In the matter of a reference under Section 414(2) of Criminal Code: ATTORNEY-GENERAL v WURRABADLUMBA

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

15 November and 5 December 1990 at Darwin

CRIMINAL LAW - S.414(2) Criminal Code - referral by Attorney-General: "whether upon an indictment charging a person with manslaughter, an alternative verdict of doing a dangerous act with or without the circumstances of aggravation set out in s.154 of the Criminal Code should be left to the jury where the evidence discloses (1) that the relationship between the accused and his intended victim was that of de facto husband and wife; and (2) that the actions of the accused giving rise to the charge occurred in such a location or in such a manner that no person other than the intended victim was caused any serious danger actual or potential"

CRIMINAL LAW - Statutory Interpretation - S.154 Criminal Code - meaning of "the public or to any member of it" - "any person": ss. 175, 176, 177, 178, 179, 180 & 216(3) - "the public or any person": s.284

CRIMINAL LAW - S.154 Criminal Code - circumstances where S.154 can be posed as an alternative charge to murder or manslaughter - s.318 Criminal Code - limits of operation of s.154

Cases followed:

R v Campbell (unrep. 5/4/90)
Attorney-General (NT) v Kearney (1990) 94 ALR 488
Baumer v The Queen (1988) 166 CLR 51

Cases referred to:

Re: Howard's Will Trusts (1961) 2 All ER 413
Lee v Evans (1964) 112 CLR 276
Jennings v Stephens [1936] Ch 469

Cases considered:

Morrisons Holdings Ltd v Inland Revenue Commissioners (1966) 1 All ER 789
Hansen v Transport Department (1968) NZLR 208
Hadley v Perks [1866] LR 1 QB 444

Legislation:

Criminal Code Act (NT) 1983
Transport Act (NZ) 1962

Counsel for the appellant:	T.I. Pauling QC with W.J. Karczewski
Solicitor for the appellant:	Solicitor for the NT
Counsel for the respondent:	T. Riley QC with D. Trigg
Solicitor for the respondent:	Solicitor for the NT

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IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No. CA14 of 1990

IN THE MATTER of a reference under section 414(2) of the Criminal Code

BETWEEN:

ATTORNEY-GENERAL

Applicant

AND:

JILLIAN WURRABADLUMBA otherwise known as JILLAIN BARA

Respondent

CORAM: ASCHE CJ, GALLOP and ANGEL JJ

REASONS FOR JUDGMENT

(Delivered the 5th day of December 1990)

ASCHE CJ: Pursuant to s.414(2) of the Criminal Code the Attorney-General refers to this Court the following point of law after the trial and acquittal of the respondent on a charge of manslaughter. The respondent the, "acquitted person", has had notice of the reference pursuant to s.414(3) but does not appear in these proceedings.

The question referred under s.414(2) is this:-

"Whether upon an indictment charging a person with manslaughter, an alternative verdict of doing a

dangerous act with or without the circumstances of aggravation set out in s154 of the Criminal Code should be left to the jury where the evidence discloses

(1) that the relationship between the accused and his intended victim was that of de facto husband and wife; and

(2) that the actions of the accused giving rise to the charge occurred in such a location or in such a manner that no person other than the intended victim was caused any serious danger actual or potential."

The Solicitor-General appears to argue for the affirmative. Pursuant to s.414(2)(c) Mr Riley QC (with him Mr Trigg) has been appointed by the Attorney-General to argue the negative. Thus, to use the term employed in Young "Declaratory Orders" 2nd Ed. at p.10 a "proper contradictor" has been "secured". See Attorney-General (NT) v Kearney (1990) 94 ALR 488 at 493.

The reference is limited to the question whether an alternative verdict under s.154 is permitted in the circumstances set out. That is because s.414(2) restricts the reference to the point of law which has arisen at the trial. However in dealing with that point of law, it is, in my view inescapable that the meaning of the expression "the public or to any member of it", which appears in s.154, and which is the gravamen of the question asked, will have to be determined in a way which affects all cases in which the section falls to be considered.

S.154(1) provides as follows:-

"DANGEROUS ACTS OR OMISSIONS

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years."

Sub-sections (2), (3) and (4) set out circumstances of aggravation and increase the maximum terms to differing extents according to whether grievous harm or death is caused by the dangerous act or whether the accused was, at the time, under the influence of an intoxicating substance. Subsection (5) provides that voluntary intoxication may not be regarded for the purpose of determining whether a person is not guilty of the crime defined by the section. Save that these subsections (2)-(5) underline the objective nature of the offence, which is already apparent by subsection (1), they are not of relevance to the question to be determined.

Under the Code, a person is guilty of murder if he unlawfully kills another person intending to kill that person or cause him grievous harm. S.162(1)(a). If that intent is not proved, he may be guilty of manslaughter if he foresaw the death as a possible consequence of his conduct, and death ensued as a consequence of that conduct, provided

that it can be established that in all the circumstances, including the chance of death occurring and its nature, a reasonable person similarly circumstanced and having such foresight would not have proceeded with that conduct. S.31(1) & (2).

S.31, however, does not apply to the offences defined by Division 2 of Part VI of the Code. (See s.31(3)). That Division includes s.154.

In the context of a charge of murder or manslaughter s.154 covers what might be called the third alternative, where death or grievous harm was neither intended nor (subjectively) foreseen by the actor, but should clearly have been foreseen by him, and the act or omission causing the death was itself an act or omission causing serious danger to the lives, health or safety of the public or any member of it. But the section is not restricted to acts or omissions causing death. As the High Court observed in Baumer v The Queen (1988) 166 CLR 51 at 55, s.154,

> "... casts a wide net, so as to cover all acts or omissions endangering the life, health or safety of any member of the public where the risk ought to have been clearly foreseen and the act or omission avoided. The offence so created can therefore cover an enormous range of conduct from the comparatively trivial to the most serious."

It follows, however, that that type of manslaughter categorised in the common law as manslaughter occurring as a result of "recklessness" or "gross negligence" (as to which see Archbold, 42nd Ed. para 20.49) would not be so categorised in the Code. If the accused did not intend but foresaw that his actions might result in the death of or grievous harm to the victim, and death occurred, he would, (absent s.31(2)), be guilty of manslaughter under the Code. If, however, he did not subjectively foresee that consequence but objectively should have foreseen it he could be guilty not of manslaughter but of an offence under s.154. It would seem, therefore, to follow that the offence created by s.154 should be available as the alternative and lesser verdict to a charge of manslaughter where the same acts and circumstances are relied on by the prosecution. So, too, in charges of murder there seems no reason why, in appropriate cases, there should not be open to the jury to consider the downwards progression of alternative verdicts from murder to manslaughter to s.154 to acquittal where the same facts and circumstances are alleged. See s.320.

But the submission by Mr Riley is that s.154 can only be an alternative if the dangerous act or omission affects the public or any member of it. He submits that the terms of the section do not contemplate dangerous acts or omissions affecting persons who could not, at the time the event occurs, be said to be members of the public vis-a-vis

the person responsible for the dangerous acts or omissions. Hence the scope of the inquiry here necessarily widens to include not only the question whether an offence against s.154 can be an alternative to a charge of manslaughter but the broader question of the limits of the operation of s.154.

Angel J. in R v Campbell (unrep 5/4/90) was the first to alert the Court to an interpretation which had not, apparently, been noticed before. That was a case where the accused had been charged with unlawfully causing grievous harm to another. (S.181 of the Code). The facts alleged by the prosecution were that the accused had intentionally struck the victim with a coffee mug which shattered on impact and caused injury to her eye. The event occurred in a private house in the course of a social gathering between four people. The accused maintained that it was an accident. It might therefore have been open to the jury, if they were not satisfied of an intentional assault, to consider whether the accused had been guilty of an unintentional but dangerous act in circumstances where he should have foreseen the danger and not done the act. Angel J., however, considered that such a charge was not available on the facts alleged. He gave these reasons:-

> "Section 154 speaks of acts in relation to 'the public or to any member of it'. This section does not speak of acts in relation to 'a person' or 'any person'. The section, or so it seems to me, is not directed to actions by an accused directed to a

person who is well known to the accused. It is rather directed to protecting the uninvolved public at large or a particular person who, vis-a-vis the accused's act, is a member of the public. When the victim, vis-a-vis the accused's act, is not a member of the public, it seems to me the section has no application. Here the unfriendly altercation was private and between people describing themselves as friends. It was not a bar room brawl between strangers. Whether the latter is within s.154 may be debatable - I would guard myself against expressing any view in that debate here - but I am firmly of the view that s.154 has no application to the case before me. Of course a person may be a member of the public for one purpose and at the same time not a member of the public for another. For example, if two friends went to the football and one assaulted the other in the course of a private argument about the merits of the umpiring, the assault by one on the other could not, in my view, be said to be an act directed against a member of the public. If on the other hand one of the friends threw a missile indiscriminately into the crowd and hit a stranger that would, in my view, clearly be an act in respect of a member of the public. If the missile were to hit the friend rather than a stranger I can see no reason why that also would not constitute an act in relation to a member of the public. As I have said, the accused's act, vis-a-vis a particular victim, must be vis-a-vis the victim as a member of the public."

That decision has been followed by several Judges of this Court, either because they agree with it, or because, as a matter of judicial comity, they take the view expressed by Wilberforce J. in Re Howard's Will Trusts (1961) 2 All ER 413 at 421 that it is, "undesirable ... that different judges of the same Division should speak with different voices". See Hals. 4th Edn. Vol. 26 para 580 and the cases there cited.

Obviously, therefore, the question must be resolved by this Court.

The expression "the public" is not an expression of a fixed and definite meaning. Lee v Evans (1964) 112 CLR 276 at 283 (per Barwick CJ). It is a term of uncertain import; it must be limited in every case by the context in which it is used. Jennings v Stephens [1936] Ch 469 at 476 per Wright M.R. The protean character of the word is obvious, often to the point of absurdity. For instance, in England and in some parts of Australia the term "public School" means precisely the opposite. Nevertheless, and speaking very broadly, there is usually a connotation which contrasts with "private". The Oxford English Dictionary commences its survey of the word "public" with this observation:-

> "In general, and in most of the senses, the opposite of private."

In Morrisons Holdings Ltd v Inland Revenue Commissioners (1966) 1 All ER 789 at 798 Pennycuick J. observes:-

> "One would not, on any ordinary use of the word, describe a man's child or partner, and above all his wife, as being a member of the public in relation to himself."

As Angel J. points out it would have been a simple matter to use the expression "any person" rather than "the public or to any member of it" in s.154. One must assume that the expression was deliberately chosen and the intent is that public acts or omissions of the nature contemplated by s.154 are to come within the scope of the Code but "private" acts of this nature do not.

If the "wide net" cast by the section does not cover "private" or "domestic" incidents, that could be because it is considered that these should not be on the same plane of seriousness as acts which create a threat or danger to the public generally. The latter may be considered sufficiently serious to be indictable; the former, not. It may be, that, having clearly established an objective standard for this type of offence, it was considered inappropriate by the legislature that it should intrude into private matters. There is nothing unusual in this. There are many cases where the operation of the criminal law stops at the private boundary. Drunkenness is the obvious example. It was always recognised by the criminal law that a man may be as drunk as he pleased in his own home. When the Drury Lane Theatre burnt down, Sheridan, who had invested in it what little fortune he had, was found drinking outside the smouldering ruins. "Surely," he said, "a man may drink by his own fireside". His facts were wrong but his law was right. When parliaments got round to

creating various statutory offences for drunkenness they did not commit trespass quare clausum fregit. They dealt only with drunkenness in public.

Much other legislation is directed to making unlawful in public that which is not unlawful in private. There is no reason in principle why s.154 should not be another example.

Mr Riley has directed our attention to several other sections of the Code which indicate that the draftsman has drawn a distinction between the expression "any person" and "any member of the public". The clearest example is s.218 which deals with unlawful use of a vessel, motor vehicle, caravan or trailer.

> "If
>
> (a) in the course of such unlawful use the offender causes any injury to any person or any danger to the lives or safety of the public or any member of it;" ...
>
> he is guilty of a crime.

It seems plain that the offence of causing injury to any person is to be contrasted with causing danger to the public or any member of it. It seems equally plain that the different terms are employed so that one class, comprised by the expression "any person", is different from the class comprised in the expression "the public or any member of

it". The terms may often overlap but cannot be meant to be synonymous. The case of Hansen v Transport Department (1968) NZLR 208 is in point. S.57 of the New Zealand Transport Act 1962 made it an offence to drive a vehicle at a speed "which, having regard to all the circumstances of the case is or might be dangerous to the public or to any person". The defendant was charged with driving at a speed "which might have been dangerous to any person". The time being 7.20am, and being an Easter Monday in New Zealand, the streets were, (naturally), deserted. The defendant was convicted in the Magistrates Court, but on appeal Speight J. quashed the conviction. At 209 his Honour said:-

> "The statute has used two words or sets of words in immediate succession and the cases tell us that the initial approach in such matters is to suppose that each word has some effect and one should assume that Parliament is not merely saying the same thing twice over. 'Public' is a word of wide import and would usually include 'any person'. Where these two words are used in association it may be that the general word is being used in a sense excluding the specific one and this approach seems proper when the only other interpretation is that the specific words are mere tautology - an interpretation which is to be avoided if any other sense can be made of the statute".

One distinction may of course be drawn that his Honour in that case was dealing only with a section in which both expressions were used - as is the case also in s.218 of the Code. It might be argued, therefore, that the remarks are not pertinent to a section where only one of the expressions was used as in s.154. But in my view the

principle applies generally that, where two expressions are employed in various parts of a statute, the draftsman must be taken as being aware of the difference throughout unless the context otherwise dictates. Bennion on Statutory Interpretation p.376 remarks that:-

> "... it is presumed that the draftsman did not indulge in elegant variation but kept to a particular term when he wished to convey a particular meaning."

He quotes Blackburn J. in Hadley v Perks [1866] LR 1 QB 444 at 457:-

> "It has been a general rule for drawing legal documents from the earliest times, one which is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning."

Apart from s.218(2)(a) the expression "any person" in the sense of being the object to whom something is done is used in ss.175, 176, 177, 178, 179, 180, 216(3). The expression "the public or any person" is used in s.284. The inference seems clear that the draftsman must have been aware throughout of the difference, and the two expressions "the public" and "any person" are meant to carry different connotations. "Where a difference of wording is inexplicable unless different meanings were intended the court does its best to find those different meanings" (Bennion - p.376). Those different meanings can be readily found in the interpretation given by Angel J.

The submissions of the learned Solicitor-General endeavour, quite properly, to restrict the question to s.154 as an alternative to murder or manslaughter. For the reasons I have already set out it has been necessary to deal with s.154 as a whole because the interpretation placed on it by Angel J. necessarily affects the particular question posed.

The argument for the Crown is that, because of s.318 and for the purposes only of alternative verdicts to charges there mentioned, s.154 must be construed in this context as applying to "any person".

S.318 provides:-

> "CHARGE OF OFFENCE AGAINST THE PERSON WHERE SECTION 31 OR INTOXICATION IS A DEFENCE
>
> Upon an indictment charging a person with murder, manslaughter or any other offence against the person, if he is found not guilty of the crime charged or any other offence of which he might otherwise be convicted upon that indictment by reason of the provisions of section 31 or intoxication, other than intoxication of such a nature that the provisions of section 35 apply, he may be convicted alternatively of the offence defined by section 154 with or without any of the circumstances of aggravation therein set out."

The learned Solicitor-General submits that the effect of s.318 is to broaden the application of s.154 to <u>any person</u> where injury or death occur in circumstances where s.31 would preclude conviction. I see no reason why

this must be so. The expression used is "the offence defined by s.154". Section 318 is not rendered nugatory by adopting the definition contended for by Mr Riley. The alternative verdict remains open but not in the way suggested by the learned Solicitor-General. To submit that it is no part of murder, manslaughter or an offence against the person that the victim be a member of the public, and therefore should be no part of s.154 when that section is considered as an alternative to such offences, begs the question. Obviously it is no part of murder or manslaughter because the relevant sections do not contain such terms. The offence of murder involves a person unlawfully killing "another" in certain circumstances. S.162(1). The offence of manslaughter involves the same concept - "unlawfully kills another" s.163. So also the crime of assault involves unlawfully assaulting "another". S.188. Various other offences against the person use the term "any person" e.g., ss.178-183 which use the terms "any person" or "another" as describing the person who is the object or sufferer of the act or omission. Such examples rather support than detract from an argument that, where the expression "the public" or "a member of the public" is used, some different meaning should be given. I see nothing inherently absurd in maintaining that, where s.318 allows s.154 as an alternative verdict to murder or manslaughter, the jury must be instructed that the section applies only if they are satisfied that the person affected by the act of the accused

was in the circumstances a member of the public. No doubt the presiding judge will be called upon to decide whether there is evidence fit to go to the jury on this point. No doubt, also, there will arise examples where the question may be one of some difficulty. A person may be a member of the public for some purposes and not for others. The test is elastic and will depend upon the circumstances. Somewhat similar difficulties arise in determining whether a place is a "public place". Furthermore the distinction between what may be broadly called "private" acts as against "public" acts may be found in other parts of the Code. Force applied by a parent to a child by way of discipline (provided it is reasonable) is not criminal s.27(p); but the same force applied to someone else's child very well may be. Deprivation of the personal liberty of a child is not an offence, if reasonable, and if imposed by a parent, guardian or teacher; but not otherwise. S.196. Within limits the law permits certain things to be done in a domestic situation which would otherwise be criminal. There is no reason why a similar principle is not at work under s.154. If the law is to be otherwise it should say so more clearly.

I would answer the question, "No".

GALLOP J: I have read the judgment of the Chief Justice in this matter and agree that the question should be answered "No" for the reasons stated by him.

ANGEL J: The question with which the Court has to deal is referred to in the reasons for judgment of the learned Chief Justice. We are told nothing of the facts of the trial which prompted the question and the only facts with which we have to deal are those expressed or implied in the question itself. I think the critical fact here is "that no person other than the intended victim was caused any serious danger actual or potential." To me it is significant that there was an intended victim. It seems to me that fact and that no one else was endangered removes the matter from the ambit of s.154 of the Code.

I agree with the other members of the Court that s.154(1) of the Code is not to be read as if the words "of the public or to any member of it" mean "a person" or "any person" or any like expression. That this is clear, I think, is evidence from the use of the words "any person" in s.154(2) and (3), and the contrast made in other sections of the Code between the expression "any person" and the expression "the public or any member of it", see e.g., s.218.

The learned Chief Justice has set out my ex tempore ruling during the trial of Campbell. Having reflected upon that ruling, I agree with it, and, as far as it goes, I see no need to qualify or amplify it. I think it is undesirable to abstractly consider the ambit of s.154 without reference to concrete facts. Section 154 is far ranging, Baumer v The Queen (1988) 166 CLR 51 at 55, and in these circumstances, in my view, it is particularly important to confine our reasons to the matter before us.

I nevertheless desire to add this. It is to be noticed that the offence created by s.154(1) is directed to dangerous situations which may be objectively seen as arising from the particular act or omission in question. The act or omission must be intentional, though the danger created thereby need not be an intended consequence. Furthermore, s.154(1) creates an offence regardless of the consequences beyond the danger, actual or potential, itself. If grievous harm or death is caused by the act or omission, then that consequence constitutes aggravation (see s.154(2) and (3)) of an offence already committed. It is also to be seen that the person who suffers grievous harm or dies can be "any person", that is, not necessarily a member of the public. Section 154 relates to intentional acts or omissions that, whether intended or not, objectively cause serious actual or potential danger, irrespective of any consequential harm. A discriminate danger to an individual

created by an act or omission done with the intention of creating that danger which does not constitute danger, actual or potential, to others, does not fall within s.154.

I, too, would answer the question, "No".