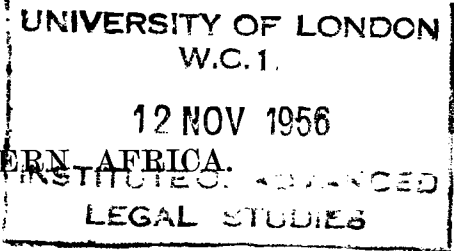


In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN
VISHWANATH VISHNU DABHOLKAR

Appellant

15223

AND

THE KING

Respondent.

CASE FOR THE APPELLANT.

RECORD.

10 1. This is an appeal by special leave from the Judgment of the ^{p. 56.}
Court of Appeal for Eastern Africa dated the 10th November, 1944,
confirming the Appellant's conviction of negligence under Section 222 (e)
of the Tanganyika Penal Code while quashing his conviction of being an
accessory after the fact to an attempt to procure an abortion under
Section 368/369 read with Section 141 of the Tanganyika Penal Code and
affirming the sentence of three months' hard labour passed upon him by
the High Court of Tanganyika at Arusha on the 15th February, 1944.

20 2. The Appellant was charged with two others, one, Doctor Sadanand ^{pp. 1-2.}
Shamrao Nadkarni, and one, George Biazzos, before the Court of Sessions
at Tanganyika with the following offences:—

“ FIRST COUNT

STATEMENT OF OFFENCE

Vishwanath Vishnu Dabholkar & Sadanand Shamrao Nadkarni.
—Using an instrument to procure miscarriage of a woman contrary
to Sect. 141 of the Penal Code.

George Biazzos:—Accessory before the fact to the same
offence, contrary to section 21 (d) of the
Penal Code.

PARTICULARS OF THE OFFENCE

30 Vishwanath Vishnu Dabholkar & Sadanand Shamrao Nadkarni
on or about the 22nd day of July, 1943, in the Northern Province
with an intent to procure the miscarriage of a woman named
Elenora Kopko unlawfully used an instrument or some other
unknown means.

George Biazzos on or about the 22nd day of July, 1943, in
the Northern Province counselled or procured the said Vishwanath
Vishnu Dabholkar and Sadanand Shamrao Nadkarni, to commit
the said offence.

SECOND COUNT

STATEMENT OF OFFENCE

Giving surgical treatment negligently & in a manner likely to endanger life or to cause harm contrary to Sect. 222 of the Penal Code.

PARTICULARS OF OFFENCE

Vishwanath Vishnu Dabholkar & Sadanand Shamrao Nadkerni on about the 22nd day of July, 1943, in the Northern Province surgically treated one Elenora Kopko in such a negligent manner as to be likely to endanger her life or to cause her harm." 10

p. 44, ll. 28-29.

3. The Sessions Judge acquitted the Appellant on the charge of unlawfully procuring a miscarriage of the said Elenora Kopko, but found him guilty on the charge under Sections 141 and 368 of the Tanganyika Penal Code of being an accessory after the fact to the crime of unlawfully procuring a miscarriage of the said Elenora Kopko. The Sessions Judge further found the Appellant guilty on the charge of criminal negligence under Section 222 (e) of the Tanganyika Penal Code.

p. 44, ll. 23-27.

p. 44, ll. 33-35.

p. 45, ll. 23-25.

The Appellant was sentenced on the first charge to six months' hard labour under Sections 368/369 read with Section 141 of the said Code and on the second charge to three months' hard labour under Section 222 (e) of the said Penal Code, the sentences to run concurrently. 20

p. 20, ll. 14-16.

Accused No. 2 Doctor Nadkarni was discharged on the ground that the prosecution had failed to establish a prima facie case against him.

p. 45, ll. 26-27.

Accused No. 3 George Biazos was acquitted on the charge of being an accessory before the fact but was found guilty of being an accessory after the fact, and was sentenced to three months' hard labour under Section 368/369 read with 101 of the Penal Code, or, alternatively, a fine of Rs.400 and seven days' hard labour.

pp. 46-48.

The Appellant appealed to the Court of Appeal for Eastern Africa, which allowed his appeal from his conviction on the first charge of being an accessory after the fact but dismissed his appeal from his conviction on the second charge of negligence. 30

4. The Appellant is a Licentiate of the College of Physicians and Surgeons of Bombay, India, and has been registered with the Bombay Medical Council, India, since 1926. He was employed as a Sub-Assistant Surgeon by the Medical Department of the Tanganyika Government from 1929 till the 15th February, 1944, when his service was terminated by the Government owing to the conviction out of which this appeal has arisen.

5. The Appellant was allowed throughout his service to have a private practice and during the said period of service he has received the usual promotions in pensionable service regularly. 40

6. The preliminary inquiry proceedings by the Resident Magistrate at Arusha showed that the patient Elenora Kopko was reserved by the Prosecution as a Crown witness from the very beginning and the accused

were warned against any attempts to see her. Later on the Prosecution abandoned her as a Crown witness and the Appellant's advocates asked permission to see her. She gave evidence at the preliminary enquiry as a defence witness, and was cross-examined by the prosecution. At that stage the preliminary inquiry was limited to the charge of procuring an abortion. The case was committed for trial on that charge only. In the Sessions Court an additional count of criminal negligence was added as stated in paragraph 2, and therefore no opportunity was offered to the Appellant's advocate to challenge the patient on the point of having
10 suffered any harm from the treatment given by the Appellant.

In the Sessions Court the Appellant's Counsel made an application for further particulars of negligence. p. 4, ll. 24-25.

The Sessions Judge ordered that further written particulars should be given by that afternoon, and the charge should be amended. p. 4, ll. 26-30.

There is no satisfactory evidence on record to show that these particulars as required by section 235 (1) of the Tanganyika Code of Criminal Procedure, were ever given, and if so at what stage of the proceedings.

The only evidence on Record to show that the count on negligence
20 was ever amended is contained in the summing up of the learned Sessions Judge where he states :—

Count 2. I sum up on Count 2.

p. 33, ll. 30-33.

The Count stands as read ; plus the words " to wit that he failed to take proper aseptic precautions."

The point as to the charge being bad in law owing to the lack of the necessary particulars was taken in the grounds of appeal, but was rejected by the Court of Appeal who assumed (it is submitted erroneously) that these particulars were given. p. 47, ll. 8-13.
p. 58, ll. 35-42.

7. On the 12th January, 1943, the prosecution gave notice of
30 information given by an additional witness, Doctor Forrest, as follows :—

" Dr. S. Forrest, Specialist. Sews Hadji Hospital Daressalaam, who will state as follows :—

" that he had read the preliminary inquiry proceedings in the above-mentioned case & upon the facts disclosed therein is of the opinion that the circumstances of the operation performed by V. V. Dabholkar & S. S. Nadkerni upon woman Elenora Kopko did not conform with the recognised medical and surgical practice and in the circumstances the operation does not appear to have been immediately necessary."

8. The circumstances surrounding the operation performed by the
40 Appellant appear sufficiently from the following passage of the Appellant's evidence :—

In July 1943 I performed an operation on the girl Elonora Kopke. On 22.7.1943 No. 3 came to see me, between 8.30 and 9 a.m. He wanted to consult me. The patient he said was

p. 21, l. 8, to
p. 22, l. 31.

suffering from bleeding and pain in the abdomen and feverishness, for three or four days. I arranged with No. 3 for the patient to be brought to me. At about 9 p.m. that day while we were dining No. 3 and two ladies came to my house. One was said to be the patient. That day I did not find out or ask the patient's name, nor that of the other woman. Both women were apparently Europeans. I told them to wait. I finished my meal. Then I went into consultation. After consultation in which it appeared that the patient could talk a little English. I took the patient into another room for examination. I got the history of the case in 10 part from No. 3 and in part from the patient. I examined the patient first externally superficially where affected and then with due aseptic precautions internally. I diagnosed a partially expelled foetus. No. 2 (now discharged) was staying with me. I agree with his statement put in here as far as his share in this matter is concerned. After we two Drs. had agreed on the condition and what was necessary I conveyed our opinion to No. 3 alone. I told him an operation was necessary. He presumably then saw the patient and came back and instructed me to get on with the operation as the patient was in pain. I took it he was conveying 20 to me her consent and that he was instructing me to proceed. On this day the 22nd terms and fees were never discussed with No. 3 or with anyone else concerned in the matter. No. 3 left after giving the girl's consent. I did not see him again until Duluti the next day, at about 7 a.m. I then gave instructions to Mike and we two doctors performed the operation. The equipment brought from the Hospital was instruments, sterilized drums, douche, can, chloroform and operation table. Everything used was sterilized. Sterilized in the Hospital and then brought over to the house. Proper aseptic precautions were taken during the operation. I removed 30 an unexpelled part of the ovum. I then curetted. Without being positive I think that the pregnancy was about a three months' one. That ovum would be about the size of an ordinary hen's egg. I can give no idea how much of that ovum had remained in the uterus. The position was complicated with a lot of blood clot. It is the practice to have a pail into which all these pieces of parts drop automatically and we leave it there for washing. I curetted with Ex. D3. Then I douched cleaned the part with iodine put a sterilized pad on and bandaged the patient. The operation took about 20 minutes from when the patient went under choloroform; the 40 patient had had no abundant growth of hair; it was as if she had been recently shaved: I did not shave her myself. I painted the parts. No. 2 confined himself to the anæsthesia. Mike helped me as a theatre attendant, the other lady who had come remained in the room for the whole operation. The patient was then put to bed in the same room. She came to in about 10 minutes. I then gave her an injection of streptocide and a little later one of pituitrin; the first is to fight sepsis the second to contract the uterus and thus stop bleeding. A little later I gave her some coffee. This was for the heart. Then I went to bed, she being apparently 50 about to go to sleep. The other woman also slept there in the same room.

9. After the Appellant had dealt with the cause of the patient's condition, she was treated with Streptocide injections, M.B. tablets, and Ergot, against possible chances of further sepsis and she was given the necessary instructions. The detailed treatment subsequently administered by the Appellant as given in evidence may be stated in brief :—

22nd July, 1943. Removal by curette of partially expelled foetus plus 5 c.c. Streptocide intra-muscularly, and injection of Pitutrine. p. 22, ll. 2-26.

10 23rd July, 1943. In the morning Pitutrine repeated plus six powders of Ergot and Sedatives. In the evening a visit and a second injection of Streptocide, and further M.B. Tablets. p. 22, ll. 33-50.

24th July, 1943. Visit by the Appellant when he diagnosed that the patient had apparently taken an overdose of Ergot and was consequently suffering from its ill effects. Mixture, sedatives, and further supply of M.B. tablets issued by the Appellant to guard against further sepsis. p. 23, ll. 1-20.

20 -10. After the operation the patient was kept in bed for 10 hours, when carefully transported to her friend's house for rest. The Appellant visited her on the 23rd July both morning and night, and the 24th July at noon and gave treatment which the Appellant explained elaborately in his evidence. It is respectfully submitted that there is no evidence that there was any negligence or carelessness in the actual performance of the operation, that there is no evidence to show that she was not put to bed, not observed and treated or was ill-advised, and that the subsequent treatment given by the Appellant was not challenged as inadequate.

30 11. The patient knew that she had to remain in bed and was actually in bed but later on feeling apparently better and failing to realise the importance of complete rest started to walk about. The Appellate Court observed that this indiscretion on her part in moving about may have been the immediate cause of subsequent complications of her illness. On the 25th July, 1943, the patient had left the place where she had been resting and it is therefore beyond dispute that all efforts of further continuation of treatment by the Appellant would have failed. There was no report either from the patient or from the said George Biazos about her condition subsequently. There is no evidence at all that they asked for further supply of medicines. The patient got ill again after a week and started other treatment. She left the said George Biazos' house on the 25th July, 40 1943, and was reported sick again. p. 60, ll. 5-10. p. 30, ll. 37-38.

12. On the 15th February, 1944, the Appellant was found guilty and sentenced by the Sessions Court of Tanganyika at Arusha as stated in paragraph 3 herein. p. 44.

13. Against that judgment the Appellant appealed to the Court of Appeal for Eastern Africa and that Court allowed the appeal on the charge of being an accessory after the fact to the crime of abortion, but dismissed the appeal on the charge of negligence under section 222 (e) of the Tanganyika Penal Code. The judgment of the Court of Appeal was delivered on the 10th November, 1944. p. 46. p. 56.

p. 62, ll. 6-36.

14. The Court of Appeal relied principally upon the circumstance that the operation was performed at the Appellant's house as warranting the conviction on the charge of criminal negligence, taking the view (it is submitted erroneously) that a lesser degree of negligence would satisfy the provisions of section 222 (e) of the Tanganyika Penal Code than was necessary in the case of manslaughter.

p. 60, ll. 6-10.

15. The Court of Appeal dealt with the evidence with regard to the development of the peritoneal symptoms and observed: the woman returned to the camp on foot after two nights' absence and that she walked home apparently alright. "It seems to us that this evidence of the girl walking about so soon after the operation indicates that the peritoneal symptoms subsequently found may well have been due to her own indiscretion in walking about rather than to a pierced uterus." It is respectfully submitted that this finding of fact substantiates the Appellant's case that the harm in question suffered by the patient was attributable to her own indiscreet actions and could not be related to any criminal negligence on the part of the Appellant. 10

16. It is respectfully submitted that the Court of Appeal for Eastern Africa has erred in holding that a lesser degree of negligence is sufficient to satisfy the offence of criminal negligence relying on the case of *Andrews v. Public Prosecutor* [1937] 22 All England Reports, p. 548, and failed to appreciate that a higher degree of negligence was necessary in a criminal case (*Rex v. Bateman* (1925), 94 L.J.K.B. 791, at pp. 794, 796). 20

17. From the said Judgment this appeal has been preferred to His Majesty in Council and the Appellant humbly submits that the appeal be allowed and the Judgment of the Court of Appeal be set aside and his conviction be quashed for the following among other

REASONS

- (1) Because there has been a non-compliance with the provisions of section 235 (1) of the Tanganyika Code of Criminal Procedure, occasioning a miscarriage of justice. 30
- (2) Because there is no evidence at all that the treatment given by the Appellant to the patient was the direct cause of her subsequent illness.
- (3) Because there is no evidence of any negligence on the part of the Appellant.
- (4) Because even assuming that there is evidence of some negligence, there is no evidence that the negligence was so gross as to create criminal responsibility as distinct from civil liability. 40

S. P. KHAMBATTA.

H. J. UMRIGAR.

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