HALL *v.* REGINAM

COURT OF APPEAL (Jones, C.J., Dove-Edwin, J.A. and Marke, J.):
November 24th, 1964
(Cr. App. No. 38/64)

[1] **Criminal Law—manslaughter—negligence—degree of negligence—disregard of safety of others deserving punishment:** Criminal negligence which will base a conviction for manslaughter is a single indivisible conception, going beyond a mere matter of compensation between subjects and showing a disregard for the life and safety of others that amounts to a crime against the state deserving punishment (page 192, line 35—page 193, line 13).

[2] **Criminal Procedure — judge's summing-up — burden and standard of proof—direction to assessors or jury:** In a criminal case the jury should be directed that the onus is always on the presecution to prove the guilt of the accused and that before they convict they must feel sure of his guilt; provided that this is clear from the summing-up taken as a whole, it does not matter what particular form of words is used (page 192, lines 4–14).

[3] **Evidence—burden of proof—criminal cases—burden on prosecution:** See [2] above.

[4] **Evidence—burden of proof—standard of proof—overall effect of summing-up that assessors or jury to be sure of guilt:** See [2] above.

The appellant was charged in the Supreme Court with murder.

The appellant was a member of one of two rival societies; one of his customary duties was to fire a gun loaded with live ammunition at ceremonies in which his society participated. At one such ceremony, the appellant fired the gun in an apparently busy street and, as a result, wounded one and killed another member of the rival society dancing close by. In a cautioned statement the appellant claimed to have fired the gun without taking aim and at the trial stated that he pointed it into the air but that someone had jostled him from behind.

He was convicted of manslaughter on a majority verdict of the jury. On appeal the appellant contended that the trial judge had misdirected the jury on the burden and standard of proof required in a criminal case in that he had instructed them that the Crown had to prove the appellant's guilt to their "satisfaction," and that they should be "satisfied" on the whole of the evidence that the charge had been proved. He contended that the use of these expressions did not convey to the jury forcefully enough that if they had any reasonable doubt about the guilt of the accused they should acquit

him. Secondly, it was argued that the jury had been misdirected as to the degree of negligence required to establish manslaughter.

Cases referred to:

(1) *R.* v. *Bateman,* [1925] All E.R. Rep. 45; (1925), 19 Cr. App. R. 8.

(2) *R.* v. *Hepworth,* [1955] 2 All E.R. 918; (1955), 39 Cr. App. R. 152.

(3) *R.* v. *Kritz,* [1950] 1 K.B. 82; (1949), 33 Cr. App. R. 169, *dicta* of Lord Goddard, C.J. applied.

Smythe and *C. N. Rogers-Wright* for the appellant;
D. M. A. Macauley, Ag. Sol.-Gen., Mrs. Dixon-Fyle, Tejan-Cole and *St. Bernard* for the Crown.

JONES, C.J.:

The appellant in the court below was charged with the murder of a girl named Felicia Johnson. The jury found him guilty of manslaughter by a majority verdict of nine to three, which was accepted by the learned trial judge, and he was sentenced to seven years' imprisonment. It is against this verdict and sentence that he has appealed to this court.

The facts fall within a narrow compass. On June 27th, 1964 a wedding took place at Wellington village not far from Freetown. Two local societies, namely the Alikali Society and the Hunting Society, participated in the festivities on the evening of the wedding day. The appellant was a member of the Hunting Society and held the office of *Olukortun,* that is, he was the officer responsible for performing all hunting ceremonies in connection with the hunting devil. One of his duties, according to custom, was to fire a gun with a live cartridge, once before their "play" started and once also after the "play" ended. It would appear that the appellant fired the first shot without any incident.

The prosecution's case was that about 6.30 p.m. when the appellant came to fire the second shot, he pointed the gun towards members of the other society, the Alikali Society, about 8 to 10 feet from them (the doctor's estimate was 21 feet) and fired. As a result one Allie Conteh, a member of the Alikali Society, was wounded and had to be taken to hospital and Felicia Johnson was killed. The doctor could not say whether death was instantaneous but he said it took place within 15 minutes of the shooting and that the cause of death was due to shock arising from the gun shot wounds to her face, upper part of the chest and the upper and lower lips.

The appellant was arrested on the spot and he made a statement at the police station the next day after being cautioned. This was what he said about the second shooting:

> "I again went into my room and took up the gun, and put a cartridge in the other barrel. By then the empty shell was in the other side of the barrel and I stood in the middle of the street and fired without taking aim. Before firing I saw some Alikali people dancing but I did not know whether the shot came down low on them."

The following day, when he was charged, he confirmed this statement. At the trial his defence was that he pointed the gun in the air without taking aim at anything. He said that whilst the gun was so pointed, someone jostled him from behind and, as his finger was on the trigger at the time, the gun went off. He denied pointing the gun towards and shooting at the Alikali dancers.

There were several grounds of appeal filed and argued by the appellant's counsel, including one as to the excessiveness of the sentence. In our view only two of these grounds call for consideration. The first complains that the trial judge misdirected the jury on the burden of proof required in a criminal case by directing them as follows:

> "The golden rule or yardstick which you have been told from time to time to apply in criminal trials is that it is for the prosecution to prove their case to your satisfaction and not for the accused to prove his innocence. As I always say to juries, an accused person enters the dock presumably an innocent man; he need not say a word; he can challenge the prosecution by saying: 'I dare you to prove your case against me.' If, after considering the evidence as a whole, you cannot make up your minds, or you cannot say you are satisfied on the evidence that the charge put forward by the prosecution has been proved, you should then return the verdict that the accused is not guilty."

Mr. Smythe quarrelled with the judge's use of the words "satisfaction" and "satisfied" in their respective contexts and argued that some stronger words or expression should have been used so as to convey to the jury that, if they had any reasonable doubt (with an explanation of that expression), they should acquit. Mr. Smythe, however, with his usual candour conceded that this court has to look at the whole of the summing-up before deciding whether the trial judge conveyed to the jury the requirements laid down by the law. With

this we entirely agree and we are buttressed in this view by a portion of the judgment of Lord Goddard, C.J. to be found in the case of *R.* v. *Kritz* (3) ([1950] 1 K.B. at 89; 33 Cr. App. R. at 177). He said:

> "It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing-up were to depend upon whether or not the judge or the chairman had used a particular formula of words. It is not the particular formula of words that matters: it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned judge uses one form of language or another is neither here nor there."

See also the case of *R.* v. *Hepworth* (2) ([1955] 2 All E.R. at 920; 39 Cr. App. R. at 155).

In the present case, we are satisfied that the language used by the learned trial judge in his direction to the jury on the matter in issue was ample and adequate and left nothing to be desired. This ground therefore fails.

The second of these grounds, and on which Mr. Smythe heavily stakes his appeal, complains of a misdirection to the jury regarding the quantum of proof required to establish the offence of manslaughter. In his summing-up the learned trial judge applied what he described as the "well worn rule" or test to be found in *R.* v. *Bateman* (1), without naming that case. He told the jury that the facts must establish negligence and that that negligence should go beyond a mere matter of compensation between subjects and show such disregard for the life and safety of others as to amount to a crime against the state deserving punishment. He went on as follows and took the trouble of repeating himself. He said:

> "You must be satisfied about that; that is, if you do not find the act was unlawful and voluntary, you must go on and ask yourselves the question if the act of the accused contained an element of criminal negligence. Before you can say criminal negligence has been established, you must be satisfied that the facts are such that, in your own view, the act of the accused was negligent and that his negligence went beyond a mere matter of compensation between subjects and that he showed such a disregard for the life and safety of others as to amount to a crime against the state, deserving punishment.

It seems to me quite a simple straightforward test to apply."

Now, in several other portions of his summing-up the learned trial judge used the expression "an element of criminal negligence" or "element of criminal negligence" or "any element of criminal negligence." It is the use of these expressions that Mr. Smythe finds fault with. He submitted that the learned trial judge appeared to have given the impression to the jury that criminal negligence was made up of several ingredients and that on proof of any one such ingredient, *e.g.*, that the appellant was merely negligent, they should bring in a verdict of guilty of manslaughter. We find nothing of the sort. Criminal negligence, as Mr. Smythe in his reply conceded, is one and indivisible and not made up of several elements in the quantitative sense. The use, therefore, of the expressions complained of in their several contexts was in place and we find that the jury were properly directed and were never left in doubt as to the quantum of proof required by the law. This ground must also fail.

As to the sentence, we do not think that the learned trial judge acted on wrong principles. We will therefore not interfere with it. We accordingly dismiss the appeal.

DOVE-EDWIN, J.A. and MARKE, J. concurred.

Appeal dismissed.

WILSON (R. A.) *v.* WILSON (E.) and GENET

SUPREME COURT (Beoku-Betts, J.): November 24th, 1964
(Divorce Case No. 28/62)

[1] **Evidence—burden of proof—standard of proof—divorce—adultery—proof against person charged beyond reasonable doubt:** A court is bound to decide a divorce suit based on adultery as strictly as a criminal case and the burden of proof in relation to the adultery is such that the benefit of the doubt must be given where a reasonable doubt exists (page 196, lines 37–38; page 197, lines 14–16).

[2] **Family Law—divorce—adultery—evidence—evidence of both opportunity and inclination required:** To prove adultery as a ground for divorce, there must be both evidence of opportunity and of inclination (page 197, lines 10–13).

[3] **Family Law—divorce—adultery—standard of proof—proof against person charged beyond reasonable doubt:** See [1] above.

[4] Family Law—divorce—desertion—consists of physical separation and intention to end cohabitation: Desertion as a ground for divorce consists of two elements, physical separation and the intention to bring cohabitation to an end permanently (page 195, lines 18–21).

The petitioner petitioned for the dissolution of her marriage with the respondent on the ground of desertion; the respondent cross-petitioned on grounds of desertion and adultery.

The parties resided in Freetown. The respondent went to stay in Blama on business, leaving the petitioner in Freetown. He invited her to live with him in Blama but having met the co-respondent to the respondent's petition she remained in Freetown. She left the matrimonial home and later she went abroad with some assistance from the co-respondent and without the respondent's consent or knowledge. She remained abroad for two years. She returned to Freetown in the month after her petition was filed. She made no attempt to find the respondent but took up company with the co-respondent. She went to public places with him and visited his house regularly. His wife was not in the house on these occasions but his daughter was. The petitioner slept there on two nights but there was no evidence as to where in the house she slept.

C. N. Rogers-Wright for the petitioner;
S. H. Harding and *Coker* for the respondent;
Miss Wright for the co-respondent to the cross-petition.

BEOKU-BETTS, J.:

The respondent married the petitioner on October 3rd, 1950 and had three children. The first was born on October 4th, 1951, the second was born on September 28th, 1953 and the last was born on October 28th, 1958 or maybe 1957. Their matrimonial home was at 11 or 15 Mammah Street, Freetown. The case before the court is a petition of the petitioner for dissolution of this marriage on the ground of desertion. The respondent cross-petitions on the grounds of desertion and adultery naming a man called Lucien Genet.

I shall now consider the merits of their cases with regard to desertion and later consider the respondent's case with regard to the alleged adultery. The evidence reveals that both parties ceased to live with each other as man and wife from late December 1958 until this petition was lodged on July 21st, 1962. The petitioner's case is simply this, that the respondent left Freetown for Blama in December 1958 promising to return but never did and that after

four months, not hearing from him, she went to Blama. She did not meet him and after staying for about four days she returned to Freetown. From then on she did not receive any support from him and she had to move from the Mammah Street house, their matrimonial home, because she could not pay the rent. The petitioner states that she inferred from this conduct of the respondent that he intended to put an end to cohabitation as she thought that he did not want her again.

The respondent on the other hand stated that he went up to Blama on business with the knowledge of the petitioner, that he came down on occasions when he saw her, and that he maintained the children. He said that on one occasion when he came down he met Mr. Lucien Genet in the house with others and that he warned the petitioner about her association with Mr. Genet because he had heard rumours of it. He further stated (which is not denied) that the petitioner left Freetown without his consent and knowledge in 1960 and returned in 1962.

According to *Rayden on Divorce*, 9th ed., at 171 (1964), there must be two elements of desertion: (a) the *factum*, (b) the *animus deserendi*. That is, there must be the physical separation and the intention to bring cohabitation to an end permanently. The desertion must also be for a period of three years continuously prior to the filing of the petition. Desertion can be inferred from the acts or conduct of the parties.

In this case the petitioner stated that the respondent did business in the provinces and had often gone to Blama and that in 1957 she herself went with him. In 1958 when he went, therefore, it was not an unusual happening save that he did not write for four months. On the other hand, the respondent said that he did return from Blama and made arrangements with her to give up the Mammah Street house and live with her mother for a while and that when he was more settled he would send for her to live with him in Blama. He said that the petitioner refused this suggestion and instead of adhering to his request she went and lived in a rented house. On examination of the evidence before me I must consider the efforts made by both to determine who had the intention to bring cohabitation to an end permanently.

The petitioner's effort at saving the marriage, if I might call it so, is to travel up to Blama after four months' silence and, not seeing the respondent, return to Freetown. If this was all, it could easily be said that the respondent deserted her without cause. But the

respondent's case is that when he came back to Freetown he met Mr. Genet in the house, that he came again afterwards and that in 1960 his wife went away to the United Kingdom without his consent or knowledge. He alleges that as a matter of fact Mr. Genet was one of the guarantors who signed guaranteeing the petitioner's stay in the United Kingdom.

There is also evidence that the petitioner knew Mr. Genet in 1958 or 1959. This period was the turning point in the marital relationship of the petitioner and the respondent and I am of the opinion that had Mr. Genet not come into the lives of these two the marriage would have been saved. Within 18 months the petitioner left for the United Kingdom without the consent or knowledge of the respondent, where she stayed for two years, and if the evidence is correct the petitioner returned to Freetown in August of 1962 and the petition was filed in July 1962. This petition must have been filed before the petitioner returned to Freetown. On her return to Freetown there is evidence that she was seen often in the company of Mr. Genet. This evidence was given by the cook and she herself gave evidence that she slept in the house of Mr. Genet and that she had been to a dance or a cocktail party with Mr. Genet. She had even gone to church with him. In assessing the evidence from the conduct of both the petitioner and the respondent I have no doubt that it was the petitioner who had the intention to put an end to cohabitation permanently.

I believe that the respondent invited the petitioner to live with him in Blama but having met Mr. Genet she refused and whilst this state of possible reconciliation existed she left for the United Kingdom without even letting her husband know, assisted in a small way—nevertheless, in a way—by Mr. Genet. By leaving this country she thereby deprived the respondent of his right of cohabitation and when she returned from England two years afterwards she did not look for her husband or make any attempt to find him. Rather than that, she chose Mr. Genet's house and company.

In view of my findings I reject the petitioner's case for dissolution on the ground of desertion and accept the respondent's case and order dissolution on the ground of desertion.

With regard to the case for adultery in which Lucien Genet is cited, I am bound to decide the case as strictly as a criminal case. I have therefore to look at the evidence. The respondent himself in the main did not give much evidence of adultery save that he heard of the association and on one occasion saw Mr. Genet in the

house at Mammah Street. The cook, Amara Koroma, gave evidence that the petitioner was very frequently in the house "Roseville," that on occasions when he went to work early in the morning the petitioner would be there, that Mr. Genet would take her in the car in the mornings and that he usually left the petitioner in the house in the evenings when he broke off from work. From the petitioner we learnt that she was in the house with Mr. Genet and his daughter. She admitted sleeping in the house on November 3rd and 4th, 1962. She admitted visiting the house regularly and that Mrs. Genet was not in the house. The evidence we have shows that there is ample evidence of opportunity for the petitioner and Mr. Genet to commit adultery, but apart from opportunity there must be evidence of inclination. Although it is not necessary for one to actually catch the parties in the act of intercourse, yet the burden of proof in a case of adultery is so high that the benefit of the doubt must be given where a reasonable doubt arises. The evidence I have is strong against Mr. Genet for his association with a married woman but I have not got any evidence that intercourse took place or that he and the petitioner were even in a place or position where intercourse could have taken place. The evidence nearest to that is that when the petitioner stated that she slept in "Roseville" on the night of November 3rd, on being asked where she slept she said she slept in a room. No further question was asked whether it was in the room of Mr. Genet or any like question. I therefore discharge Mr. Genet from the suit on the ground that he did not commit adultery with the petitioner. I grant the respondent a decree nisi.

With regard to the custody of the children: The children of the marriage normally should be in the custody of the father but in the interest of the children, because the respondent is not stationary in view of the nature of his work, I order that the children be in the custody of the petitioner until such time as they are old enough to make their own decisions. I also order that the respondent be given access to the children, that he should not be prevented from visiting them at reasonable times.

Petition dismissed; cross-petition granted.