"WHICH OF YOU DID IT?"

The injustice of the loophole in the law which previously enabled those jointly accused of the murder or manslaughter of a child to escape justice, has long been recognised. The crucial question of *"which of you did it?"* was all too often left unanswered, usually by the accused remaining silent or blaming each other.

The Domestic Violence, Crime and Victims Act 2004

This Act has set out to dramatically change the potential to successfully answer that same question.

The Prosecutor's dilemma to date has existed where it can be proved that one or more of a small group of people living in the same household as the victim caused the death of that victim, but not specifically which one of them. Section 5 of the Act provides for a new offence of *'causing or allowing the death of a child or vulnerable adult'*[1], which, together with procedural changes provided for in Section 6, will allow prosecutors to close the net on those criminally responsible within the household. The relevant sections came into force on the **21 March 2004**, and apply to acts committed after that date.

Section 5(1) of the Act provides that:

> "A person ("D") is guilty of an offence if:
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> (a) A child or vulnerable adult ("V") dies as a result of the unlawful act of a person who –
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> (i) was a member of the same household as V, and
>
> (ii) had frequent contact with him,
>
> (b) D was such a person at the time of that act,
>
> (c) at that time there was significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
>
> (d) either D was the person whose act caused V's death or:
>
> (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),
>
> (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
>
> (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

Section 5 will no doubt be employed as a serious 'stand alone' offence, the maximum penalty for which is 14 years. However, it is also clear that the section will often be used in *conjunction* with an allegation of murder or manslaughter. This is

[1] Namely someone over 16 years of age whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness through old age or otherwise.

particularly so having regard to the evidential and procedural assistance provided for by section 6 of the Act (see below).

The conditions

The new offence provides that *members of a household*[2] who are 16 years of age or over,[3] and who have *frequent contact* with the child or vulnerable adult victim, will be guilty if they *caused* the death of that victim or, *alternatively*, three conditions are met, namely that:

- They were aware, or ought to have been aware, that the victim was at significant risk of serious physical harm from another member of the household, and
- They failed to take reasonable steps to prevent the victim coming to harm, and
- The victim subsequently died from the unlawful act of a member of the household in circumstances that the Defendant foresaw or ought to have foreseen.

Thus the Act provides for potential prosecution where the Defendant may have *caused* or *allowed* the death of the victim. The Prosecution do not have to prove which of the two different circumstances apply to the Defendant.[4] Equally, charges can be brought under the offence even when evidence suggests that the Defendant could not have directly caused the death, but there is sufficient evidence that he or she allowed the death to occur. This enables a Prosecution to be brought against two Defendants even where they remain silent as to what happened or blame each other.

The rationale of this Act

In times where new legislation is often criticised in all quarters, it is refreshing to see a new statute which adopts a measured approach to the issue that a person who has a duty to protect a victim from harm, is expected to take some action and not simply stand by and do (and subsequently say) nothing. The new provisions echo the public concern and expectation that it is indeed reasonable that such a person should be held to account to the Court for the circumstances of the victim's death.

That Act has been drafted to ensure that all potential offenders are caught within the particular net provided for by this legislation. Those at risk of investigation are members of the household having *"frequent contact"* with the victim, such a description being considerably wider in its description than, for example, that provided for by a "carer" within the cruelty provisions of the Children and Young Person's Act 1933. This is modern legislation where Parliament has recognised that the family and household unit is today very much more dynamic than was the case a few years ago. One parent may strike up a number of short term relationships with

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[2] A person is to be regarded as "member" of a particular household even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it, Section 5(4)(a).
[3] Unless they are the Mother or Father of the victim, in which case a prosecution can be brought against someone under 16, Section 5(3).
[4] Section 5(2).

new partners, each such partner having no "caring" role, but nevertheless being in the position of a household member whose "frequent contact" affords him a responsibility for a child or vulnerable person within that same household.

Reasonable steps

Quite what *"reasonable steps"* the Courts will decide should have been taken by members of the household having that frequent contact with the victim is a considerably more difficult question. Reasonableness in this context is an objective test, and it will be for the Court to decide what was reasonable for a person in their particular circumstances and having regard to their particular relationship to the victim. For example, if the Defendant is a foster child of 16, the steps which he or she could be expected to take to protect a younger member of the same household might be limited in the extreme. What account is to be taken of a member of the household who may have been simply too frightened to take any sensible steps that might in other circumstances have been available to them. Some insight to the expectations in this regard is provided for in the Home Office Guidance accompanying the Act, and from some of the observations made by the Law Commission consultation and report documents. Reasonable steps were variously envisaged to include contacting Social Services, attending promptly upon the police, informing schools, the NSPCC, and other voluntary organisations. Calling upon the assistance of neighbours and addressing the addictions of other fellow householders were also identified as reasonable expectations.

When one returns, by way of example, to the plight of the young, frightened fellow house member, one must ask how realistic (and so reasonable?) it would be to expect steps to be taken of the kind discussed. A body of case law will develop in this regard, but it can sensibly be anticipated that a rigorous and demanding level of expectation will be placed upon householders, not least to reflect the public concern that those in a position to "do something" are called upon by the Courts to do just so.

Surviving a submission of no case

In addition to the potential to prosecute under Section 5 alone there will be renewed enthusiasm to prosecute a householder where suspicion points to that individual having been responsible for murder or manslaughter. This is so because there are evidential and procedural implications provided for by Section 6, if the Defendant is charged with the victim's murder/manslaughter and an offence pursuant to Section 5. The legislative intention is to ensure that more cases survive a submission of "no case to answer." The changes are twofold, namely:

(1) The drawing of adverse influences from silence in Court and
(2) Postponement until the end of a Defence case of the decision on the question of whether there is a case to answer.

Inference

Where a person charged with the new offence fails to give evidence, and the Jury would be able to draw an adverse inference[5] from that silence, section 6(2) provides that the Jury may **also** draw an adverse inference from the silence in respect of the

[5] Section 34 of the 1994 Act.

murder/manslaughter charge faced by the same Defendant. The silence can be used in determining whether he is guilty of the murder/ manslaughter even if there would otherwise be no case for him to answer in relation to that offence.

Postponement of the Decision whether there is a Case to Answer

Where a person is charged both with the new offence and with murder/ manslaughter section 6(4) of the Act provides that the decision on a Defence submission of "no case to answer" made at the end of the Prosecution case shall be postponed until the close of all the evidence providing that the Prosecution has successfully established a case to answer on the charge of the new offence. Without this new procedural safeguard there would have remained the risk that the murder/manslaughter charges would already have been lost at the close of the Prosecution case despite the fact that new evidence may well emerge during the course of the continued trial in respect of the new offence.

Police Station advice

There is now the need for revised consideration as to the advice that may or may not be given at the police station. When previously faced with two persons having been found in the household with the deceased victim, ordinarily advice would have been given to the effect that he should remain silent in anticipation of the Prosecution being left utterly unable to prosecute. Careful consideration will now have to be given as to whether the lay Client should give an account of their lack of involvement and sound reason as to why they were unable to take steps to act if indeed the circumstances of the offence did, or may, have called for the same.

This is a new legislation which one suspects will be much used. No doubt it will be applauded by all as to its intentions. More often we will learn, *"which of them did it."*

Richard Smith QC