STATE v METUISELA TOKA

HIGH COURT — CRIMINAL JURISDICTION

SHAMEEM J

18, 19 September 2003

[2003] FJHC 182

Criminal law — defences — application that there is no case for Accused to answer — Manslaughter — whether act unlawful — Whether act grossly negligent — Criminal Procedure Code s 293 — Penal Code ss 198, 210, 213, 323.

Accused speared his 11-year-old daughter, who died as a result, thinking that she was a pig. He alleged that there is no case for him to answer on the charge of Manslaughter. Defence alleged that there is no evidence of an unlawful act or of gross negligence.

Held — (1) Accused's act of killing pigs was not unlawful in relation to s 323 of the Penal Code. The State may not rely on this factor when addressing the assessors.

(2) The use of the spear near the family home, the failure to ascertain the nature of the dark shadow and the darkness of night which might have required the exercise of greater care, were facts which must be put to the assessors to allow them to conclude whether or not this is a case of killing by gross negligence.

Application dismissed.

Cases referred to

R v Adomako [1995] 1 AC 171; *Krishna Kiran Naidu v Reg* [1984] 30 FLR 81; *R v Osip* (2000) 2 VR 595; [2000] VSCA 237; *R v Litchfield* [1998] Crim LR 507; *Timbu Kolian v R* (1968) 119 CLR 47; [1969] ALR 143, considered.

Andrews v Director of Public Prosecutions [1937] AC 576, approved.

Attorney-General's Reference No 2 of 1999 (2000) 2 Crim App R 207; *R v Lawrence* [1982] AC 510; *R v Watts* [1998] Crim LR 833; *Sisa Kalisoqo v Reg* Crim App No 52 of 1984; *State v Mosese Tuisawau* Crim App No 14 of 1990; *State v Nadessan Mudliar* Crim Case No HAC 7 of 2001L, cited.

P. Bulamainaivalu for the State.

M. Waqavonovono for the Accused.

Shameem J. Counsel for the Accused submits that there is no case for the Accused to answer on the charge of Manslaughter. The test at this stage is whether there is no evidence that the Accused committed the offence. If there is some relevant and admissible evidence, direct or circumstantial, in respect of all the essential elements of the offence, then s 293 of the Criminal Procedure Code does not apply (*Sisa Kalisoqo v Reg* Crim App No 52 of 1984, *State v Mosese Tuisawau* Crim App No 14 of 1990).

The credibility of witnesses and the weight to be given to evidence are not the concern of the judge at this stage.

The evidence of the prosecution is that the Accused on the 22 September 2002 at Nasoki Village, Moala speared his 11-year-old daughter, Wati Salata, thinking that she was a pig. He used a spear, or moto, commonly used to kill turtles and pigs. His daughter died as a result of a penetrating wound in the chest, causing massive internal bleeding. Much of the evidence is not in dispute.

Defence counsel submits that there is no evidence of an unlawful act, nor of gross negligence on the part of the Accused and that therefore an essential element of the offence is missing. State counsel submits that the spearing of any animal is an offence under s 323 of the Penal Code and that the Accused was therefore committing an unlawful act when he speared his daughter. Further the State says that the Accused did the unlawful act knowing that there was some risk of injury to a person, and that all the essential elements of the offence have prima facie been proved.

Section 198 of the Penal Code provides:

> Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Section 210 of the Penal Code provides:

> It is the duty of every person who, as head of a family, has charge of a child under the age of fourteen years, being a member of his household, to provide the necessaries of life for such child; and he shall be deemed to have caused any consequences which adversely affect the life or health of the child by reason of any omission to perform that duty, whether the child is helpless or not.

Section 213 provides:

> It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precaution to avoid such danger; and he shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to perform that duty.

Section 323 of the Penal Code provides:

> Any person who wilfully and unlawfully kills, maims or wounds any animal or bird capable of being stolen, is guilty of a misdemeanour.

This is a case either of Involuntary Manslaughter, by an unlawful act which requires proof that the Accused caused the death of another by an unlawful act, or of Manslaughter by gross negligence. In the former category there must be proof of an unlawful act carrying with it a risk of some harm to others. In the latter category there must be proof that the Accused did an act, albeit lawful, in a way which was grossly negligent which caused the death of the deceased, and which involved a high degree of negligence requiring criminal sanction.

There is no dispute in this case that the Accused speared the deceased thereby causing her death. The only question is either whether the act was unlawful carrying with it some risk of harm to another person, or whether the act might be seen by the assessors as grossly negligent in that all sober and reasonable people would inevitably recognise the risk. (*R v Watts* (1998) Crim LR 833; *R v Litchfield* (1998) Crim LR 507; Attorney-General's Reference No 2 of 1999 (2000) 2 Crim App R 207 and *R v Adomako* (1995) 1 AC 171).

The only question of law in the above is that of whether the act was unlawful. There is no doubt that s 323 of the Penal Code prohibits the killing of animals if done wilfully and unlawfully.

The word "wilfully" means "intentionally". The word "unlawfully" means "without lawful excuse".

In this case it is not in dispute that pigs straying into the compounds of people in the village, was a problem discussed at a village meeting with the turaga-ni-koro. Nor is it in dispute that "as a result of this problem, in July 2002, the turaga-ni-koro, Iliesa Gaunavou held a village meeting where the villagers resolved to confine their pigs in a pen and that any stray pigs found within the village may be speared dead with the carcass returned to the owner" (agreed facts).

This resolution indicates the consent of the pig owners to the killing of their pigs if they strayed. It is certainly correct that no turaga-ni-koro can give orders for members of his village to defy the law. It is also correct that it is no defence for a person to say that his defence to a criminal offence is that he was acting under chiefly orders. However where the owner of goods consents to the goods being taken by the Accused, the Accused is not acting unlawfully. He has an honest claim of right. Similarly where the owner of an animal allows the Accused to kill his animal and the Accused does so, the Accused is not acting unlawfully. It is the consent of the owner which renders the taking of goods lawful and the killing of animals lawful. In this case, the Accused had a lawful excuse for killing or attempting to kill pigs in his yard. That excuse was the consent of the village pig-owners.

I find therefore as a matter of law that the Accused's act of killing pigs is not unlawful in relation to s 323 of the Penal Code. The State may not rely on this factor when addressing the assessors.

That leaves us with the second type of Involuntary Manslaughter, that of gross negligence or the gross breach of a duty of care.

There is no doubt at all that the Accused owed all his children a duty of care. The defence concedes this. The only question is whether there is evidence which ought to be put to the assessors which might show that he was grossly in breach of that duty.

In *Adomako* (above) the House of Lords considered the case of a doctor whose negligence caused the death of a patient when a tube became disconnected from a ventilator during an eye operation. Lord MacKay, at 187 said after referring with approval to Lord Atkin's judgment in *Andrews v DPP* (1937) AC 576:

> On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent on him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

His Lordship went on to say that it was not necessary to direct the jury on the word "reckless" within the meaning adopted in *Lawrence* (1982) AC 510, although it is open to a judge to use the word "reckless" in its ordinary sense.

In *R v Litchfield* (above) the Appellant was owner and master of a vessel which broke up on rocks off the Cornish coast causing the death of three crew members. The Crown alleged that the Appellant had steered an unsafe course. The jury was asked to decide whether the breach of duty constituted the cause of the deaths and

whether it amounted to gross negligence. On appeal it was held that the judge had rightly left the question of gross negligence to the jury, there being ample evidence of an "unsafe course."

Counsel for the defence has helpfully referred me to a number of authorities including *Queen v Osip* Supreme Court of Victoria No 132 of 2000, which arose from a hunting incident. The jury found the Accused to be guilty of Negligent Manslaughter. The judge had directed the jury that the Crown must establish causation, a conscious voluntary act, and gross or criminal negligence. The conviction was upheld on appeal, the appeal court considering whether "mens rea" had to be proved in a case of Negligent Manslaughter and the relevance of "mistake of fact" in relation to the offence. I return to this case later in this ruling.

In *Timbu Kolian* (1986) 119 CLR 47; [1969] ALR 143, the High Court of Australia found that a man who threw a stick at his wife causing the death of the baby she was carrying was not guilty of Manslaughter because his was not a voluntary act and (per Kitto, Menzies and Owen JJ) that the act was an accident for which the Accused could not be held responsible.

In *Krishna Kiran Naidu v Reg* [1984] 30 FLR 81 however the Fiji Court of Appeal on similar facts upheld the conviction of the Accused for the murder of his child. Referring to the doctrine of what is popularly called "transferred malice" the court held that the defence of accident did not apply where a deliberate and unlawful act resulted in the death of a person other than the one to whom it was directed and that his act had been a "willed" act, done with intent to inflict grievous bodily harm. The court specifically considered Timbu Kolian but came to a different conclusion because, as it pointed out in the "Addendum", under the Queensland Criminal Code, the doctrine of transferred malice is inapplicable. It is applicable in Fiji and *Timbu Kolian* would have been decided differently if the Fiji Court of Appeal had heard it.

In none of these cases, were the questions of fact, that is whether the Accused was grossly negligent or in breach of a duty of care, or is entitled to the defence of mistake of fact or accident, withdrawn from the jury or assessors.

In *Osip*, the Supreme Court of Victoria (per Batt JA) expressed doubt that the defence of honest and reasonable mistake of fact applied to the offence of Negligent Manslaughter because the question of reasonableness was in any event part and parcel of the offence. In any event the test is one for the assessors to consider in the light of all the evidence.

In this case, that is certainly a valid argument. The question of whether the Accused's conduct was negligent is an objective one requiring the assessors to ask whether a reasonable sober man would have behaved in that way. The same test applies to the "reasonableness" component of the defence of mistake of fact. Both tests require objectivity and are tests best left to the assessors. Govind J in *State v Nadessan Mudliar* Crim Case No HAC 0007/01L came to this view in a case where similar issues arose.

On the basis of the evidence led, there is evidence to leave to the assessors of breach of a duty of care, and of gross negligence of the high degree necessary to merit criminal punishment. The facts in the case in relation to the use of the spear near the family home, the failure to ascertain the nature of the dark shadow and the darkness of night which might have required the exercise of greater care, are facts which must be put to the assessors to allow them to conclude whether or not this is a case of killing by gross negligence.

For these reasons, the application that there is no case for the Accused to answer is unsuccessful. However the State may not proceed on the basis that there was an unlawful act in the attempt to kill a pig. I find that as a matter of law, that act in itself was not unlawful. The alleged unlawfulness in this case must be that an otherwise lawful act became unlawful in the manner in which it was done.

Application dismissed.