



# Life in crime

The case of *Kennedy* raised an important distinction between principal and secondary parties to a crime, says David Rhodes

**“THE CRIMINAL LAW** generally assumes the existence of free will,” explained Lord Bingham in *R v Kennedy* (No 2) [2007] UKHL 38 (see (2007) 151 SJ 1340, 26.10.07). It is a beautifully simple judgment which makes the answer seem so obvious that it is a shame the courts had not seen the light earlier – given that Kennedy was convicted of manslaughter in 1996 and his five year sentence was completed long ago, after two differently constituted Courts of Appeal rejected his appeal.

Kennedy lived in a hostel with Bosque, a drug addict. One night he visited Bosque, who had been drinking and who told Kennedy that he wanted “a bit to make him sleep”. Kennedy warned him to take care that he did not go to sleep permanently. He then prepared a dose of heroin and handed Bosque the syringe ready for injection. Bosque injected himself and returned the syringe to Kennedy, who left the room. Shortly afterwards Bosque stopped breathing. An ambulance was called, but he was pronounced dead upon arrival at hospital.

Kennedy was convicted of “unlawful act manslaughter”. The issue on appeal and before their Lordships was whether Kennedy’s actions could really be said to have “caused” the death of Bosque. After all, Bosque had freely and voluntarily self-administered the heroin.

Unlawful act manslaughter requires three ingredients: (i) the defendant commits an unlawful act; (ii) such an act was a crime; and (iii) that unlawful act was a significant cause of the death of the deceased.

In his judgment, Lord Bingham said that “much of the difficulty and doubt which have dogged the present question has flowed from a failure, at the outset, to identify the unlawful act on which the manslaughter count was founded”. His Lordship implored the Crown Prosecution Service, counsel and judges to consider carefully, at an early stage, exactly how the accusation is put. In this case, the unlawful act was the supply of heroin to Bosque. Yet it could never be contended that the mere act of supply, without more, could have harmed Bosque at all, let

alone have been a significant cause of his death. Bosque had to choose whether to use the drugs he had been supplied.

All parties agreed that, on the facts, the only unlawful act on which a case could have been founded was “administering a noxious thing, or causing a noxious thing to be administered to, or taken by another”, contrary to s23 Offences Against the Person Act 1861. Even so, the crucial question was one of causation: had Kennedy “administered” or “caused” a noxious thing to be administered?

Lord Bingham said: “The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they would act and none of the exceptions was relied upon as possibly applicable in the instant case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.”

## Principal and secondary parties

The case raised an important distinction between principal and secondary parties to a crime. The Crown had argued that by preparing the syringe and making it available for immediate use, Kennedy was encouraging and instigating the administration of the heroin and as such was jointly responsible as a secondary party. But Bosque had not committed any offence by injecting himself with a fatal dose of heroin. If Bosque was not a principal offender, then Kennedy could not be a secondary party jointly responsible. In their Lordships view, in contrast to the Court of Appeal, the finding that Bosque freely and voluntarily administered the injection to himself, knowing what it was, was fatal to any contention that the appellant caused the heroin to be administered.

An interesting twist in the case was that, in trying to resist the appeal, the Crown relied

on *R v Rogers* [2003] EWCA Crim 945 in which the defendant pleaded guilty, following a ruling by the trial judge, to having “administered” a noxious thing and manslaughter. In that case, Rogers assisted the deceased by holding his belt around the deceased’s arm as a tourniquet, so as to raise a vein while the deceased injected himself. The Court of Appeal upheld the conviction on the basis that it was artificial to separate the tourniquet from the injection and so Rogers had played a part in the mechanics of administering.

Analysing that case, Lord Bingham said that the only question was whether the injection was the result of a voluntary and informed decision by the person injecting himself. If it was, that act of free will relieved the appellant of responsibility. As such, their Lordships said *Rogers* was wrongly decided. So too was the case of *R v Finlay* [2003] EWCA Crim 3868 in which D had handed V a syringe for immediate use and thus V’s self-injection was entirely foreseeable. Again, the Court of Appeal had upheld the conviction and had been wrong to do so. The personal autonomy and informed voluntary choice of the person injecting herself, breaks the chain of causation.

In reply to the question of when it is appropriate to find someone guilty of manslaughter when the controlled drug had been freely and voluntarily self-administered, their Lordships said that in the case of a fully informed and responsible adult the answer was simply “never”. But in answering, their Lordships said that at least three cases had been wrongly decided by the Court of Appeal. If anyone happens to see *Rogers* or *Finlay*, who have long since served their sentences and been released, please could you let them know: they might want to contact the Criminal Cases Review Commission.

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