IN THE FIJI COURT OF APPEAL

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At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 6 OF 1991
(Criminal Case No. 16 of 1990)

BETWEEN:

S T A T E — APPELLANT

-and-

SEFANAIA BILOVUCU TABUA — RESPONDENT

Mr. I. Mataitoga for the Appellant
Mr. Q. B. Bale and Dr. Ajit Singh for the Respondent

Date of Hearing : 27th August, 1992
Date of Delivery of Judgment : 30 September, 1992

JUDGMENT OF THE COURT

The respondent was charged on two counts under s.172 of the Penal Code Cap.17 that, with intent to procure the miscarriage of a woman, he unlawfully used instruments. He pleaded not guilty and following a trial, he was acquitted on both counts. The Director of Public Prosecutions now appeals against those acquittals upon matters of law.

Section 172 provides:

> *"Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever, is guilty of a felony, and is liable to imprisonment for fourteen years."*

Both complainants gave evidence of their pregnancy, of their visit to the respondent, who is a registered medical practitioner, and of the steps taken by the respondent to terminate the pregnancy. All this was admitted in evidence by the respondent. His defence was that he attempted to terminate the pregnancy in each case believing in good faith that to allow the pregnancy to continue would have made of each woman a physical or mental wreck. It should be added that in the case of one of the women, who was 28 weeks pregnant at the time, the attempted termination failed and a healthy child was born subsequently.

In his summing-up the Judge directed the Assessors that if in each case the respondent formed an opinion, based on reasonable grounds, and with adequate knowledge available to him, that the probable consequence of the continuance of the preganncy would be to make the woman a physical or mental wreck then he would not have acted unlawfully in procuring a miscarriage. In giving this direction the Judge said that this interpretation of the law of Fiji was derived from the English cases of R. v. Bourne (1939) 1 K B 687, R. v. Smith (1974) 1 All E R 376 and Royal College of Nursing v. DHSS (1981) 1 All E R 525.

The Assessors returned opinions of not guilty on each charge and the Judge agreed with those opinions so that the respondent was acquitted. In the absence of any expert evidence

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called on behalf of the prosecution as to the question of danger to the life or health of the complainant in each case these acquittals are not surprising.

The Director of Public Prosecutions has appealed from those acquittals. In his notice of appeal he set out three grounds, but in the result consolidated them into a single ground, namely, that the Judge erred in his directions to the Assessors regarding the relevant consideration for a successful prosecution under s.172. This ground was argued under several sub-headings, but we can conveniently deal with most of these together.

The essence of the argument was that, on a fair and plain reading of s.172, all that was required for a successful prosecution was:

(i) Any person

(ii) With intent to procure the miscarriage of a woman

(iii) Whether she is or is not with child

(iv) Unlawfully administers to her or causes her to take any poison or other noxious thing or uses force of any kind or uses any other means whatsoever.

It was contended that all of those ingredients had been proved beyond reasonable doubt and indeed admitted by the respondent, so that there should have been a verdict of guilty.

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It must be observed at once that one essential aspect of those ingredients had not been admitted by the respondent, namely that what he did had been done "unlawfully". His pleas of not guilty were plainly based upon his expressed belief that he had acted lawfully. This was therefore the very basis of the trial.

The submissions on behalf of the respondent were that, in the light of the decided cases, the direction given to the Assessors was correct. Since we have arrived at a view very much in accordance with the respondent's submissions we do not set out those submissions separately.

For a determination of this appeal it is necessary to consider what is the proper interpretation to give to s.172. It must be said at once that the use of the expression "unlawfully" would seem to presuppose that there will be circumstances in which an instrument or other means may "lawfully" be used with the intent to procure a miscarriage. The Director conceded as much, but contended that the meaning to be given to "unlawfully" should be restricted to the common law concept of necessity for the preservation of life and should not be broadened as has been done in other jurisdictions.

We will deal later with the ancillary arguments advanced that the proper interpretation is affected by ss.221 and 234 of the Penal Code. First we consider the effect of earlier

decisions of the Courts which may be said to have persuasive value.

Considerable weight is attached by the appellant to the fact that the Judge based his directions in part on the decision in Royal College of Nursing v. DHSS (Supra). We agree that this was not a happy choice of authority. That case concerned a charge preferred under s.1(i) of the Abortion Act 1967 (UK) which is in very different terms from s.172 of the Penal Code and expressly introduces the concept of good faith and risk to physical and mental health. It is possible, however, to put that case aside and still derive considerable assistance from other cases.

The leading case on the offence of procuring an abortion has for a long time been R. v. Bourne (Supra). That, too, was the case of a medical practitioner who had admittedly used an instrument with intent to procure a miscarriage. His patient was a girl under the age of fifteen who had been raped with great violence and in terrifying circumstances. Bourne was charged under s.58 of the Offences Against the Persons Act 1861 that he unlawfully procured the miscarriage of the girl.

In the course of his summing-up Macnaghten J directed the jury that the word "unlawfully" in s.58 was not to be regarded as a meaningless word, but that it imported the meaning

expressed by the proviso in s.1(i) of the Infant Life (Preservation) Act 1929 which provides:

> *"Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction and shall be liable on conviction thereof on indictment to penal servitude for life. Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."*

Macnaghten J then went on to consider what was meant by the expression "preserving the life of the mother" and directed the jury in this way:

> *"As I have said, I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds with adequate knowledge, that the probable consequence of the continuance of the preganancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, was operating for the purpose of preserving the life of the mother."*

It should be observed that s.1(i) of the Infant Life (Preservation) Act (UK) set out above is in virtually identical terms with s.221(1) of the Penal Code and accordingly the direction given by Macnaghten J has direct application to the law of Fiji. It is obvious that the direction given by the Judge to the Assessors in this case was taken directly from Bourne's case.

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It is helpful to consider the way in which the law concerning the procuring of abortion has been applied in New Zealand because until recently the law in that country on this topic was for all practical purposes identical with that in Fiji.

Section 221(1) of the Crimes Act 1908(NZ) is in terms indistinguishable from s.172 of the Penal Code, as also is its successor, s.183(1) of the Crimes Act 1961(NZ). In R. v. Anderson (1951) N Z L R 439 the accused, who was charged under s.221(1) of the 1908 Act, was not a medical practitioner but, at first instance, F B Adams J followed the direction in Bourne's case and held that it extended to apply to any person and not only to medical practitioners. Although Anderson's case went to appeal this finding was not challenged.

More recently the Court of Appeal of New Zealand in R. v. Woolnough (1977) 2 N Z L R 508 considered closely the effect to be given to the word "unlawfully" in s.183(1) of the Crimes Act 1961. The principal judgment of the majority of the Court, delivered by Richmond P, examined the history of the legislation in New Zealand and the few English cases there have been since Bourne's case.

In Woolnough's case the jury had been directed that the word "unlawfully" should be applied in this way:

> *"The test for whether or not the use of an instrument is lawful is whether it is necessary to preserve the woman from serious danger to her life or to her physical or mental health, not being the normal dangers of pregnancy and childbirth."*

After extensive consideration a majority of the Court held that this direction was not incorrect, although it was observed that the words "not being the normal dangers of pregnancy and childbirth" would have been better omitted as being redundant. While expressing the view that it was almost impossible to apply a formula to "unlawfully" so as to meet all circumstances under the section, Richmond P made some helpful comments. He was not prepared to accept that the test was one of necessity. At p.518 he said:

> *"But I am quite satisfied after reading the summing-up as a whole, that the jury would have clearly understood that the Judge was telling them that there must, in the bona fide opinion of the doctor, be a real risk of serious danger to the life of the mother or of serious harm to her physical or mental health."*

And again at p.519:

> *"I think it necessary for the courts to take the responsibility of saying that, for the purposes of the criminal law, an abortion performed to preserve the mother from a real or substantial risk of serious harm to her mental or physical health is an act which is not out of proportion to the destruction of a potential life. Whatever his personal beliefs may be as to the sanctity of potential life, a doctor can then make a decision by reference only to the degree of risks and the gravity of the likely consequences to the mother if her pregnancy is not terminated."*

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Having regard to the considerations discussed we are not prepared to say that in the present case the direction given to the Assessors was wrong.

We return briefly to the argument presented by the appellant that, when considered in the light of ss.221 and 234 of the Penal Code, an interpretation based on necessity and the preservation of life should be given to s.172.

Section 221 makes it an offence for any person, with intent to destroy the life of a child capable of being born alive, by any wilful act to cause a child to die before it has an existence independent of its mother. There is, however, a proviso that no person shall be found guilty of that offence unless it is proved that the act which caused the death of the child was not done in good faith for the purpose of preserving the life of the mother.

Section 234 provides that 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.

The argument for the appellant was that each of these sections introduces the concept of good faith and the preservation of life, but that s.172 does not and accordingly should be interpreted as creating an offence based on the common law concept of necessity.

We do not agree, and it suffices to say that the existence of the equivalent of s.221 in Bourne's case did not persuade Macnaghten J to conclude that the offence created by s.58 of the Offences Against the Persons Act was one allowing for a defence of necessity for the preservation of life. Similarly, in New Zealand, the equivalent of ss.221 and 234 did not produce such a conclusion in the interpretation of s.183(NZ).

One further argument advanced by the appellant concerned a passage in the summing-up in which the Judge said:

> *"The accused justifies his acts but it is for the prosecution to prove to you, beyond reasonable doubt, that the accused is lying."*

To describe the obligation on the prosecution in this way was overstating the position somewhat, but we are unable to see that it was in the circumstances a serious misdirection, and, in any event, the Assessors evidently concluded either that the respondent was not lying or perhaps that they were prepared to allow him the benefit of any doubt and so returned a verdict of not guilty.

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By way of summary it should be said, in agreement with Richmond P, that no precise formula of words should be regarded as meeting all circumstances in a charge under s.172. It is sufficient to say that, in this case, the direction given was not an incorrect one. We think that in general, a direction which is based on Bourne's case is likely to be appropriate, but that a Judge should have in mind the possible variations contemplated by the judgment in Woolnough's case. Certainly we are satisfied that it would have been wrong for the Judge to have treated the word "unlawfully" as being limited to the common law concept of necessity for the preservation of life. Nor can we agree with the Director's submission that s.172 creates "a strict liability offence", to use his expression.

The appeal is dismissed.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Peter Quilliam
Judge of Appeal