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NZ Law Reports

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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

T 10/84

737

Name suppressed.

THE QUEEN

v.

J G

Hearing: 2 July 1984

Counsel: G.A. Rea with A. Walker for the Crown
R.B. Wolff with G.J.C. Ferguson for the accused

Ruling: 2 July 1984

Reasons for Ruling: 3 July 1984

REASONS FOR RULING OF SAVAGE J.

The accused, J G was on the 6th of March 1984 committed by the District Court at Napier to the High Court for trial. The information on which she was committed charged her with manslaughter in that without lawful excuse she had neglected her legal duty to supply her newly born female child with the necessaries of life whereby the death of the said child was caused.

On the 15th of April Quilliam J. had heard an application made under s 347 of the Crimes Act for an order that no indictment should be presented against the accused. At that stage the Crown Prosecutor, Mr Rea, indicated that the Crown proposed to present an indictment charging the accused with manslaughter and indicated that the Crown intended to rely upon two different bases to support the charge. The first basis was that the death of the child had been caused by an unlawful act and the second basis was that it had been caused by her

neglecting to provide the necessaries of life. Quilliam J. made an order directing that no indictment be presented on the basis of causing death by neglecting to provide the necessaries of life but held that the Crown was entitled to proceed on the other basis, namely that the death had been caused by an unlawful act.

The trial was due to start yesterday, Monday the 2nd of July. It appeared that at the end of last week a further application had been made on behalf of the accused that no indictment for infanticide be presented. It transpired that the Crown had indicated to the solicitors for the accused that for a variety of reasons, to which I shall make reference later, the Crown had decided not to present an indictment for manslaughter but did intend to proceed on an indictment for infanticide. The motion came before me at 9.30 a.m. and was then argued. The members of the jury panel were advised that there would be a delay in the commencement of the trial and instructed that they were to return to the court at 11.00 a.m. In the event the argument took rather longer than was expected and at its conclusion I informed counsel that I was satisfied that an order should be made directing that no indictment be presented and that the accused be discharged but in the circumstances, since the jury panel was waiting, I proposed to make the order then and put my reasons in writing later. I now do that.

For the sake of completeness, and as it may be helpful, I record the course followed. I made the order directing that no indictment for manslaughter be presented and that the accused be discharged in open court as required by s 347 (3A). However, in view of the fact that the case had not previously

been called in open court and the accused had accordingly not been brought before the court, I had directed that it was not necessary for the accused to be present. In my view, while s 347 requires that every direction under the section that no indictment be presented, or if an indictment has been presented that the accused be not arraigned on it, or that the accused otherwise be discharged shall be made in open court, it does not require that the accused must be present, though it would ordinarily follow tht once the accused had been arraigned any such order would be made in the presence of the accused. At the same time I do not doubt that the court can in any case direct that the accused shall be present when such an order is made if it considers it appropriate. In this case, because of its circumstances and the nature of the charge, no good purpose would be served, in my view, in requiring the accused to be present in order to hear the order made directing that no indictment for infanticide be presented.

Before dealing with the basis of the present application, I propose to record very briefly the factual basis of the Crown's case as disclosed by the depositions and the other material placed before me. The other material consisted of a proof or brief of additional evidence that was to be given on behalf of the Crown by a psychiatrist, a Dr Una Stephenson, and also proofs of evidence that it was intended to call on behalf of the defence. The defence evidence was to be given by a Dr G.W.K. Bridge, a psychiatrist, and a Dr P.C. Dukes, an obstetrician and gynaecologist. It was this additional material that had led to the Crown deciding not to present an indictment for manslaughter but one of infanticide.

The Crown case is that in October 1983 the accused shared a house in P between with a man named T She is a She was then pregnant, although she had, apparently fairly successfully, concealed this fact from her parents, flatmate and others. In the early morning of the she gave birth to a female child. There was in the house at the time T and his girlfriend but they were unaware of what had happened. The accused was in her bed in her room on her own. She had told no-one, as already noted, that she was pregnant and no-one apparently was aware that the birth was imminent. At what must have been about two hours after the child's birth the flatmate T went to the accused's room when she called out to him. He realised that she was not well and he did what he could for her, making her some tea and toast, though it is obvious he did not appreciate the seriousness of her condition. A little later the accused's mother, Mrs G called to see her. She had been aware for a little time that something was wrong with her daughter but had been led to believe that it was due to some trouble attributable to her liver as her daughter had some time previously had Mrs G was shocked by her daughter's condition and, notwithstanding that she did not wish it, Mrs G rang the doctor who had previously treated the accused, a Dr E who called soon after midday. He examined the accused on her own and ascertained that she had given birth to a child whom he found at the foot of the bed under the blankets, wrapped in a towel. The child was dead and cold. There were lacerations on the child's neck and body which the accused told him had occurred after the baby had died and which she said she had done with a pair of scissors. The accused was taken to hospital. She was in a state of shock,

attributable to the loss of a substantial quantity of blood which had happened at the birth of the child and also to the fact that the placenta had not come away from her after the birth. She was given a blood transfusion and other treatment and the next day she was interviewed by a detective to whom she answered a number of questions relating to the events surrounding the birth and death of the child. It appeared from the evidence of the pathologist that the death of the child was caused by shock due to bleeding from the superficial neck wounds and it was contributed to by a respiratory difficulty in the child resulting from inter-uterine infection.

There was a good deal of evidence by other witnesses in the depositions in relation to the circumstances, but for the purposes of this application it is not necessary for me to set it out. I must, however, record that in the course of the interview of the accused by the detective she stated that she had cut the baby around the neck with a pair of scissors that she had obtained in advance for the purpose of cutting the child's cord. She said she had done that because at the time she did it she thought the child was dead and she felt so cheated. To understand what she meant, it is perhaps necessary to add that the accused had said that when the child was born she had realised it was a girl, that it made a noise and it looked perfect. She had held it but at that stage would appear to have lost consciousness: probably this would have been due to loss of blood. When she recovered and went to pick it up, she said,it was no longer perfect, it was blue and limp and was not moving. She was sure that the baby had died. It was then that she felt cheated.

The Crown psychiatrist, Dr Stephenson, in the proof of the evidence she was to give, said:

> "After prolonged acquaintance with J I am certain that her irrational violence against the baby was due to a temporary clouding of consciousness. She had certainly lost enough blood to cause anoxia to the brain and to severely impair her judgment. ... I am certain, despite all the steps she took to conceal the pregnancy, that she had no intention of harming the child and that she only struck out in rage and frustration when she believed the child was already dead and was suffering from temporary mental impairment due to the effect of severe blood loss."

The defence psychiatrist, Dr B in the proof of his evidence, said that he understood that the accused was probably significantly anaemic before the onset of labour and thus with the significant degree of blood loss her mental functioning and total awareness of the circumstances through the time of the fairly protracted labour would have been impaired. He was of the view that her mental state must have become worse with the progress of her labour and that it was compounded much more by the birth, the loss of blood and the sheer shock and trauma of what she had experienced. He was also of the view, based on material that he canvassed, that she had become obsessed over the anticipated birth but that she was dissociated to a significant degree with the reality of what she was to go through and was going through. He expressed the opinion that "the discovery of the child she was convinced had died after seeing it as a beautiful object and one which she had desired to have and keep with her for a short time brought forth from her a reaction completely out of keeping with the sort of person

she is and the background she comes from". The reaction was the one of attacking it with the scissors.

The final material to which I refer is contained in the proof of the evidence to be given by the obstetrician and gynaecologist. He expressed the view that the accused suffered fairly exaggerated effects of labour in the form of dehydration and exhaustion compounded by a severe postpartum haemorrhage. The effects of the postpartum haemorrhage were further complicated by the pre-existing anaemia. During the initial postpartum haemorrhage there was loss of consciousness and over the period through which there was loss of consciousness it was likely that she had had a very reduced recall of events and also impaired judgment. It seemed to him very likely that it was over this period that the stabbing with the scissors incident occurred.

Mr Wolff submitted that to establish the offence of infanticide under s 178 of the Crimes Act the Crown must prove that the death was caused "in a manner that amounts to culpable homicide". The basis for culpable homicide relied on by the Crown was an unlawful act on the part of the accused. The unlawful act was the infliction of the neck wounds with the scissors. The Crown contended that this was an assault by the accused upon the child. Mr Wolff submitted, however, that on the evidence no jury could reasonably reach the view that what the accused did constituted an unlawful act in the sense that it amounted to an assault. The essence of his submission was that on the evidence the jury would have to reach the conclusion that the accused believed the child was dead at the time she administered those injuries to it and that it followed that what she did was not an assault because she could not have had the necessary intent to constitute an assault. This argument

had been considered briefly by Quilliam J. when he had heard the original application under s 347. He had considered on the argument put to him that this was a question that required a determination of fact which should properly be left to the jury. While Mr Wolff accepted that the matter had been dealt with by Quilliam J., he submitted he was entitled to apply again on the same basis, but he submitted that, in any event, the situation was now rather different from that which had existed when the application had been considered by Quilliam J. He pointed out that Quilliam J. did not have before him the psychiatric material proposed to be given in evidence on behalf of the Crown by Dr Stephenson, nor had he seen the material placed before me in relation to what it was intended to put before the court by way of evidence from Drs Bridge and Dukes. In my view, though it may well be that an accused can apply more than once on the same grounds for an order under s 347, subsequent applications are unlikely to be successful unless there is a change in circumstances or in the evidence which would justify the court taking a different view from that taken by the Judge on the earlier application. In my view, the additional material placed before me has presented the matter in a substantially different light from the way in which it was presented to Quilliam J. I add in passing that I understood from counsel, though they were not agreed on precisely the way in which the argument developed before Quilliam J., that Mr Wolff had to a substantial extent shifted the emphasis of his argument from the unlawful act basis to the neglect to provide necessaries of life basis.

The basis of Mr Wolff's argument is that at the time she struck the child with the scissors the accused thought it was dead. In those circumstances, Mr Wolff submitted, she lacked the intent necessary to make the act an unlawful one. He relied on R v Church [1966] 1 QB 59. The circumstances of that case were that the accused was charged with the murder of a woman whose badly injured body was found in the River Ouse. The cause of death was drowning. According to his story the accused had taken her to his van for sexual purposes, was mocked by her for failing to satisfy her and, a fight ensuing, he knocked her semi-conscious. He tried to rouse her for about half an hour and then, thinking she was dead, was seized by panic and threw her into the nearby river. The judge in his direction to the jury had told them that the effect of the accused's belief that the woman was dead when he deliberately threw her into the river was irrelevant to the offence of manslaughter. In giving the judgment of the Court of Appeal, Edmund Davies L.J. had said, at p 70:

> "The conclusion of this court is that an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

He referred to various authorities and then went on to say:

> "If such be the test, as we adjudge it to be, then it follows that in our view it was a misdirection to tell the jury simpliciter that it mattered nothing for manslaughter whether or not the appellant believed Mrs Nott to be dead when he threw her in the river."

Mr Wolff submitted that this exposition of the law was accepted in R v Lamb [1967] 2 QB 981 and D.P.P. v Newbury [1976] 2 AER 365. He referred also to Glanville Williams' Textbook of Criminal Law at pp 243 and 244.

Mr Rea, in answer to this argument, submitted that it all depended upon the state of the accused's mind and that question ought, as Quilliam J. had said in his earlier ruling, to be left to the jury. He submitted that the question of whether the accused believed the child was dead when she struck it was wholly dependent upon her own statement to the detective who interviewed her and it was open to the jury not to accept it. Mr Rea accepted that the material contained in the proofs of evidence of Drs Stephenson and Bridge was new material but submitted that, so far as it appeared to support the accused's statement that she thought the child was dead when she struck it with the scissors, it was again wholly dependent upon what the accused had said to the doctors. I accept that if the material that is to be the doctors' evidence was to be viewed as in some way corroborating the accused's statement as to her belief then it would not assist very much, because it is dependent upon what the accused said in the first instance. However, I accept Mr Wolff's submission that what the doctors will say is not merely some kind of hearsay dependent upon what the accused has said but is original evidence in the sense that it is the opinion of the doctors in relation to the accused based upon all the material that had been put before them.

The crucial issue is whether the act relied upon by the Crown as causing the death of the child was an unlawful act within the terms of s 160(2)(a). If the child had been dead at the time the accused struck it with the scissors, then, in

my view, the striking clearly would not amount to an assault because an assault is the intentional application of force to the person of another and, of course, that other must be living. Intention is an essential element in assault and it follows that if a person believes another to be dead when he or she applies force to that other then the person applying the force obviously lacks one of the intents necessary to an assault. In my view, in the circumstances of this fortunately very unusual case no reasonable jury, properly directed, could be other than left in doubt as to the accused's intent in this respect. The only evidence on the question is that to which I have already referred. In my view, no jury could be satisfied beyond reasonable doubt that the accused had the intent to apply force to another living person when she struck the baby; it must at least have been left with a reasonable doubt and that must have led to a verdict of not guilty. In those circumstances the proper order, in my view, was to direct that no indictment for infanticide be presented and I so directed.

In view of the argument developed by Mr Wolff, I add a further comment upon the cases he cited. In R v Church Edmund Davies L.J. made it clear that it was not sufficient that the act relied upon was merely unlawful; it had to be both unlawful and one that "all sober and reasonable people" would recognise as subjecting the other to some harm. There may well be some unlawful acts which in the event cause or contribute to a death but which are ones no-one would anticipate as being likely to cause harm to another person. The subsequent cases of R v Lamb and D.P.P. v Newbury made it clear that the test was an objective one and not a subjective one so far as the question of recognising the likelihood of causing harm was concerned, but they did not deal with the

question of the intent of the person to do the act itself, whether he or she recognised what the consequence of the act might be. In this case it appeared to me that the lack of intent on which Mr Wolff relied was the lack of intent to apply force to a living person so that the act did not amount to an unlawful act of assault upon which the Crown relied. Mr Wolff emphasised in his submission that the accused lacked the intention to do any act which would cause any harm to the child because she knew the child was dead. That is, perhaps, but another way of expressing what to my mind is the crucial point, namely, the lack of intent to do the unlawful act charged against her of applying force to another person because she believed the baby was dead.

Finally I record that I made an order continuing the order previously made that neither the accused's name nor any particulars that might lead to her identification be published.

Solicitor for the Crown: Crown Solicitor (Napier)

Solicitors for the accused: Carlile, McLean & Co. (Napier)