

1, 1948

In the Privy Council.

No. 44 of 1946. UNIVERSITY OF LONDON
W.C.1

ON APPEAL FROM THE COURT OF
APPEAL FOR EASTERN AFRICA.

12 NOV 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

15221

BETWEEN

VISHWANATH VISHNU DABHOLKAR APPELLANT

AND

THE KING RESPONDENT.

CASE FOR THE RESPONDENT.

RECORD

1.—This is an Appeal from a Judgment of the Court of Appeal for Eastern Africa dated the 10th November, 1944, which confirmed the Appellant's conviction for negligence under Section 222 (e) of the Tanganyika Penal Code by the Sessions Judge of Tanganyika on the 4th September, 1944, and the sentence of three months imprisonment with hard labour to which the Appellant was sentenced for that offence. p. 56, l.28—p. 62, l. 41
p. 44, ll. 34-36
p. 45, l. 24

10 2.—The Appellant, a Government Sub-Assistant Surgeon, was charged jointly with another medical man who was acquitted at the close of the (case for the prosecution) with using an instrument to procure the miscarriage of a woman, Elonora Kopke, contrary to Section 141 of the Penal Code, 1930. On this charge he was acquitted, but he was convicted of being an accessory after the fact to the crime of unlawfully procuring a miscarriage of the woman. The Court of Appeal for Eastern Africa, however, quashed this conviction. pp. 1-2
p. 20, l. 14
p. 44, ll. 22-29
p. 57, l.22—p. 58, l.23

3.—The Appellant was also charged with giving surgical treatment negligently and in a manner likely to endanger life or to cause harm contrary to Section 222 of the Penal Code. The other medical man was also jointly charged with this offence, and was acquitted of it at the close of the case for the prosecution. In the Particulars of the Offence it was p. 2, ll. 15-19
p. 20, l. 14
p. 2, ll. 20-25

CASE FOR RESPONDENT

alleged that the two accused on or about the 22nd July, 1943, surgically treated Elonora Kopke in such a negligent manner as to be likely to endanger her life or to cause her harm.

4.—Section 222 of the Penal Code, 1930, is as follows :

222. Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person—

- (a) drives any vehicle or rides on any public way ; or
- (b) navigates, or takes part in the navigation or working of any vessel ; or 10
- (c) does any act with fire or any combustible matter, or omits to take precautions against any probable danger from any fire or any combustible matter in his possession, or
- (d) omits to take precautions against any probable danger from any animal in his possession ; or
- (e) gives medical or surgical treatment to any person whom he has undertaken to treat ; or
- (f) dispenses, supplies, sells, administers or gives away any medicine or poisonous or dangerous matter ; or
- (g) does any act with respect to, or omits to take proper 20 precautions against any probable danger from any machinery of which he is solely or partly in charge ; or
- (h) does any act with respect to, or omits to take proper precautions against any probable danger from any explosive in his possession

is guilty of a misdemeanour.

5.—The Criminal Procedure Code contains the following provisions :

132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such 30 particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

* * * *

132 c. The following provisions shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code—

(a) (i) A count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence ;

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(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence ;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary :

Provided that, where any rule of law or any Ordinance limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required ;

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(iv) the forms set out in the Second Schedule to this Code or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable ; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case ;

* * * *

335. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account :—

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(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code ; or

(b) of the omission to revise any list of assessors in accordance with section 243,

unless such error, omission or irregularity has in fact occasioned a failure of justice :

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Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

RECORD

6.—The Second Schedule of the Criminal Procedure Code contains 22 forms of stating offences in informations, but none of them relates to negligence except, possibly, the form for charging manslaughter, which is as follows :

3. Manslaughter.

Manslaughter contrary to Section 185 of the Penal Code.
Particulars of Offence.

A. B. on the day of , in the province
of unlawfully killed J. S.

The felony of manslaughter, under Section 185, is committed by “ any 10
“ person who by an unlawful act or omission causes the death of another
“ person.” Section 185 also provides that “ 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.”

p. 4, ll. 24-30

7.—On the opening day of the trial Counsel for the Appellant applied for further particulars of negligence and an order was made that further written particulars should be given by the afternoon. “ The charge to “ be amended.”

p. 33, ll. 30-33

8.—The learned trial Judge did not formally record the giving of 20
these particulars or any amendment of the charge. However, in making a note of his summing up to the assessors on Count 2 he states : “ The “ Count stands as read ; plus the words ‘ to wit that he failed to take “ ‘ proper aseptic precautions ’.” In fact, Counsel for the Crown and Counsel for the defence informed the Court that they had agreed that the charge should be amended by the addition of those words. It seems clear that the trial was conducted on the basis of the amendment, and no further question of particulars was raised until the Appeal to the Court of Appeal for Eastern Africa.

p. 21, l. 9—p. 22, l. 1

9.—The Appellant’s evidence showed that on the 22nd July, 1943, 30
Elonora Kopke was brought to his house about 9 p.m. by one George Biazzos and another woman pursuant to an arrangement which the Appellant had made in the morning with Biazzos. The Appellant diagnosed a partially expelled foetus. With the assistance of the other medical man and the head dresser of the Native Hospital (called “ Mike ”) he performed an operation with sterilised equipment brought from the hospital to the house. He described the operation, during which, he said, proper aseptic precautions were taken. Elonora Kopke was put to bed in the same room. At 6 a.m. the next morning the Appellant took her in his car to the house of Biazzos, 11 miles away. The Appellant described 40
his treatment after the operation and during the next two days. In cross-

p. 22, ll. 1-22

p. 22, l. 23

p. 22, ll. 31-33

p. 26, ll. 22-23

p. 22, l. 23

- examination the Appellant stated that such a case calls as a rule for two or three days in bed and that it would have been safer to have had the operation in hospital as this type of incomplete abortion calls for more precautions against sepsis than an ordinary operation. The Appellant also stated that during the operation he suspected some slight sepsis. He also said that before the operation he arranged with Biazzos to take Elonora Kopke to his house at 6 a.m. if Biazzos had not previously come for her. He also admitted that he had made no examination of what came away from the uterus.
- 10 10.—For the prosecution it was proved that on the 31st July, 1943, Elonora Kopke was very ill with peritonitis and general septic infection originating in the uterus. She was 4 or 5 weeks in hospital.
- 11.—For the prosecution the dresser Mike had given evidence of the presence of sepsis when the operation was performed, of the patient being in upper khaki clothes and of the poor light.
- 12.—The Acting Deputy Director of Medical Services, Dr. Forrest' had given evidence dealing with the duties of medical officers in a case of incomplete abortion, and explaining the sepsis precautions which should be taken.
- 20 13.—The assessors expressed the opinion that the operation would have been safer in hospital, but that the Appellant was as careful as he should have been. They were not agreed on whether the Appellant was careless to fix the time for lying down before the operation.
- 14.—In his Judgment the learned trial Judge examined the evidence. He held that the Appellant took risks over sepsis by operating under conditions more septic than necessary. He found the Appellant guilty of being accessory after the fact to the unlawful procuring of a miscarriage, and of negligence in terms of Section 222 of the Penal Code. He sentenced the Appellant to 6 months' hard labour on the first count, and to 3 months' hard labour on the second count.
- 30 15.—The Appellant appealed to the Court of Appeal for Eastern Africa, which gave Judgment on the 10th November, 1944. The Court (Sheridan C.J., Whitley C.J., and MacRoberts J.) quashed the conviction and sentence in respect of the first charge, and then considered the charge under Section 222 of the Penal Code. After referring to the form of the charge and the order for further particulars, the Court said that it was to be assumed that the further particulars were given from the evidence adduced as to the conditions in which the operation was carried out, and

p. 22, ll. 20-32

p. 23, ll. 22-23

p. 24, ll. 17-27

p. 26, ll. 1-19

p. 10, l. 8—p. 11, l. 6

p. 12, ll. 1-4

p. 12, ll. 15-19 ;

p. 20, ll. 3-6

pp. 13-19

p. 15, l. 17—p. 16, l. 8 ;

p. 18, l. 21—p. 19, l. 27

p. 33, l. 30—p. 35, l. 6

p. 37, l. 26—p. 44, l. 16

p. 43, l. 24—p. 44, l. 16

p. 44, ll. 22-36

p. 45, ll. 21-25

p. 56, l. 29—p. 62, l. 44

p. 57, l. 23—p. 58, l. 23

p. 58, l. 24—p. 59, l. 2

RECORD
p. 59, l. 3—p. 60, l. 11 the Court quoted the record of the words added to the count. The Court then dealt with the use of the uterine sound in the operation and held that the learned trial Judge was wrong in finding that the use of the sound was an offence under Section 222.

p. 60, l. 12—p. 61, l. 45 16.—The Court then turned to the evidence bearing on the charge that the Appellant had failed to take proper aseptic precautions, and to the Judge's view of that evidence. The Court reached the conclusion that the charge was proved. Accordingly the appeal against the conviction and sentence on the charge of negligence was dismissed.

p. 62, ll. 1-36

17.—The Respondent submits that the Judgment of the Court of Appeal for Eastern Africa was right and should be affirmed for the following amongst other 10

REASONS

1. Because the evidence showed that the Appellant gave surgical treatment to Elonora Kopke in a manner so negligent as to be likely to cause her harm.
2. Because in the information as amended such particulars of the offence were given as were necessary for giving reasonable information as to the nature of the offence charged.
3. Because if the particulars were insufficient Counsel for the defence should have objected before any technical witnesses were called, whereas he agreed that the words added to the charge were sufficient. 20
4. Because there has been no substantial miscarriage of justice.

FRANK GAHAN.

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