a) D has agreed to take part in an armed robbery, but not being a very violent person he has decided to buy a replica gun, which will not shoot, instead of a real one. During the robbery he points the gun at V, and one of D’s accomplices, X, tells him to shoot V. Knowing that he will be in trouble with X for buying a replica instead of a real gun, D decides to ‘try’ to shoot the gun, and then claim that it has got jammed so that X will not find out it is a fake. Unfortunately the shop from which D bought the gun has made a mistake and put a real, loaded gun in the box instead of a fake one, so that when D ‘pretends’ to fire the gun, it does actually go off, killing V. Advise D.

D could potentially be convicted of two alternative offences: murder or unlawful act manslaughter. Each offence will be addressed in turn.

**Offence 1: Murder**

Murder is the unlawful causing of death of another person with the intention of killing or causing grievous bodily harm (*Cunningham*). The actus reus is present as it is D’s shooting of V that kills him. However, it can be put forward that because D believed he had bought a replica gun, the fact that the shop made a mistake and put a real loaded gun in the box instead of a fake one, could be considered to break the chain of causation. If anything, D’s act would be a concurrent cause of the result as D’s contribution was a significant cause of the harm (*Cheshire*). Thus, the causal chain would not be broken by the *novus actus interveniens* of the shop keeper giving D the wrong gun.

As for the mens rea for murder, D would be lacking it, as he did not intend to kill or even cause grievous bodily harm to V, as he thought the gun was a fake and that it would not go off, even though he did intend to pull the trigger. However, he may be found to have had oblique intent, that is where D did not act in order to bring about the intended outcome (the death of V), but for other reasons, that is to avoid getting in trouble with his accomplice X. Nonetheless, seeing as D did not appreciate that death or serious bodily harm was a virtual certainty, the direction in *Woollin* would thus indicate that the jury is not entitled to find an intention for murder.

Furthermore, s 1 of the Homicide Act 1957 abolished the doctrine of constructive malice, that said that a person who killed in the course of committing a felony involving violence, for example robbery, was guilty of murder. Thus, it can be argued that since D did not kill during the furtherance of the armed robbery with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the furtherance of another offence, then his act does not amount to murder. Therefore, the conviction of murder may fail on these points.

**Offence 2: Involuntary Manslaughter: Unlawful Act Manslaughter**

D may be liable for unlawful act manslaughter. For this to be found, (i) D’s conduct would need to have constituted an unlawful act, (ii) D’s act would need to be objectively dangerous, and (iii) D’s unlawful and dangerous conduct would need to have caused V’s death.

First of all, D’s conduct must have constituted an unlawful act, that is a recognizable crime for which the actus reus and mens rea can be proven in full (*Jennings*). In this case, the base crime on which manslaughter would be constructed could be assault, as D pointed a gun on V. This constitutes the actus reus. However, as per *Lamb*, the mens rea of D would necessarily have to be taken into account, as if D did not intend to cause harm, then he could not be found to be committing an unlawful act. On the basis of pointing the replica gun at V being the unlawful act then, this premise may fail as D did not intend to cause any harm to V as he thought the gun was a replica. That said, in *Watson*, it was found that in a burglary that caused an 87-year old man’s death, the unlawful act comprised the whole of the burglarious
intrusion. Therefore, in a broader context, the armed robbery may be deemed the base unlawful act of D, and D did in fact have the necessary mens rea for that act.

Second of all, D’s act must have been objectively dangerous. Under *Church*, firing the ‘replica’ gun would have to be an unlawful act which as objectively dangerous to a sober and reasonable bystander. Even so, it is unclear whether the gun being a replica would have raised a risk of some harm in the mind of a sober and reasonable bystander. Although the courts lack clarity on this point, it seems likely that they would not. Indeed in *Dawson*, during a robbery, a petrol attendant with a heart condition died at the sight of an imitation firearm. D was not liable for manslaughter as a sober and reasonable bystander would not have foreseen physical harm but merely fright, and the robbery did not otherwise carry the risk of harm. In *Dawson* then, any information that D did not know should not be taken into account by the sober and reasonable bystander. In the present case, if the sober and reasonable bystander had the same information as D, then they would not only have not seen the risk in pointing the gun, but they would not have known that the gun was a replica. Also, D would not be held liable for manslaughter under *Watson* because it was not foreseeable that the gun would not be a replica.

However, it seems clear that a sober and reasonable bystander would have perceived the danger of pointing and shooting a real gun at V. The question is thus whether a reasonable and sober bystander could be considered to have knowledge - the fact that the gun was real - that D did not. In *Ball*, D had a pocket of live and blank cartridges. Believing the cartridge in his gun to be a blank one, he shot his gun and killed V. However, the Court of Appeal found that the dangerousness of the act was not to be judged according to the defendant’s appreciation (the defendant’s mistaken belief that the cartridge was blank), but rather the knowledge that a sober and reasonable man would have had, that is that the pocket contained both live and blank cartridges. It was considered that at that stage, his intention, foresight or knowledge was irrelevant. Thus, in suggesting that the jury is entitled to ascribe to the reasonable person all circumstances present at the time of D’s act, beyond what D actually knew himself, *Ball* may be used to show that the reasonable person would have known that the gun was indeed real, which would result in a finding that D’s act was objectively dangerous.

In any case, *JM and SM* upholds the idea that it is not a requirement of the offence of unlawful act manslaughter that the defendant should have foreseen any specific harm or that the reasonable bystander would have recognized the precise form or sort of harm which had ensued and caused the victim’s death. What mattered was whether reasonable and sober people would recognize that the unlawful activities, in the present case an armed robbery, would inevitably subject the victim to the risk of some harm resulting from it. On this basis then, D would fulfill the requirements that his act be unlawful and objectively dangerous.

Third of all, D’s unlawful and dangerous conduct must have caused V’s death. As already briefly addressed above, even though D was not responsible for the shop owner mistakenly giving him a real gun, he was still responsible for a “substantial and operating” (*Cheshire*) concurrent cause of V’s death. As such, seeing as all that is required is that the criminal and dangerous act was a legal cause of V’s death (*Mitchell, Goodfellow*), this requirement is fulfilled.
b) D and V are married and D has just given birth to their baby son, X. D, V and X go on holiday and
every night D gets up to feed X three times a night, so she is very short of sleep. V refuses to do anything
to help and he regularly hits D, telling her she is a bad mother. One morning they are by the pool when V
starts on D again, telling her that she is a bad mother, and making fun of her because she can’t swim. In
the course of their argument V also reveals to D that he has recently been having an affair. D picks up a
heavy glass and swings at V with it, intending to kill him. She knocks him out and he falls into the
swimming pool, where he begins to drown. Fortunately for V, however, the lifeguard notices and dives
into the pool to save V. D is charged with attempted murder. Advise D. Would your answer be diff
erent if
the lifeguard had not seen V in time

In the case where the lifeguard had saved V, then D would be charged with attempted murder and would
not benefit from any defense. If the lifeguard had not saved V, then D could be charged with murder,
though she may have access to the partial defense of loss of control, which would reduce her charge to one
of voluntary manslaughter.

The lifeguard notices and dives into the pool to save V:

Offence 1: Attempted murder:

D can be charged with attempted murder. Under s 1 of the Criminal Attempts Act 1981, the actus reus
would be doing an act which is more than merely preparatory to the commission of the offence. As for the
mens rea, it is intention to kill (Pearman). The actus reus is present here, as by picking up a heavy glass
and knocking V out, it is clear that D has completed an act that is more than merely preparatory as she has
completed her planned action. That alone fulfills the actus reus of attempted murder.

As for mens rea, it is clear D intended to kill V with direct intent, as it is specified that she hit D with the
heavy glass, “intending to kill him”. If there was no intent to kill, but merely an intent to cause grievous
bodily harm, then D would be charged under Section 18 of the Offences Against the Person Act 1861.

The lifeguard does not see V in time and V dies:

Offence 2: Voluntary manslaughter – defense of loss of self-control:

To be guilty of murder, D has to unlawfully cause the death of another with the intent to kill or cause
grievous bodily harm or kill (Cunningham). As explained above, it is clear that D had the direct intention
to kill V. Thus, she may be liable for murder.

Moreover, thee fact that the lifeguard, in not seeing V, was the cause of V’s death would fail as a defense
for D, as D’s original act was still making an ongoing contribution at the time of V’s omission. The same
logic would apply if D were to try to rely on V’s drowning as being the cause of death. Indeed, as per
Hart, the causation would still be attributed to D as the natural event was reasonably foreseeable. D’s act
is a concurrent cause of the result, and the causal chain is not broken by the novus actus interveniens.

However, D might be able to rely on the partial defense of loss of control (Coroners and Justice Act 2009,
ss 54-56), which would reduce the verdict to voluntary manslaughter. For this partial defense to apply,
then (a) the loss of self-control needs to have resulted in D committing murder (s 54(1)(a); (b) the loss of
self-control was caused by a qualifying trigger (s 54(1)(b)); and (c) a person similar to D in terms of sex
and age with a normal degree of tolerance and self-restraint and in similar circumstances to D would have
responded in the same way (s 54(1)(c)).

(a) If loss of control causes the death:
D seems to have lost control, as her act of killing her husband came directly after he taunted and revealed information to her. Although it does not matter whether or not the loss of control was sudden (s 54(2), Coroners and Justice Act 2009), there remains that the greater level of deliberation, the less likely the killing followed true loss of self-control (Clinton). Thus, the fact that D acted suddenly, after her husband’s taunts and revelations, may play in her favor.

Furthermore, although in isolation, V’s revelations of infidelity and taunts about her mothering and inability to swim may not be sufficient to provoke a loss of self-control, it can be argued that D lost her self-control following the cumulative impact of earlier events (Dawes), as it is said that V “regularly hits D, telling her she is a bad mother”. Her loss of self-control would thus be sprung by the new episode of criticism and revelations, but past events would have contributed to this loss of self-control as well. The impact of the revelation of infidelity will be dealt with later.

(b) If there was a qualifying trigger:

A qualifying trigger existed if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person (s 55(3)) or if D’s loss of self-control was attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character (s 55(4)(a)) and caused D to have a justifiable sense of being seriously wronged (s 55(4)(b)).

D may not be able to rely on the qualifying trigger under s 55(4), as while V’s words may have caused D to have a justifiable sense of being seriously wronged due to his insults and infidelity, V’s acts were not of an extremely grave character. However, the evidence of systematic abuse suffered by D may establish the gravity of the wrongdoing as well as the justifiable sense of being seriously wronged. That said, there could be evidence of circumstances of an “extremely grave character” from the long-term “slow burn” factors combined with matters which were immediately proximate to the killing (Hatter). On the other hand, D could have feared serious violence given V’s history of violence towards D (s 55(3)). Furthermore, given the events described above, it may be found that D did not act in a considered desire for revenge but due to a loss of self-control.

However, should it be found that there was a qualifying trigger, the question remains of whether the trigger would be disqualified by the fact that the thing said by V constituted sexual infidelity. That said, since sexual infidelity would not be the only trigger, given V’s physical and emotional abuse of D, then it should be considered as part of the context. Therefore, where sexual infidelity forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls under sections 55(3) and (4), the prohibition in 55(6)(c) does not apply (Clinton).

(c) If a person similar to the defendant would have reacted in a similar way:

Should the jury conclude that D’s acts do constitute a qualifying trigger, then under 54(c) it would need to be assessed whether a person similar to the defendant and in the circumstances of D would have reacted in a similar way. The fact that all circumstances other than those bearing on D’s general capacity for tolerance or self-restraint can be taken into account when assessing the objective standard means that sexual infidelity is relevant at this stage of the analysis, even if it has been excluded when considering the second qualifying trigger (Clinton). To sexual infidelity must be added V’s taunts of V on her inability to swim, but mainly V’s continued abuse of D and her. Under s 54(3) however, D’s lack of sleep and thus her irritability must not be taken into account as this falls under circumstances whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint. If it is found that a person similar to D would have reacted in as similar way, then D’s plea for loss of control would succeed.
Well done! You have a very systematic technique for answering problem questions, your writing is clear, and you have a good habit of citing legal authorities when mentioning a legal principle. Apart from only a very few instances (see my individual comments), you also have a very clear and accurate understanding of the law.