MURDER OR MANSLAUGHTER?

The decision of the Court of Criminal Appeal in *R.* v. *Jarmain*[1] illustrates, because of the facts of the case, the difference between the law of England and the law of Canada in respect of homicide committed by an alleged involuntary act of the accused in the course or in the furtherance of a crime involving violence.

In *Director of Public Prosecutions* v. *Beard*,[2] the House of Lords restored a conviction of murder arising out of the death of a girl thirteen years of age, the evidence being that in aid of the act of rape the accused placed his hand upon the girl's mouth to stop her from screaming, at the same time pressing his thumb upon her throat, with the result that she died of suffocation. Drunkenness was the main defence, but in the Court of Criminal Appeal two separate and independent points were raised on behalf of the prisoner, the first of which is the only one now relevant, namely, that the trial judge should have told the jury that, if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased to prevent her screaming, they could and should return a verdict of manslaughter. The Lord Chancellor (Lord Birkenhead) said that this objection failed, the Court of Criminal Appeal having been of opinion that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence; that Court held that by the law of England such an act was murder and he said that no attempt had been made in their Lordships' House to displace this view of the law, as to the soundness of which there could be no doubt.

Within a few months of this decision the Court of Appeal of Manitoba in *R.* v. *Elnick*[3] held that, according to the law of Canada, an act of violence causing death, done in the furtherance of a felonious crime of violence, is murder and that, if a person proceeding to rob another points a loaded firearm at him which is unintentionally discharged and kills him, that is murder. Being engaged in the commission of a crime of violence, his intention to discharge the firearm cannot be regarded separately from his intention to commit robbery. The accused gave evidence in his own behalf and, while admitting that he pointed

[1] [1945] 2 All E.R. 613.
[2] [1920] A.C. 479.
[3] [1920] 2 W.W.R. 606.

the gun at the victim, said he did not intend to fire the pistol at all. Cameron J. A. (for the court) held in a carefully reasoned judgment that the *Beard* case applied.

In *R.* v. *Hughes et al.*[4] the respondents had been convicted of murder in circumstances which showed that they were carrying out a previously concerted plan to hold up and rob the proprietor of a small shop conducted by a Japanese family in Vancouver; that one of the respondents carried a loaded revolver and when three of the respondents entered the shop in question, one of them fired two shots, either recklessly or with the intention of intimidating the occupants of the living quarters in the rear of the shop. The deceased was shot twice, but not fatally, and then grappled with Hughes who had the gun and, either during the scuffle or afterwards, the evidence being conflicting, shot and killed the victim. The accused did not give evidence, but the cross-examination of a crown witness indicated that Hughes had told him that during the struggle the gun was accidentally discharged.

The learned trial judge, Mr. Justice Sidney Smith, directed the jury that, if they accepted the circumstances related by the Crown witnesses as to the accused being engaged in robbery with arms when the shot was fired, the accused were guilty of murder regardless of intent and he did not put to the jury the question of manslaughter based on the accidental discharge of the revolver during the struggle.

The majority of the Court of Appeal of British Columbia held that it was open to the jury if they took a certain view of the evidence to find that the pistol went off by accident in the sense that it was not discharged by any act of Hughes done with the intention of discharging it, that if they so found they might properly have brought in a verdict of manslaughter and that the learned trial judge erred in not leaving that issue to them. A new trial was ordered.

On appeal by the Crown to the Supreme Court of Canada, Chief Justice Sir Lyman Duff, who delivered the judgment of the court, distinguished the *Beard* and *Elnick* cases. As to the *Beard* case the learned Chief Justice stated that:

> It was proved that there was a violent struggle in which the accused overpowered the child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death.

[4] [1942] S.C.R. 517.

Continuing, the learned Chief Justice said:

> I cannot agree that you can bring within this rule the accidental discharge of the pistol admitted by Hughes. If the pistol went off accidentally, in the sense mentioned above, it could hardly be said as matter of law to be an act of violence done by the accused 'in furtherance of or in the course of' the crime of robbery in the sense of the Lord Chancellor's judgment.
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> No question of accident in the relevant sense arose in *Beard's* case. There was no question that the act which caused the suffocation, the act of the prisoner in placing his hand on the mouth of the victim, was his voluntary act.

Regarding *Elnick's* case, the Chief Justice drew attention to the statement of Cameron J. A. that:

> The jury should have been told that on the undisputed and admitted facts the killing of De Forge was caused by an act of violence done by Elnick in furtherance of a crime of violence, that the killing was therefore murder and that it was their duty to return a verdict of guilty.

As to this statement he observed:

> That is really the basis of the decision in that case. Such a direction could not properly have been given in this case, in view of the evidence set forth above as to accidental discharge.

It may be observed that in the *Elnick* case the accused, Elnick, admitted that he had released the safety catch and the gun would shoot when the trigger was pressed. He pointed it at the victim but he said that he did not intend to fire the pistol at all.

Sir Lyman Duff said that if the jury thought that the pistol did not go off by the voluntary act of Hughes, or if the jury were in serious doubt about it, then another question might arise that was the real point for decision on the appeal. After quoting section 252 (2) of the Criminal Code,

> Homicide is culpable when it consists in the killing of any person . . . . by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death . . . .,

he then quoted section 259 (d) *infra* and a passage from the judgment of Anglin J. (as he then was) in *Graves* v. *the King*[5] and repeated that on the facts the jury as reasonable men might well have inferred that Hughes ought to have anticipated some such occurrence and the probable involuntary discharge of the pistol as a natural incident thereof. It would then be for a jury to say whether the conditions of 259 (d) when read with 252 (2) were fulfilled. The learned Chief Justice finally said:

[5] (1913), 47 S.C.R. 568.

> The learned trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of Hughes, and that Hughes did not anticipate and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused.

This case is a binding authority in Canada and in all cases of homicide committed in the course of a crime of violence a judge at assizes must charge the jury on manslaughter if there is any evidence that the act of the accused was inadvertent.

That it is not the law of England is again made clear by *R.* v. *Jarmain.*[6] The accused, armed with an automatic pistol, held up and robbed a woman who was in charge of a garage while she was counting the day's takings. The gun was loaded and cocked and he pointed it at her, but he said he must have inadvertently pressed the trigger as the woman was shot and afterwards died as a result of the wound inflicted. Charles J. directed the jury in part as follows:

> ....he went to execute an armed robbery, which is a felony, and in the execution of that armed robbery, which he carried out to its absolute completion by taking the money which he went there to get with the assistance of the revolver, in doing that he was carrying out a dangerous or unlawful act, holding a loaded cocked revolver with his finger on the trigger in the direction of that woman while he was executing a felony and as part of it. It may well be that he did not intend or desire that revolver to go off. I have to tell you in law that does not make any difference; if you accept the circumstances under which this terrible killing took place, that is murder.

It was argued on behalf of the convicted man that this was misdirection and that the judge confused inadvertence as to what the result of his action might be with inadvertently doing the very act itself, that in order to render himself guilty of murder the appellant must have pressed the trigger voluntarily and not inadvertently, and so fired the pistol.

The court held that the judge was no more under a duty to direct the jury that if the pressing of the trigger was inadvertent the killing was manslaughter, than was the judge in *Beard's* case under a duty to direct the jury that if the pressure exerted voluntarily by the appellant in that case was only so much as was necessary to silence the child, and the extra pressure which throttled her was inadvertent and accidental, then the accused there was guilty of manslaughter.

The court thought that the object and scope of this breach of the law was that he who uses violent measures in

[6] [1945] 2 All E.R. 613.

the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim; and for this purpose the use of a loaded firearm in order to frighten a person into submission is a violent measure.

Having regard to the *Hughes* case, it is too late to argue that section 259 (d) of the Criminal Code should be interpreted to mean precisely what was decided in *R.* v. *Jarmain*. This section reads:

> 259. Culpable homicide is murder,
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> (d) If the offender, for any unlawful object, does an act which he knows or ought to have known 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.

It may fairly be said, however, that all the elements of this section were present, namely,

(a) the unlawful object (armed robbery), and
(b) an act which the accused knew or should have known was likely to cause death (the possession and display of a loaded gun),

but the *Hughes* case precludes such an argument.

It was said in the *Hughes* case that section 260 of the Code would cover a case such as that of *Beard*, but the difficulty in applying that section is that there would be an onus resting on the Crown of showing an intention on the part of the accused of causing grievous bodily harm to the victim. No such onus was on the Crown either in the *Beard* case or the *Jarmain* case. Such being the state of the law, it remains to consider whether in the public interest the law should be altered. Crimes of violence are all too common in Canada and homicide committed in the course of them is frequent. Whether or not a bandit holding up a bank teller at the point of a gun and killing him may say that the gun went off accidentally and thereby permit a jury to bring in a verdict of manslaughter is something that Parliament should ponder and, if thought fit, by an appropriate amendment to the Code bring our law in line with that of England.

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