Mr. Justice Raine

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IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM: LALOR, J.
Monday,
22nd April, 1974.

THE QUEEN

v.

TUMBIPAI LAKI and DIRU TALIPUANI

Decision and Reasons for Decision

1974
Apr 22
LAIAGAM
Lalor J.

The accused in this case were jointly charged with unlawfully killing one Mark Irei on 4th September, 1973. The case for the Crown was that the two accused had performed an operation on the deceased as a result of which operation the deceased had died by reason of a massive infection introduced by that operation.

The evidence in the case was quite short and in fact not subject to dispute in any material point.

It appears that the deceased had been suffering from an illness which he attributed to a blow from a stick received about one year before his death. The evidence was that in that year on a number of occasions he had sought medical attention at three hospitals, government and mission, which were staffed by qualified European doctors. The furthest of these hospitals was distant from his village some sixty miles. From the evidence of his mother it appears that he did not obtain any treatment from these hospitals which alleviated his condition. Immediately before his death his condition apparently worsened; he did not eat nor did he move from his house. At this stage he called in the two accused and asked them to operate on him.

From the evidence it appeared that the two accused were surgeons in the village. There was no evidence given as to their registration or non-registration, but I am prepared to assume that they were not registered. They claimed that they had performed many operations successfully and offered to produce their patients to the court.

The evidence was that, in the present case, they operated upon the deceased's chest with a bamboo scalpel and after having bound up his chest helped him to the house where he remained until his death some three days later. Upon operating, it seems that they found a large amount of puss inside the chest and thought that it was likely that he would die from it.

The medical evidence called by the Crown was the lower court deposition of a Dr. McGoldrick, a Bachelor of Surgery and a Bachelor of Medicine, who graduated from Monash University in 1971. He had, at the time, five months experience at Laiagam. He has since left the territory and his deposition was admitted in evidence, subject to the exclusion of certain passages expressing non-medical opinions, for which he had not been qualified. His evidence was that on general examination there were found to be three incisions made over the chest. On opening the chest he found that the whole right lung was consolidated and the plural cavity was completely involved in a purulent infective process. He attributed this infection to a result of the operation. The examination was made some thirty-six hours after the death of the deceased.

The Crown based their case on three sections of the Criminal Code.

"282. Surgical operations. - A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."

"284. Consent to death immaterial. - Consent by a person to the causing of his own death does not affect the criminal responsibility of any person by whom such death is caused."

"288. Duty of persons doing dangerous acts. - It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person or to do any other lawful act which is or may be dangerous to human life or health,

to have reasonable skill and to use reasonable care in doing such act: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

The Crown argued that by reason of these sections the accused were guilty of the unlawful killing of the deceased and the particulars of criminal negligence alleged were as follows: -

(1) The use of the bamboo knife for the operation and the lack of asepsis;

(2) The fact that the operation was performed on the chest; and

(3) The massive infection which the doctor found to be present following the operation.

I turn now to direct myself on the law applicable to this case.

The first two sections of the Criminal Code relied on by the Crown, namely ss. 282 and 284 form part of Chapter XXVI of the Code which is headed "Assaults and Violence to the Person Generally: Justification and Excuse".

The chapter is concerned with defining what is an assault and with making assaults unlawful unless authorised or justified or excused by law. The majority of the sections of this chapter are concerned to define the circumstances in which an assault is authorised or justified or excused.

Section 282 is a section which is concerned to justify what would otherwise be an assault upon a person when a surgical operation is performed upon him without his consent. It reproduces almost verbatim Clause 68 of the English Draft Bill of 1880 based upon the work of Sir James Fitzjames Stephen. The proposition that an operation performed in the circumstances set out in this section was not the subject of criminal responsibility was accepted both by Sir James Stephen and by Sir Samuel Griffith in the Queensland Code. The common law position is not so clear.

In the circumstances of this case I hold that s. 282 has no application to the case. The section is concerned with

what would otherwise be an assault by reason of lack of consent. In this case there was no assault as the accused were asked to perform the operation by the deceased. In any case it does not create but negatives criminal responsibility.

Section 284 is also concerned to delimit the area in which an assault is lawful. By definition - s. 245 - a person cannot commit an assault if it is consented to. The effect of s. 284 is merely to remove any legal significance from the consent by a person to the causing of his own death. In other words, the law relating to assault has no relevance where death is caused by that assault. A person may consent to an assault but his criminal responsibility *qua* assault does not affect his criminal responsibility *qua* death. This is determined by Chapter XXVIII of the Code in which it is made unlawful to kill any person unless such killing is authorised or justified or excused by law. Killing is defined as causing the death either directly or indirectly of a human being. A direct cause of death is one from which the death flows immediately and includes the acts or omissions set out in ss. 294 to 298 of the Code. The indirect causes of death are set out in Chapter XXVII of the Code dealing with duties relating to the preservation of human life. In ss. 285 to 290 the failure of a person to carry out the duties therein laid down is held to have caused the consequence arising from the omission to perform a duty. Thus if the omission to perform the duty results in the death of a person, the person failing to perform the duty is held to have caused the death.

Neither s. 282 nor s. 284 then can operate to create criminal responsibility in this case. This is to be found elsewhere and specifically in s. 288 of the Criminal Code.

Under this section the Crown must establish the following facts to show that the accused is guilty of unlawful killing:

(1) If there is evidence that the surgical treatment was given in a case of necessity the Crown must negative this on the facts.

(2) The Crown must show that the accused undertook to administer surgical treatment which was or could be dangerous to human life.

(3) It must show that the accused did not have reasonable skill and did not use reasonable care in administering surgical treatment.

(4) And finally it must show the death was a consequence of the failure in the duty to have reasonable skill and use reasonable care.

The standard of reasonable skill and reasonable care set out in s. 288 is as the High Court said in relation to s. 266, "that set by the common law in cases where negligence amounts to manslaughter", Callaghan v. The Queen (1). The common law test as to criminal negligence of unqualified medical men is set out by Ellenborough C.J. in Rex v. Williamson (2). In that case the accused who was a practising but unqualified midwife mistook a prolapsus uteri for a remaining part of the placenta which had not been brought away at the time of delivery; in attempting to bring away the prolapsed uterus by force, he lacerated the uterus and tore asunder an artery causing the death of the patient. A number of medical witnesses gave evidence that there must have been a great want of anatomical knowledge in the prisoner. Lord Ellenborough directed the jury as follows:

> "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and, from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill."

Accordingly I direct myself that the Crown must establish either the grossest ignorance or the most criminal inattention on the part of the accused.

It must establish further that the death of the deceased was caused by this criminal lack of skill or lack of

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(1) (1952-53) 87 C.L.R. 115 at p. 124
(2) (1807) 3 Car. & P. 635

care. It should be noted that the consequences of the criminal negligence, whilst a necessary fact to establish the offence charged, are not evidence of the criminal negligence. As the Privy Council said in Akerele v. The King (3) -

> "The act had already taken place, and its observed consequences, which only showed themselves at a later date, could not add to its criminality. The negligence to be imputed depends on the probable, not the actual result."

Further on their Lordships said -

> "Their Lordships cannot accept the view that criminal negligence has been proved merely because a number of persons have been made gravely ill after receiving an injection of sobita from the appellant coupled with a finding that a high degree of care has not been exercised. They do not think that, merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence was proved."

Applying the above directions to the facts of the case I now ask myself - Have the Crown established these facts beyond reasonable doubt?

Firstly as to the evidence of necessity. As has been noted the Crown evidence was that the deceased unsuccessfully sought treatment on a number of occasions over a period of a year from registered hospitals until, finally, in apparently a serious state of ill-health, he called in the accused. Having regard to the fact that there are some three European doctors in an area with a population of well in excess of 100,000 people and the proven inability to obtain medical attention from a hospital it would seem that there is evidence upon which it could be held that a state of necessity existed. No attempt was made by the Crown to explain or elaborate this evidence. In the view I take of the major facts of the case, it is unnecessary to express any opinion as to whether, if the case turned upon this point alone, the Crown would have negatived the state of necessity as they were bound to do.

Turning to the second element in the case to be proven by the Crown, namely the gross ignorance or the most criminal inattention of the accused the particulars given by the Crown are as set out above. Before considering them I

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(3) (1943) A.C. 255 at p. 264

make the following general comments on the state of the evidence.

Firstly, no direct evidence was called by the Crown as to the qualifications and experience of the accused. However, in the Crown evidence it appeared that the accused operated at the request of the deceased and furthermore that they had performed operations successfully in a considerable number of cases. In Williamson's case (4) (supra), a number of former patients of the accused were called, who spoke as to his kindness and attention and also to his skill as far as they were able to judge. Referring to this evidence in his summing up, Lord Ellenborough said as follows -

> "... from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill."

Since the question of whether the accused had reasonable skill is a jury matter and since "it is on just such questions as these that the knowledge and common sense of a local jury are invaluable." (Kwaku Mensah v. The King (5)). I ask myself whether a jury of Enga villagers would find that the Crown had proven beyond reasonable doubt that the accused had acted with the grossest ignorance. I find that all of the evidence is to the contrary. That in fact the accused were accepted by the villagers as men of reasonable skill.

I turn now to the question as to whether the accused acted without reasonable care. Here again the evidence of the Crown was very sketchy. The only direct evidence that I have is that the accused operated on the deceased with a bamboo scalpel in the open air. The Crown prosecutor in his summing up alleged that one of the particulars of the criminal neglifence alleged by the Crown was the use of the bamboo scalpel together with a lack of asepsis. Applying the same jury test to this allegation I find that there is no reason why one should designate the use of a bamboo scalpel as gross negligence. On the question of lack of asepsis there was no direct evidence of any kind as to the manner in which the operation was performed or the precautions against the introduction of infection. There is no evidence on which I could find that as regards the performance of the operation the accused had acted with the criminal inattention which the Crown must prove.

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(4) (1807) 3 Car. & P. 635
(5) (1946) A.C. 83 at p. 93

As further evidence of the lack of reasonable care the Crown relied on two further particulars -

(1) The fact that the operation was to the chest; and

(2) The massive infection from which the death was caused.

If the performance of chest operations were evidence of lack of reasonable care, then only total success could save thoracic surgeons from prosecution. The evidence as to the source of the massive infection was not wholly satisfactory, in that whilst the doctor was certain that it had been introduced as a result of the operation, the evidence of the accused was that there was a pre-existing infection. Assuming, however, that the infection was caused or was secondary to the operation, is this then evidence of lack of reasonable care? The Crown argument suffers from the very defect which the Board rejected in Akerele's case (6) (supra). In other words, they argued from an actual consequence to an assumed but undefined criminally negligent act, rather than from a defined act bearing probable consequences. As a matter of logic the Crown proposition could only be supported if there was a valid major premise to the effect that "all infections are caused by criminally negligent acts." Of course, such a premise is factually untenable.

I therefore find that there is no evidence on which the accused could have properly been charged with manslaughter and I find them not guilty of the charge. I would refer to the statement of Hullock B. in Rex v. Van Butchell (7). He said -

"This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and, even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion, that it makes no difference whether the party be a regular or an irregular surgeon, indeed, in remote parts of the country, many persons would be left to die if irregular surgeons were not allowed to practise. There is no doubt that there may be cases where both regular and irregular surgeons might be

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(6) (1943) A.C. 255
(7) (1829) 3 Car. & P. 629

liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. .... It may be that a person not legally qualified to practise as a surgeon may be liable to penalties; but surely he cannot be liable to an indictment for felony. It is quite clear, you may recover damages against a medical man for a want of skill; but, as my Lord Hale says, 'God forbid that any mischance of this kind should make a person guilty of murder or manslaughter.' Such is the opinion of one of the greatest Judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, bona fide and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter. In the present case, no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. Lloyd has himself told us that he performed an operation, the propriety of which seems to have been a sort of vexata quaestio among the medical profession; but still it would be most dangerous for it to get abroad, that, if an operation performed either by a licensed or an unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter."

In view of these findings I order the accused to be discharged.

I find it a matter of great concern that two reputable citizens should have been imprisoned for five and a half months on a charge without any foundation in law or fact.

The discretion given to lay a charge in this court is not a discretion to lay charges in the Macawber-like hope that some evidence will turn up where none is apparent on the depositions or further obtained.

The words of Atkin L.J. in Meering v. Grahame-White Aviation Company Limited (8) set out the minimum requirements if a prosecution, whether Crown or private, is not to be unlawful:

"I think that honest belief must be not merely belief by the prosecutor in the guilt of a person, but it must be a

(8) (1920) 122 L.T. 44 at p. 56

belief that the prosecutor will be able to adduce such evidence before the jury or the court as would justify the court in convicting the accused. For instance, it constantly happens - or, at any rate, it happens from time to time - that a person receives information from sources which he knows are unavailable. It is given sometimes confidentially in the sense that the witness cannot be called. It is given sometimes by witnesses who are in themselves untrustworthy of belief, or who have acquired their information in ways which for public reasons or otherwise cannot be disclosed. It seems to me that, if belief were founded solely upon evidence such as that, it could not be said in any way to justify the bringing of a prosecution. A man is not entitled to bring a prosecution, to my mind, unless he believes not merely that the person is guilty, but that he at any rate believes that there is a reasonable prospect of the prisoner being convicted."

Similarly, the duty of counsel to withdraw a prosecution which cannot succeed is not restricted by departmental instructions, or public service considerations.

The Court of Appeal in Abbott v. Refuge Assurance Co., Ltd. (9) has approved the following statement of the law:

"It is a long established practice that, if counsel in charge of a prosecution at any stage is convinced that there is no evidence against the defendant, or so little evidence that it would not be safe to leave the case to the jury, it is then the duty of counsel to acquaint the court with his views and to ask for leave to withdraw the prosecution. I certainly have never known such an application to be refused. As I say, that is well established as being the duty of counsel and it does not depend on any instructions at all. Whoever is instructing counsel, whether it be a private person or the Director of Public Prosecutions, may violently disagree with counsel's view, for as a matter of courtesy the prosecutor would naturally be informed by counsel of what he proposed to do - but it would be quite wrong of counsel to accept any instructions to go on with a prosecution once he had formed a view that the prosecution should not continue."

Solicitor for the Crown : P.J. Clay, Crown Solicitor
Solicitor for the Accused: G.R. Keenan, Acting Public Solicitor

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(9) (1961) 3 All E.R. 1074 at pp. 1084-5