant's defence of accident by the trial judge – Whether the defence of gross negligence manslaughter or the defence of unlawful act manslaughter should have been left to the jury by the trial judge – Whether a retrial should be ordered

Held: allowing the appeal, quashing the conviction, setting the sentence aside and discharging the appellant, that:

1. The trial judge's withdrawal of the appellant's defence of accident and the absence of any or adequate directions to the jury to assist them in assessing and evaluating the transcript of the Rhode Island depositions of the appellant, amount to material irregularities which make the appellant's conviction for murder unsafe.

2. To obtain and sustain a conviction for manslaughter by gross negligence, it is necessary for the prosecution to establish that the defendant: (i) owed a duty of care to the deceased; (ii) was in breach of that duty; (iii) that the breach of duty caused the death of the deceased; and (iv) that the defendant's conduct was so bad in all the circumstances as to amount in the jury's opinion to a crime.

   R v Bateman (1925) 19 Cr. App. R. 8 cited; R v Adomako [1994] 3 W.L.R. 288 applied.

3. In the present case, neither gross negligence manslaughter nor unlawful act manslaughter was a viable alternative to be left to the jury by the trial judge. The evidence relating to the panic history of the deceased in her diver's log book entries and the appellant's knowledge of this, provided no sufficient basis for lesser verdicts to be left to the jury. Having regard to the way in which the trial developed, the alternative verdict of manslaughter was not really a live issue; it would have been confusing for the jury to be advised of a possibility of a manslaughter verdict which could make no sense in the circumstances of the trial.

4. The decision whether to order a retrial involves consideration of the public interest and the legitimate interests of the appellant. In the present case, the legitimate interest of the appellant calls for consideration of the time which has passed since the alleged offence and any penalty already paid. In the circumstances, the Court does not consider it appropriate to order a retrial, particularly where the evidence falls short of establishing criminal liability.

   Archbold Criminal Practice 2007 cited; Sherfield Bowen v The Queen Antigua and Barbuda Criminal Appeal No. 4 of 2005 (delivered 20th June 2007, unreported) cited.

ORAL JUDGMENT

[1] This is the judgment of the court. The appellant and the deceased who were married for six years lived in Rhode Island in the USA. They came on a sailing and diving trip to the British Virgin Islands in March 1999 along with another couple, the Thwaites, and their infant son. Mr. Swain is an experienced diver with top qualifications in diving, has dived all around the world and at the material time he operated a dive shop in Rhode Island. His deceased wife was also an experienced diver and was at the time of her death qualified to the standard of a rescue diver. She had dived over 300 times in the waters of Rhode Island which, compared to the pristine waters of the Virgin Islands, are murky and difficult.

[2] On 12th March 1999, the Swains donned their diving equipment and went from their vessel 'The Caribbean Soul' into the sea. Shortly after 12:00 p.m. the Swains dived on the Twin Wrecks off Coopers Island, an underwater attraction in the BVI. They left the Thwaites on board the vessel. There were no other divers in that vicinity at the time. It was their last planned dive for their holiday, and it turned out to be their last dive together.

[3] A tragedy occurred under the water. After a little more than half an hour, Mr. Swain returned to the surface without Mrs. Swain. He enquired from Mr. Thwaites if his wife had returned. Mr. Thwaites told him no and then dived only to discover the fin of Mrs. Swain embedded by its blade in the sand with its heel portion up and the heel strap irregularly stretched below the sole. After swimming underwater he discovered the body of Mrs. Swain lying face up without her face mask, her mouthpiece which brought air from the tank was not in place, her eyes were open, and her arms were up. He held her and swam with her up to the surface.

[4] He did what he was trained to do by giving her mouth to mouth resuscitation. Mr. Swain came by in a dingy and did Cardio-Pulmonary Resuscitation (CPR) on her briefly. When he stopped the procedure, Mr. Thwaites attempted to continue but was stopped by Mr. Swain who told him no. The established diving protocol for divers is to attempt resuscitation until the rescuers have no more energy left or someone of higher qualifications takes over. They were all expert divers.

[5] After Mr. Thwaites was stopped by Mr. Swain from giving Mrs. Swain resuscitation, he tried to radio on the Mariner's Channel to call "mayday" for emergency. Mr. Swain dissuaded him, saying that he did not want any crowd to gather. Mr. Swain used his cellular phone to call Virgin Islands Search and Rescue who radioed for assistance. Assistance eventually arrived and Mrs. Swain was taken in a vessel into Tortola. She was declared dead and a post mortem was subsequently conducted. The findings in the autopsy report were that she had pulmonary oedema and congestion; white foam in her upper and lower airways; bilateral hydrothorax; cerebral oedema; haemorrhage of petrous bones; coronary

artherosclerosis, mild to moderate; old and recent contusions of the lower extremities, and abrasions of her dorsal left hand. The report listed her manner of death as an accident.

[6] Mr. Swain returned to Rhode Island a few days after her death and resumed his normal life. Prior to their marriage, the Swains made an ante nuptial agreement from which he stood to benefit on the death of his wife. He collected the proceeds of a life insurance policy on Mrs. Swain's life. Under her will he inherited property to a value of approximately $650,000.00. He expanded his business, and enjoyed another relationship with a female who turned out to be a prosecution witness at his trial.

[7] Subsequently, Mrs. Swain's father filed a civil suit against Mr. Swain in Rhode Island for causing her wrongful death. Mr. Swain testified at the trial in Rhode Island in 2004 and also gave two depositions before the trial of the suit. He was found liable for her death. Following the conclusion of the suit, he was extradited to Tortola where he was arrested and charged with her murder.

[8] At the trial in Tortola, the prosecution case depended solely on circumstantial evidence. The prosecution's theory was basically that Mr. Swain planned to kill his wife and took certain steps cutting off her air supply while they were diving, and then swam around until it was likely too late for her to be revived. Discontinuing CPR was one step to ensure she was not revived. The motive, according to the prosecution, was financial gain from the proceeds of the insurance policy and her estate, and his desire to pursue a romantic relationship with a lady who two years later, ended that relationship. This lady testified as a prosecution witness at Mr. Swain's murder trial in 2009. Love letters between them were also tendered in evidence at the trial.

[9] During the trial, a transcript of the recorded depositions taken in Rhode Island from Mr. Swain were admitted in evidence as part of the circumstantial evidence after being edited

on the instructions of the trial judge.[1] They were edited to remove those portions which the Director of Public Prosecutions and counsel for Mr. Swain agreed were prejudicial to Mr. Swain's case. A diving expert investigator, Mr. Jenni, who was present at the wrongful death civil suit trial in Rhode Island, also testified at the criminal trial in Tortola as a prosecution witness. Mr. Jenni testified about Mr. Swain's evidence at the trial in Rhode Island,[2] his (Mr. Jenni's) investigations in Tortola and Rhode Island, and his conclusions from those investigations. He testified that after attending and observing the proceedings in the civil trial he was of the opinion that Mr. Swain killed his wife.

[10] Mr. Swain also testified at his trial and called expert witnesses to negative the prosecution's case, and to establish that Mrs. Swain's death had been an accident, and further that she could have died from medical causes, having regard to the paucity of findings and the failure of the pathologist to carry out further forensic inquiries and tests.

[11] The edited transcript of the two depositions was comprised of some 261 pages. The learned trial judge treated Mr. Jenni's testimony as evidence from an expert in dive accident investigations, and gave the jury general expert directions without more. Mr. Jenni gave a blow by blow account of what Mr. Swain had said in the Rhode Island civil trial and tendered a number of exhibits. At the end of a protracted trial lasting three weeks, the learned trial judge failed to give the jury any directions at all as to how they were to deal with the evidence in the transcript of the depositions. She simply told them:[3]

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[1] This hearsay evidence was admissible under s. 71(2) of the Evidence Act No. 15 of 2006, Laws of the Virgin Islands ("the Evidence Act, 2006"): "The hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise perceived the making of the representation, which is a representation that was (a) … (c) …; or (d) against the interests of the person who made it at the time when it was made." See also s. 71(4) "If a representation tends (a) to damage the reputation of the person who made it, (b) to show that that person has committed an offence, or (c) to show that that person is liable in an action for damages, then, for the purposes of subsection (2) (d), the representation shall be taken to be against the interests of the person who made it." See also ss. 131 and 132 of the same Act which deal with proof of a foreign document.

[2] See note 1 supra.

[3] See Record of Appeal Vol. 6, Tab 2, pp. 81-82.

> "You have the transcript of the Rhode Island proceedings which has been reduced into writing for ease and convenience. It has not been challenged as to its accuracy. So you will use that also as the evidence in this case."[4]

She gave the jury no assistance as to how to evaluate and use this evidence, or warned the jury as to the weight to be given to it. She also failed to put Mr. Swain's case in a balanced manner to the jury and her summation was more favourable to the prosecution's case where she expressly withdrew the defence of accident, saying that it had no place in the trial.

[12] Section 7(1) of the Criminal Code, 1997[5] provides for the defence of accident in the following words:

> "Subject to the express provisions of this Code or any other law, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or an event which occurs by accident."

[13] Learned Queen's Counsel submitted that when the learned trial judge rejected the defence of accident and refused to put it to the jury for consideration, Mr. Swain was unfairly deprived of the statutory and common law defence on the evidence, thereby resulting in the material irregularity which made the trial unfair and made the conviction unsafe and unsatisfactory. The learned Director of Public Prosecutions pointed to page 22, Volume 6, Tab 2, in the summation, where the learned trial judge said:

> "The Prosecution says that she was murdered at the hands of her husband, David Swain. The defence says her death was due to drowning, due or stemming from medical reasons and that Mr. Swain has nothing to do with it."

[14] At page 24 she said also:

> "The Defence says it's drowning due to medical reasons and accident, accidental drowning."

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[4] See s. 146 of the Evidence Act, 2006 which requires the judge to warn the jury about the unreliability of hearsay evidence and evidence affected by self interest or state reasons for not giving the warning.

[5] Act No. 1 of 1997, Laws of the Virgin Islands.

However, we are of the view that her final direction at page 28 served to completely withdraw the defence of accident, where she said:

> "You heard of self-defence or accident, neither of which has any place in this trial."

In keeping with that direction, the trial judge made no further mention of the defence of accident thereafter.

[15] Ground 6 of the Notice of Appeal stated that on the evidence that was before the jury, it would have been open to the jury upon a proper direction to find that Mr. Swain was guilty of manslaughter only due to an unintentional wrongful presumption of his wife's death shortly after she was recovered from the sea; and the omission of such direction in law deprived Mr. Swain of a lesser verdict than guilty of murder. Dr. Archibald, QC referred to the evidence which came from the deceased's diver's logbook which showed that she had made entries that she had panicked on previous occasions during the course of her dives, and that she had corrected the problem that had caused her to panic. He also focused on the evidence of Mr. Swain that at the material time, he knew of his wife's history of panicking during the course of diving.

[16] Dr. Archibald, QC also referred to the cases of R v Evans,[6] R v Coutts,[7] R v Mills and Another (No. 2).[8] He submitted that spouses owe a duty of care to each other and if Mr. Swain breached that duty of care where he dived with Mrs. Swain and knowing her history of panic, failed to respond to her signs of panicking where it was obvious that she may be in distress while they were diving together, and Mr. Swain returned to the surface without her, resulting in her death, then the issue of an alternative verdict of manslaughter would arise.

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[6] [2010] 1 All E.R. 13 at 25, paras. 41, 44 and 48.
[7] [2006] 1 W.L.R. 2154.
[8] [2003] 1 W.L.R. 2931.

[17] Lord Mustill in Airedale NHS Trust v Bland[9] spoke of the existing common law that "a person may be criminally liable for the consequences of an omission if he stands in such a relation to the victim that he is under a duty to act. Where the result is death the offence will usually be manslaughter, but if the necessary intent is proved it will be murder…"

[18] In Coutts the House of Lords held that in a trial on indictment, any obvious and viable alternative verdict should ordinarily be left to the jury once there was evidence to support it, irrespective of the parties' wishes; and that in the circumstances of that case, where the prosecution on an indictment for murder alleged that the deceased was deliberately strangled to satisfy the macabre sexual fantasies of the defendant, and the defendant claimed that she died accidentally during consensual asphyxial sex, the judge should have left a verdict of manslaughter to the jury although neither the prosecution nor the defence was asking for manslaughter to be left to the jury. Lord Bingham opined at paragraph 27 that:

> "the judge should have left a manslaughter verdict to the jury. His failure to do so, although fully understandable in the circumstances, was a material irregularity. While the murder count against the appellant was clearly a strong one, no appellate court can be sure that a jury, fully directed, would not have convicted of manslaughter. For these reasons, and those given by my noble and learned friends, Lord Hutton, Lord Roger of Earlsferry and Lord Mance, with which I agree, I would accordingly allow the appeal. I would remit the matter to the Court of Appeal and invite that court to quash the conviction. It may also deal with any application for a retrial which may be made, the appellant remaining in custody meanwhile."

[19] The common law since R v Bateman[10] and R v Adomako[11] is that "gross negligence manslaughter" can be said to apply where the defendant commits a lawful act in such a way as to render his actions criminal:[12]

> "In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety

[9] [1993] 1 All E.R. 821 at 890.
[10] (1925) 19 Cr. App. R. 8.
[11] [1994] 3 W.L.R. 288.
[12] R v Bateman (1925) 19 Cr. App. R. 8 at 11.

of others as to amount to a crime against the State and conduct deserving punishment."

[20] In Adomako Lord Mackay, LC set the test for gross negligence manslaughter where he stated[13] that:

> "… the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.
>
> "It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission." (Emphasis added).

[21] It may be said therefore in summary that to obtain and sustain a conviction for manslaughter by gross negligence, it is necessary for the prosecution to establish that the defendant: (i) owed a duty of care to the deceased; (ii) was in breach of that duty; (iii) that the breach of duty caused the death of the deceased; and (iv) that the defendant's conduct was so bad in all the circumstances as to amount in the jury's opinion to a crime.

[22] In Evans, it was made clear that the question whether a duty of care or duty to act is owed by one individual to another is a question of law and the jury is to be directed on what the law is if they find certain facts to be established. The breach of the duty of care may

[13] At p. 295.

consist of an omission or failure to act. It was further accepted[14] that: " When omission or failure to act are in issue two aspects of manslaughter are engaged. Both are governed by decisions of the House of Lords. The first is manslaughter arising from the defendant's gross negligence (R v Adomako [1994] 3 All ER 79, [1995] 1 AC 171). The second arises when the defendant has created a dangerous situation and when, notwithstanding his appreciation of the consequent risks, he fails to take any reasonable preventative steps (R v Miller [1983] 1 All ER 978, [1983] 2 AC 161). Gross negligence manslaughter and unlawful act manslaughter are not necessarily mutually exclusive (R v Willoughby [2005] 1 WLR 1880)."

[23] Having reviewed the law that is engaged by the stimulating submissions of learned Queen's Counsel Dr. Archibald, we have carefully applied it to the evidence in this case. We have also focused on the way in which the case was presented to the jury. We are of the view that neither gross negligence manslaughter nor unlawful act manslaughter was a viable alternative to be left to the jury by the trial judge. The learned Director of Public Prosecutions, Ms. Hinds, submitted that the evidence relating to the panic history of Mrs. Swain in her diver's log book entries, and Mr. Swain's knowledge of this provided no sufficient basis for lesser verdicts to be left to the jury. We agree with Ms. Hind's submissions. Having regard to the way in which the trial developed, the alternative verdict of manslaughter was not really a live issue; and it would have been confusing for the jury to be advised of a possibility of a manslaughter verdict which could make no sense in the circumstances of the trial. Though justice serves the interests of the public as well as those of Mr. Swain, a conviction for a lesser offence in the present case cannot be substituted out of a reluctance to see Mr. Swain get clean away with conduct which in our view was reprehensible and deserving of punishment. Moreover, the evidence in this case, though it would satisfy the civil standard of proof on a balance of probability, in our judgment it falls short of the heavier burden of proof beyond reasonable doubt for establishing criminal responsibility.

[14] At para. 21.

[24] Dr. Archibald, QC has urged that we do not order that the appellant be retried in light of the fact that 12 years have passed since the date of the offence, and any unavailability of defence witnesses for a second trial will prejudice Mr. Swain. In Sherfield Bowen v The Queen[15] the appellant's appeal was allowed and his conviction for murder quashed. When considering whether to order a retrial, Rawlins J.A. (as he then was) stated at paragraph 46:

> "The question which arises is whether this case should be remitted to the High Court for a retrial. In Andre Bennett and Another v The Queen, the Privy Council reiterated that the issue of a retrial order depends upon whether the interest of justice and the public interest would be served by such an order. The main consideration is whether in the interest of the community and the family of the victim, a person who is convicted of a serious crime should be brought to justice and not escape merely because of some technical shortcoming in the conduct of the trial or in the directions to the jury. Their Lordships said that a critical factor is the seriousness of the crime."

[25] We are further guided by the commentary on the law and practice in Archbold Criminal Practice 2007 where it is stated that the decision whether to order a retrial involves consideration of the public interest and the legitimate interests of the defendant. The legitimate interest of the appellant calls for consideration of the time which has passed since the alleged offence and any penalty already paid. We do not consider it appropriate to order a retrial particularly where the evidence falls short of establishing criminal liability. We have also taken into account the fact that 12 years have passed since the alleged offence, and the appellant has spent more than 4 years including his remand period incarcerated.

Conclusion

[26] We are satisfied that the trial judge's withdrawal of the appellant's defence of accident and the absence of any or adequate directions to the jury to assist them in assessing and evaluating the transcript of the Rhode Island depositions of the appellant amount to material irregularities which make the appellant's conviction for murder unsafe. We accept

[15] Antigua and Barbuda Criminal Appeal No. 4 of 2005 (delivered 20th June 2007, unreported).

Dr. Archibald, QC's submissions concerning the fatal effect of the withdrawal of the defence of accident from the jury. The other grounds of appeal have obviously paled into insignificance in light of our conclusions.

[27] Consequently, the appeal is allowed, the conviction is quashed, the sentence is set aside and the appellant is discharged.