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FACTS

On discovering that his wife is cheating on him, Benjamin waits for her to return from work. When she gets into the house, he hits her on the head and she falls unconscious. In panic, he attempts to rouse her to no avail and after half an hour, he believes she is dead. He waits until it is dark and dumps Sandra in the river. Her body is later found and drowning is determined as her cause of death. Had she been treated for the head injury, she would have survived. Later, Benjamin tells his brother of the event and they both decide to exact revenge against Simon. On meeting them, Simon taunts Benjamin who retaliates with rage by hitting Simon on the head several times with a rock. Joshua stops him and they leave the scene. Simon is taken to hospital but he refuses to get treated. He later dies. The doctor certifies that had he accepted treatment, he would have survived.

ISSUE

The main issue for determination is whether Benjamin and Joshua are criminally liable for their actions.

LAW

Other than in crimes of strict liability, the general rule is that two elements, *actus reus* and *mens rea*, must be present for a crime to occur.¹ *Actus reus* is the voluntary and deliberate act that amounts to a guilty deed while *mens rea* is the accompanying guilty state of mind. Another general rule is that for a crime to occur, these two elements must be present at the same time during the commission of a crime.² This is known either as the contemporaneity rule or the

¹ Catherine Elliot & Frances Quinn, *Criminal Law* (9th edn, Pearson 2012) p 14.

² J C Smith & B Hogan, *Criminal Law* (7th ed. Butterworths 1992) p 29.

principle of concurrence or coincidence of *actus reus* and *mens rea*. However, some circumstances may present problems in determining whether both elements are present thus proving that a crime has been committed. These include situations where an offence may occur over a long period of time or where a number of events that constitute a chain of action, have occurred.

I. Contemporaneity rule

This rule is concerned with the presence of both constitutive elements of a crime that results in an accused person's criminal liability. In *Fowler v Padget*,³ Lord Kenyon firmly stated that to be called a crime, '*the intent and the act must concur*.'⁴ Accordingly, the rule holds that it must be shown that both elements coincided at the time of the commission of that offence.⁵ These elements must be present at the same time during the period within which an offence has been committed.⁶ Therefore, where an offence requires *mens rea* for one to be guilty, an offender must have that intent when performing the act or omission, and that intention must be in relation to that specific act or omission.⁷

II. Exceptions to the contemporaneity rule

a. Continuing Act Principle

Owing to the exigencies of different situations, Courts have devised exceptions to the contemporaneity rule. The first situation that constitutes an exception to the rule is the 'continuing act' or the 'continuous act principle.' This principle recognises that a course of

³ *Fowler v Padget* (1789) 7 T R 509, 514.

⁴ Geoffrey Marston, '*Mens Rea and Mistake of Law*' *University of Western Australia Law Review* (1967-8) p 459-75.

⁵ J C Smith & B Hogan, *Criminal Law* (7th ed. Butterworths 1992) p 29.

⁶ *Edwards v Ddin* [1976] 3 All ER 705.

⁷ *Taaffe v R* [1984] AC 539.

conduct can go on over a period of time. Therefore, following this principle, *actus reus* can be a continuing act.⁸ It is not imperative that there is a complete coincidence of both elements that constitute a crime.⁹ In *Jakeman v R*¹⁰ the court, in varying the rule, held that it was sufficient if the elements coincide ‘*at some point in time*’ during the commission of the offence. Following this principle, it is not a must for *mens rea* to exist at the beginning of or at the same time with the *actus reus*. This intention can subsequently be implied from the acts or omissions of the concerned person after his actions are already manifested.¹¹

b. Single Transaction Principle

The single transaction principle is the second exception to the contemporaneity rule. Situations may arise where a series of events comprise *actus reus* as opposed to one single act. Where there is a series of events which form a nexus, these may be considered as a single transaction for the purposes of determining the guilty act. A single transaction is attained when no external factor interferes with the chain of causation of an offence. Therefore, where there is an essential link between an act and the result of that act, this is considered a single transaction. In *Thabo-Meli v R*¹² the Privy Council held that where an accused person had earlier planned to kill the victim, and does so in two separate acts, these acts should be considered as part of one transaction even if the intention was not present at the time the second act happened.¹³ The

⁸ *Kaitamaki v The Queen* [1985] PC (New Zealand).

⁹ Peter W Edge, ‘Contemporaneity and Moral Congruence: *Actus Reus* and *Mens Rea* Reconsidered’ *The Liverpool Law Review* (Vol. XVII(1) 1995) p 2.

¹⁰ *Jakeman v R* (1982) CA.

¹¹ *Fagan v Metropolitan Police Commissioner* [1969] 1 QBD 439.

¹² *Thabo-Meli v R* [1954] 1WLR 228.

¹³ *ibid* at 44.

decisions in *R v Church*¹⁴ and *R v LeBrun*¹⁵ further established that the continuing act principle applies even in situations where the actions were not planned beforehand.

c. Chain of Causation and ‘New Intervening Acts’

The requirement of causation in criminal law entails proof that the resulting injury to the victim was caused by a specific act of the defendant.¹⁶ It has to be certain that no other factor apart from the accused’s actions resulted in the injury. The chain of causation comprises the direct and effective connection between the acts of an accused person and the consequence of those acts on the victim.¹⁷ To establish legal causation, we seek an answer to the question whether the initial injury still is the substantial and operating cause of any more injuries. A defendant can only be liable for the injuries occasioned to a victim if the chain of causation is not broken.

For example, in *R v Smith*¹⁸ the defendant wounded the victim’s lung by stabbing him. The victim died approximately after an hour while undergoing treatment. On his way to hospital, the victim had been dropped twice by the person carrying him. The defendant argued that the victim had died because he had been dropped several times and not because of the stab wound. The court rejected this argument and held that the dropping of the victim did not constitute a break in the chain of causation and that the wound resulting from the stabbing was the substantial and operating cause of the victim’s demise. He was found guilty of murder.

¹⁴ *R v Church* [1965] 2 WLR 1220.

¹⁵ *R v LeBrun* [1991] 3 WLR 653.

¹⁶ Catherine Elliot & Frances Quinn, *Criminal Law* (9th edn, Pearson 2012) p 16.

¹⁷ N Padfield, ‘Clean Water and Muddy Causation: Is Causation a Question of Law or Fact, or just a way of Allocating Blame *Criminal Law Review* (1995).

¹⁸ *R v Smith* [1959] 2 QB 35.

After the defendant's act, if something else happens that contributes further to the victim's injuries, the chain of causation is broken at this point. This other factor is called a 'new intervening act' which must be independent from any of the defendant's actions and with the capability to cause injury to the victim. For example, in *R v Jordan*¹⁹ the victim had been treated for a stab wound and he was healing well. However, the doctor erroneously administered an anti-biotic which resulted in an allergic reaction that caused his death. The court found that the doctor's administration of a wrong anti-biotic was the substantial, operating cause of the victim's death. Therefore, Jordan was not liable for the death because the chain of causation had been broken.

III. Murder or Manslaughter?

Any act or omission by a person that causes another person's death is homicide. Under Common Law, homicide was broadly categorised into two; felonious and non-felonious homicide. Acts or omissions that attract criminal liability, namely murder and manslaughter, are criminal homicide. Murder, the unlawful killing of a person with 'malice aforethought', is the intentional and planned killing of a person.²⁰ It was considered as felonious homicide under Common Law. Non-felonious homicide was either excusable or justifiable. Manslaughter is the unintentional killing of a person caused by either negligence or recklessness.²¹ To establish whether an offence amounts to murder or manslaughter, one has to have regard to the nature of the offence and the circumstances that inform its commission in order to establish the presence or otherwise of the element of the guilty state of mind.

¹⁹ *R v Jordan* (1956) 40 Cr App E 152.

²⁰ John M Scheb, *Criminal Law* (7th edn, Australia: Wadsworth 2014) p 142.

²¹ *ibid.*

Manslaughter is categorised into either voluntary or involuntary. Voluntary manslaughter is that which would qualify as murder but for the presence of a mitigating factor, such as provocation or self-defence, which diminishes the severity of the offence.²² Also known as unlawful or constructive manslaughter, involuntary manslaughter comprises those homicide cases which do not attain the threshold required for murder mainly because of lack of intention. Involuntary manslaughter is defined as an unlawful and dangerous act which results in death of a person. Accordingly, for an offence to amount to involuntary manslaughter, three elements must be satisfied. First, there must be an unlawful act; second, the unlawful act must be dangerous; and third, that act must be the substantial cause of the resulting death.

IV. Complicity in Crimes

Complicity in a crime can either be in a primary or a secondary capacity. A primary actor is one who participates in the actual commission of the crime while a secondary actor is one who helps or encourages the primary actors in the commission of a crime.²³ Common law had a dichotomy of actors as either principals or accessories to the commission of a crime. Principal actors are those who are present at the crime scene and actually participate in the commission of a crime. Accessories to a crime are those people who although not present at the scene of crime, they participated in one way or another in the commission of the crime. Therefore, anyone who aids, procures, counsels, commands, protects, or encourages the principals before or after the commission of a crime is an accessory.

²² W T Westling, 'Manslaughter By Unlawful Act: The "Constructive" Crime Which Serves No Constructive Purpose' *Sydney Law Review* (Vol. 4 1974) p 211.

²³ Joshua Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offense?' *Ohio State Journal of Criminal Law* (Vol 5, 2008) available at www.moritzlaw.osu retrieved on 2 August 2015.

Principals can further be categorised according to the roles they undertake in the commission of a crime. Therefore, there is a principal in the first degree who is the person who has the requisite guilty state of mind and actually commits the offence. A second degree principal is one who is present at the crime scene but merely aids or encourages the first degree actor. Accessories are categorised according to the time at which he becomes complicit with the offence. Therefore, there are accessories before the fact and accessories after the fact. An accessory before the fact is one who gets involved in the preparation and planning of the offence but is not present at the time the offence is actually committed. An accessory after the fact is one who, with the knowledge that a person has committed an offence, provides assistance to such an offender in order to avoid arrest.

The type of assistance rendered to a principal can be physical or psychological. Physical assistance entails actually offering help in committing the offence. Psychological assistance can be the encouragement of a person in the commission of a crime or even the mere presence of a person as another commits an offence. It is not necessary that an accomplice's acts are either a proximate cause or actual cause of the crime. The only element that has to be proved is that one provided assistance or had the intention to offer assistance to an offender. Further, two or more people may qualify as first degree principals in the commission of a crime where both perform an act that contributes to the commission of an offence.

APPLICATION

Benjamin's actions towards Sandra raise questions involving the contemporaneity rule and the nature of his culpability for her death. It is possible that his actions were premeditated. This can be implied from the fact that upon learning that Sandra was cheating on him, he sat and

waited for her to return from work and he lurched at her knocking her unconscious the moment she walked in. To further compound the situation, he hit her on the head. However, his reaction after knocking her out, panicking and trying to rouse her, may suggest that he did not intend to harm her in the way that he did. Nonetheless, it is my opinion that Benjamin had formed an intention to harm Sandra as evidenced by his calculated moves before and at the time she walked into the house.

Benjamin thinks that Sandra is dead and therefore makes arrangement for the disposal of her body. Whether intention is present at the time of making these arrangements or not is irrelevant at this point. In any case, even if it is argued that the coincidence of *actus reus* and *mens rea* did not occur at the time he hit her, his subsequent actions satisfy the continuing act and single transaction principles. His disposal of the body at the river, thereby resulting in her drowning, was a continuing act precipitated by his first act of hitting Sandra on the head. Therefore, the disposal was part of an act that began by hitting her and ended by his disposal of the body in the river in an attempt to cover up his actions. Further, the single transaction principle is satisfied in light of the fact that he did not take any active steps to mitigate the effects of his actions on Sandra. For instance, if he had tried to assist or get medical attention for Sandra after knocking her out, this would comprise an intervening act that would break the chain of causation.

This case is distinguishable from *R v Church* whose facts are almost similar. In *Church*, the victim and the defendant were together in a van. The victim insulted the defendant who in return, knocked her out. Thinking she was dead, he threw her into the river where she drowned. The court held that the defendant's conduct amounted to a series of acts which led to her death. He was convicted of manslaughter. The distinguishing factor between *Church* and Benjamin's

case is that while the actions of the defendant in *Church* were spontaneous and a reaction to the victim's insults, Benjamin's case possesses an element of premeditation in light of the fact that first, he had suspicions of his wife's infidelity that led to his hiring a private detective. Second, upon confirmation of his suspicions, he sat at home waiting for his wife in order to confront her. These acts are pointers to the existence of a premeditated intention.

All elements necessary for the commission of the offence of murder are present. However, the defence of provocation may be available to Benjamin in light of the fact that the discovery of his wife's infidelity is what precipitated his actions towards her. Sandra's infidelity can be used as an explanation of why Benjamin reacted in the way that he did. Therefore, it may provide a mitigating factor that, if accepted, can diminish Benjamin's culpability for Sandra's death.

In the second scenario, Simon's taunts amount to a *prima facie* provocation that precipitated the attack by Benjamin. However, that is irrelevant in light of the fact that Benjamin and Joshua had already formed the intention of harming Simon even before they met him. Although their intention was to cause lesser harm than that which Benjamin eventually caused, this factor is irrelevant at this point. Had he died from the injuries inflicted by Benjamin's blows, liability for his death would have attached to Benjamin and Joshua. However, Simon's refusal to undergo treatment at the hospital constitutes a break in the chain of causation. His refusal to get treated is a new intervening act that shifts liability for his ultimate death away from Benjamin.

Joshua is an accomplice to Benjamin and is liable for both offences committed by him. For the first offence against Sandra, Joshua becomes aware of the circumstances surrounding Sandra's death from Benjamin's confession but does not take any active steps to bring this to the

attention of the concerned authorities. Therefore, in this regard, Joshua is an accessory after the fact. To further compound the situation, he encourages Benjamin to inflict harm on Simon. In fact, they plan to teach Simon a lesson together. It is in carrying out this agreement that they encounter Simon

CONCLUSION

Benjamin is guilty of voluntary manslaughter in relation to Sandra's death. He received the evidence of her infidelity and had time to mull over it hence had sufficient time to premeditate and form an intention. His attempts at disposing the body were a continuation of the actions that began when he knocked her out and culminated in her drowning. This situation satisfies all requirements needed for establishing the offence of murder. However, provocation presents a mitigating factor that would diminish his culpability. The fact that he discovered Sandra's infidelity may amount to provocation which would result in a conviction of voluntary manslaughter rather than murder. However, he is not liable for Simon's death because of a new intervening act that broke the chain of causation. Consequently, Simon died because of his refusal to get medical attention and not because of the injuries inflicted by Benjamin. His refusal to get treated made up the new intervening act that shifted blame from Benjamin. However, Benjamin would still be liable for aggravated assault that occasioned grievous bodily harm.

Joshua is criminally liable as an accessory after the fact in relation to Sandra's death. He was aware of the circumstances that occasioned her death but he did not make them known to the authorities. In the second scenario, he is a principal in the second degree. He encouraged Benjamin to exact revenge against Simon and even accompanied him to where Simon was with the intention of exacting revenge. Further, after Simon is hurt, he assists Benjamin by pulling

him away from the crime scene but does nothing to assist Simon who they leave unconscious.

This makes him complicit to the crimes that Benjamin committed.

Table of Cases

Edwards v Ddin [1976] 3 All ER 705

Fagan v Metropolitan Police Commissioner [1969] 1 QBD 439

Fowler v Padget (1789) 7 T R 509, 514

Jakeman v R (1982) CA

Kaitamaki v The Queen [1985] PC (New Zealand)

R v Church [1965] 2 WLR 1220

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