Criminal Case No. 2 of 1980

The Republic v. Roderick Olsson

4th March, 1980.

Immature age - child aged between eight and thirteen years - proof of capacity to know that he ought not to do the act - amount and weight of evidence required.

The accused, a boy just under 13 years of age, while riding as a passenger in a bus deliberately threw a large stone from the window of the bus. He aimed it at a girl of about the same age who was standing outside a shop. It hit her on the head. Two days later she died as the result of intra-cranial bleeding caused by the blow. No evidence was adduced specifically related to the accused's capacity on that day to know that he ought not to do the act. However, there was evidence that two days later he did in fact know that it was wrong.

Held: (1) The strength of the evidence required to rebut the incapacity of a child between the ages of eight and thirteen years to know that an act is wrong decreases as the age of the child increases.

(2) Capacity to have such knowledge on a given date can be inferred from the actual possession of such knowledge two days later.

Accused convicted of manslaughter.

P.A. Thorpe for the Republic
Mrs. M.L. Billeam for the accused

Thompson C.J.:

The accused, a school boy now aged 13 years, is charged with the manslaughter of a Gilbertese girl named Kamareti. The prosecution case is that, while travelling home from school by bus soon after midday on 25th September, 1979, he leaned out

of the window of the bus and threw a fairly large stone at Kamereti, that the stone struck her on the right temple, and that she died next day of intra-cranial bleeding caused by the blow.

In the alternative, the accused is charged with doing grievous harm to Kamereti, assaulting her and occasioning her actual bodily harm, causing bodily harm to her by a negligent act and common assault upon her.

Uncontroverted evidence has been given that Kamereti was struck on the temple by a stone thrown by a boy travelling on the bus, that she developed intracranial bleeding shortly afterwards and died next day as the result of it. Mrs. Billeam, representing the accused, adduced evidence that, if certain surgery had been done, Kamereti might well have survived in spite of the intracranial bleeding. But both at common law and by virtue of section 297 of the Criminal Code of Queensland in its application to Nauru it is immaterial that death from the injury might have been prevented by proper treatment. There was no evidence raising any real possibility that death resulted from the treatment, as in R v Jordan (1956) 40 Cr. App. R.152, so as to break the chain of causation between the injury caused by the stone and death.

I therefore find that it has been proved beyond all reasonable doubt that Kamereti was killed by the boy who threw the stone which struck her on her right temple.

Four issues remain to be decided; they are:-

1) was the accused the boy who threw the stone?
2) if so, did he intend to strike Kamereti with it?
3) if he did not intend to do so, was he recklessly negligent in throwing the stone?
4) in the event of either issue (2) or issue (3) being decided in the affirmative, has the prosecution rebutted the presumption that, being just under 13 years old, he did not have the capacity to know that he should not do the act which he did and was accordingly incapable

of committing the offence of manslaughter or any of the alternative offences with which he is charged.

Evidence that the accused was the boy who threw the stone was given by three children, aged respectively 9, 11 and 12 years. However, although each of them purported to identify him positively, as the trial progressed it became clear that at the time of the incident he was a stranger to them. The youngest of them gave evidence that she knew him because she had previously seen him riding a bicycle in the Location, where she lived; but the investigating officer admitted that she had told him at the start of the investigation that she did not know the face of the boy who threw the stone. The 11 year-old boy gave evidence that he identified the accused to the investigating officer on 27th September at the Secondary School but that the investigating officer had confronted him with the accused before he did so. The investigating officer gave evidence that he did not intend to confront the witness with the accused and that he did not hold an identification parade because, when the investigation started, the witness had not shown sufficient certainty about being able to identify the boy who threw the stone. So the identification of the accused by that witness is suspect. Finally, the 12-year-old girl admitted that she had never seen the accused before the incident and that afterwards another girl, who was not a witness at the trial, had told her his name.

The evidence of those three child witnesses directly identifying the accused is of very little probative value. However, they also gave evidence that the stone was thrown from one of the windows on the left side of the bus, towards the back. They did not all specify the same window; but, as the incident was both unexpected and completed within, probably, less than a second, such a discrepancy is natural and does not indicate either any lack of veracity or any unreliability of observation. There was also disagreement as to whether the stone hit Kamereti and then the wall of the shop next to which she was standing, or the wall of the shop first and then Kamereti. But again the speed and suddenness of the incident account for such a

discrepancy without detracting from the reliability of those witnesses' evidence about where the stone came from. I find it proved beyond all reasonable doubt that it was thrown by a boy who was on the left side of the bus towards the back.

At the request of Mrs. Billeam the deposition of a Nauruan boy taken at the preliminary inquiry was read out in pursuance of section 199 of the Criminal Procedure Act 1972. The boy's evidence was that he was a passenger on the bus and that the accused was also travelling on the bus, sitting on the left side towards the back. His evidence was not in dispute. I therefore find as fact that the accused was sitting in that part of the bus, that is to say the part of the bus from which the stone was thrown.

The principal evidence tending to prove the identity of the accused as the boy who threw the stone is the evidence given by the investigating officer of an oral admission to that effect made to him by the accused and another statement made orally by the accused and recorded in writing. The first admission was made to the investigating officer while he was travelling with the accused to the place where he intended to interview him; the accused said that he was scared because he had thrown the stone which hit the girl. In the school office, when the accused was interviewed by the investigating officer in the presence of the headmaster and a senior Nauruan teacher, he made the statement recorded. I am absolutely satisfied that it is a correct record of what he said; he acknowledged that next day in the presence of his mother. In the statement he said that he threw the stone at a Gilbertese girl and saw it make contact with her head.

Next day, after acknowledging that the statement had been correctly recorded, the accused made another statement retracting the admission which he had made in the previous statement and saying that he did not throw the stone which struck the girl. Before he made that statement his mother had prompted him, saying "Tell him you were not the only one throwing". It is apparent that, either by himself or at the prompting of his parents, the accused had had second thoughts about the admissions

he had made. However, those admissions were made in the course of a narrative statement, not by way of answers to questions requiring an answer "Yes" or "No". They were specific. I am satisfied that they were made voluntarily and that the accused could not have expected to gain any benefit from making them, other than, possibly, relief of his own conscience. If they were not true, he had no reason to make them. But he may well have had reason to retract them, e.g. prompting by his parents or fear of the consequences.

Mrs. Billeam has pointed out that a lot of stones were thrown and has submitted that even the accused could not have been certain that it was his stone which hit the girl. However, there is evidence that the other stones thrown were much smaller, mere shingle; and, even if other larger stones had been thrown, the thrower of each was in an excellent position behind its trajectory to observe what mark it found. From the evidence that the accused was sitting in the part of the bus from which the stone which hit the girl was thrown and from his own admissions to the investigating officer I am satisfied beyond all reasonable doubt that he was the boy who threw that stone.

Turning to the second issue, whether the accused intended to strike Kamereti with the stone, I am satisfied beyond all reasonable doubt, from the admission which he made in his statement to the investigating officer to that effect, that he did deliberately throw it at her.

If the accused had been fourteen years old at the time of the incident, that would have been the last issue which I should have had to decide. There was a deliberate assault on the girl by the accused and it resulted in her death. There is no evidence of intention to do grievous harm; if there had been, the accused would have been guilty of murder. But no such intention is required to be proved to establish the offence of manslaughter. If death results from an assault, even though the risk of death is not foreseen, the person who carried out the assault is guilty of manslaughter. This is not a case where the manslaughter is constituted by causing death by a reckless and dangerous act or omission; if I had not found it proved that

the accused deliberately threw the stone at Kamereti, it might have been. But, as there was an assault, there was no need for the prosecution to prove that the act created an unreasonable risk of serious injury, which must be proved where it is alleged that manslaughter is constituted by causing death by a reckless and dangerous act or omission.

However, since the accused was just under 13 years of age when he did the act, the fourth issue to which I have referred earlier must be decided. Section 29 of the Criminal Code of Queensland in its application to Nauru, insofar as it relates to the criminal responsibility of children between the ages of seven and thirteen years inclusive, is a statutory restatement of the common law. There is a presumption that such a child is not criminally responsible for any act or omission but that presumption can be rebutted. The onus is on the prosecution to prove that, at the time of doing the act or making the omission, the accused had the capacity to know that he ought not to do the act or make the omission. It is to be observed that the prosecution does not have to prove that the accused did in fact know that he ought not to make the act or omission; to prove that might in many cases, including the present one, be virtually impossible. What has to be proved is that the accused had the capacity to know.

The prosecution made no attempt to adduce evidence specifically related to that issue; such evidence can usually be given by school teachers and other adults associated with the accused. It seems that in the present case the omission was due to a misunderstanding as to the age at which the presumption of incapacity ceased. Be that as it may, there is evidence of the accused's capacity to know on 27th September, 1979, two days after the act was done that he ought not to do so such acts. Mrs. Billeam has stressed that the time at which he must be proved to have had the capacity was the time when he did the act. She has further submitted that the fact that he stated on 27th September that he was scared because he threw the stone did not necessarily indicate that he knew that throwing the stone was wrong or that he knew, or had the capacity to know, it on 25th September.

The strength of the evidence required to rebut the presumption of incapacity varies with the age of the child. The younger he is, the stronger it needs to be (B. v R. (1958) 44 Cr. App. R.1). Where the person charged is a boy aged twelve years, there must be some evidence (Ex p. N. (1959) Crim. L.R. 523). Indeed, section 29 requires some proof by the prosecution even where the child is only a few days short of his fourteenth birthday. But, as I have already observed, the amount and weight of evidence necessary to prove capacity decreases with increase in age.

It is well established that the mere doing of the unlawful act by a child is not evidence proving his capacity to know that he ought not to do that act. But that capacity can be inferred from his general behaviour and upbringing (B. v R. (supra)) and from circumstantial evidence. On 27th September, 1979, the accused, who had been told by the investigating officer that Kamereti had died, volunteered the remark that he was scared because he had thrown the stone at the girl. It is clear that at that time he knew that what he had done was wrong. He had the capacity to do so then; he was nearly thirteen years old; there is no evidence to suggest that that capacity had been acquired only in the previous forty-eight hours. I consider, therefore, that it is proper to infer that that capacity existed also on 25th September.

Accordingly, I find that the prosecution has rebutted the presumption that the accused was not doli capax when he threw the stone.

The accused is, therefore, guilty of manslaughter, and also of the alternative offences of doing grievous harm, assault occasioning actual bodily harm and common assault. He is not guilty of causing harm by a negligent act.