

Republic v Francis (alias Kalenba)
(1997) SLR 63

Alexia ANTAO for the Republic
Anthony JULIETTE for the Accused

Judgment delivered on 30 January 1997 by:

ALLEEAR CJ: The accused, Jeffrey Francis, (alias Kalenba) is charged with the offence of manslaughter contrary to section 192 of the Penal Code and punishable under section 195 of the Penal Code. The particulars of offence are that Jeffrey Francis (alias Kalenba) on 17 June 1991 at Castor Road, Mahe, unlawfully killed David Barbe.

On Monday 17 June 1991 in the afternoon at Castor Road, English River, following an altercation between the accused and the deceased, David Barbe, the former punched the latter twice on the face causing the latter to fall and hit his head against the edge of a ditch along the said Castor Road. David Barbe sustained serious head injuries due to his fall as a result of which he died the following day.

There were several eye-witnesses to the said incident. Georges Pierre (PW4) was one of them. He said he was seated on the wall of one Michel Richmond by the side of Castor Road. The time was around 1 pm. He witnessed an incident between the accused and one Jason Charles. Shortly after the said incident was over, the deceased came along the Castor Road. The Accused who was standing close to a lamp post with a bottle of Guinness in his hand, asked him for a cigarette. The deceased playfully touched the abdomen of the accused. The accused swore at him. The deceased said "you ask me for a cigarette then you swear at me." The accused who was apparently in a sour mood did not like what the deceased said to him and punched him in the face. The deceased fell down. When he was on his feet again, the accused punched him a second time. The deceased fell backward hitting his head on the tarmac and became motionless. The deceased remained immobile on the ground for about 2 to 4 minutes. At the same moment the accused immediately left the scene and walked up in the direction of the Radio Seychelles Station. One Robert Confait came along and helped to pick up David Barbe, and put him in a car which drove away in the direction of English River. The next day Georges Pierre learnt that David Barbe had died.

On 17 June 1991 at around 11.10 am Albert Joseph Pierre Louis, another witness, was standing by the shop of "kaliman" at English River. He saw the deceased whom he observed was in an inebriated state. The deceased told him he was going to climb a mango tree to pick some mangoes. At the same moment the accused came along Thomson Lane. The deceased stopped the accused and said the following to the latter "What you are doing is wrong, you are assaulting everybody at English River." The accused replied, "I have done nothing to you and I am going home". The deceased repeated "what you are doing is wrong and I have to talk to you." The accused replied "you are putting me on my nerves. I have done nothing to you."

At that Albert Joseph Pierre Louis said he intervened and told the accused to leave the deceased alone. Before going away the deceased told Albert Joseph Pierre Louis that he would meet him at Krishna Mart shop at around 2 pm the same afternoon.

In the afternoon when Pierre Louis reached Krishna Mart's shop he was informed of the incident which had taken place between the accused and the deceased. He proceeded straight to English River clinic to see the deceased. The next day he was on his way to work when he learnt that the deceased had passed away. He was detailed to be on sentry duty at the mortuary, Victoria Hospital. Upon reaching the mortuary he made a visual examination of the body of the deceased. He saw a bump at the back of the deceased's head. There were about 7 stitches on the right side of the deceased's chin.

Bernard Jourdan Delorie recalled the incident of 17 June 1991. He said at around 1.30 pm he parked his car along the English River road and went inside "Kailasam", shop to buy a tin of milk. Whilst he was inside the said shop he heard an argument outside. When he came out he heard the accused say to the deceased "I am on good terms with you and we have no quarrel. Why are you doing all this?" The deceased pulled the t-shirt of the accused. The accused lost his temper and punched the deceased. As a result of that blow, the deceased fell backward hitting his head on the tarmac by the gutter. After the accused had punched the deceased, he ran upwards the Union Vale Road followed by one Daniel Charles who gave chase to him. The accused picked up two stones in order to defend himself. Delorie helped to put the deceased in his car in order to transport him to the English River Clinic.

Robert Confait, another eye-witness who undoubtedly came to this Court to mislead it, deposed that on 17 June 1991 between 1.30 and 2 pm he was in the vicinity of Chang Lai shop at Castor Road. He saw Daniel Charles, Jason Charles and Bernard Jourdan Delorie on the road. He heard the deceased say to the accused "you asked me for a cigarette then you swear at me." The deceased pulled the t-shirt of the accused which was over his trousers. The accused and the deceased started arguing. The accused punched the deceased on the side of his face. The deceased fell backward in a sitting position against the wall of a house bordered with CI sheets. The deceased got up immediately. The accused punched him again. This time the deceased fell back hitting his head by the edge of the gutter by the road side. The deceased remained motionless on the road.

With the help of one Poppy Delorie, he helped to put the deceased inside Delorie's car. The deceased was taken to English River Clinic. From the English River Clinic the deceased was transported to the Victoria Hospital. In the evening Robert Confait went to visit the deceased. The latter was still unconscious lying in bed. The next morning he learnt that the deceased had died.

Robert Confait spoke of an incident between the Charles brothers and the accused person. The said incident he said had occurred on the night prior to the incident giving rise to this case. Robert Confait wanted to link the incident between the accused and

the Charles' brothers with the incident between the accused and the deceased in order to show that the accused was provoked to act in the way he did. I do not think that the two incidents had anything to do with each other. They were quite separate incidents.

On 19th June 1991 Dr Rubel Brewer was present when Dr Wang, who has since left the Republic, performed a post mortem examination on the body of the deceased. Doctor Brewer recalled that the deceased had died of brain damage due to skull fracture. He said that the head injury could have been caused by a blow received at the base of the skull.

Shortly after the incident of 17 June 1991, the accused left the Republic, unknown to the authorities. On 4 November 1992 Mireille Charles made the following deposition in Court pursuant to section 133 of the Criminal Procedure Code Cap 54. She has since passed away and was obviously not available to depone in this trial. Her deposition, a copy of which was made available to defence counsel, has been admitted in evidence in this case pursuant to section 133(I) of the Criminal Procedure Code Cap 54. In her deposition Mireille Charles stated

My name is Mireille Charles of Castor Road, a house wife of 43 years old. In June 1991 I was living in Castor Road, Mahe. I know the accused Jeffrey Francis alias Kalenba. I knew the deceased too. I recall an incident which occurred on 17 June 1991. It was in the afternoon. The incident occurred on the road. I was coming from Ah Seng's shop. I saw a lot of people along the road. I saw the accused and the deceased talking. They were conversing. They were by the road side. I heard the accused ask the deceased for a cigarette and deceased gave him one. Then I saw the deceased raise the shirt of the accused saying it is wrong to walk with a weapon or stick whereupon the accused slapped the deceased on the face and the deceased fell on the road. The accused fell on his feet. I saw the incident clearly although I was not close to the deceased and the accused.

David rose to his feet and Kalenba punched him in the face. He fell backwards and his head was in the ditch and body on the road. Then I left. David never got up. I did not notice whether Kalenba had anything in his hand then I went home.

The accused gave an unsworn statement to the Court in which he stated thus

On the 17th June 1991, at around 11 o'clock, it happened that the deceased, David Barbe, tried to pick a quarrel with me. I ignored him and went on my way.

After that, at about 1.15 p.m, I was going to buy some items from the shop. When I got to English River, between Chang Lai Seng's shop and Bonte's, I saw some empty bottles being thrown at me and I also saw stones being thrown at me. I was looking to see where they came from and they were

coming from either side of me. I was hit at the back of my head. I looked up and I saw David Barbe talking to Jason Charles. After speaking to Jason, he came towards me. When he was coming towards me, Jason and his brother who were throwing stones at me stopped throwing stones at me. When David came towards me, I was about to leave by another way and he pulled at my shirt.

In order to succeed in proving the charge of involuntary manslaughter against the accused person, the prosecution bears the burden of proving the following elements beyond reasonable doubt:

(i) that there was an unlawful act; (ii) that the unlawful act was committed by the accused person; (iii) that death of the deceased person resulted from the unlawful act of the accused.

It is worth remembering that the defence of provocation and diminished responsibility are applicable only to the charge of murder so as to reduce that crime to manslaughter. However, the defence of self-defence is still available to an accused person charged with the offence of manslaughter. It stands to reason that the defence of self-defence can only be invoked if there has been an attack by the victim on the accused.

A killing is manslaughter if it is either (a) the result of a reckless act or omission on the part of the accused or (b) the result of an unlawful act where the unlawful act is one, for example, an assault which all sober and reasonable people would inevitably realise must subject the other person i.e the victim to the risk of some harm resulting, albeit not serious harm. Unlawful in this context means criminal and not tortious. Mens rea of some kind is also an essential ingredient in manslaughter. That mens rea can consist either of recklessness as to the possibility of the accused's act or omission resulting in death or serious injury or, in the case of death resulting from an unlawful act, the mens rea appropriate to that act.

Where the manslaughter is alleged to result from an unlawful act, involving a risk of some harm, it is essential that the act, usually alleged to be an assault, must be proved to have been unlawful. In *R v Lipman* (1969) 53 Crim App R 600 the Court recognised the necessity to prove the mental element of assault where that was alleged to be the cause of death amounting to manslaughter.

In this case, in spite of minor inconsistencies in the various testimonies of the witnesses who testified, it is crystal clear to me that on 17 June 1991 prior to the incident giving rise to the present case, the accused had been involved in a stone throwing incident with the Charles' brothers. The latter incident had nothing to do with the subsequent incident between the accused and the deceased. I say this for the following reasons. If the deceased had anything to do with the previous incident of stone throwing the accused would not have asked him for a cigarette. Nobody in his right mind asks for a cigarette from someone who has only a while ago been a participant in a stone throwing incident against him.

What happened is that following the stone throwing incident the accused went and stood by an electric post with a Guinness bottle which was half full. When the deceased came near him, the accused asked him for a cigarette. The evidence shows that the deceased had been consuming drinks that morning. In his inebriated state he pulled the t-shirt worn by the accused over his trousers. That was indeed a silly thing to do but one has to admit that drunken persons usually do such silly things. The accused asked the deceased to stop pulling at his t-shirt and the latter persisted. The accused lost his temper and voluntarily and unlawfully punched the deceased on the side of his face causing the deceased to fall in a sitting position. As soon as the deceased got up on his feet the accused punched him again. The deceased fell backwards, hitting his head against the edge of a gutter. The deceased sustained serious head injuries as a result of which he died the following day.

There was indeed no need for the accused to strike a second blow when the deceased got up he had done nothing to provoke the accused. The second blow inflicted on the deceased was in the circumstances intentional, malicious and unwarranted. The accused cannot be said to have acted in self defence. The defence of self defence becomes available to an accused who has sustained a physical attack from the victim.

On the evidence I accordingly find all the elements of the offence of manslaughter proved beyond reasonable doubt against the accused person. I find him guilty and convict him as charged.

Record: Criminal Side No 1 of 1992