Privy Council Appeal No. 17 of 1942

John Oni Akerele – – – – – – – – *Appellant*

v.

The King – – – – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1942

Present at the Hearing:

THE LORD CHANCELLOR
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

The appellant in this case is a duly qualified medical practitioner who carried on practice in Nigeria.

On the 7th March, 1941, he was charged before the Assistant Judge at Umudhia Sessions of the High Court of the Enugu-Onitsha Division in the Protectorate of Nigeria on three charges

(i) Manslaughter contrary to Section 325 of the Criminal Code in killing one Kalu Ibe in May, 1940.

(ii) Reckless and negligent acts contrary to Section 343 (1) (*e*) of the said Code in giving medical treatment to the said Kalu in a manner so rash or negligent as to endanger human life or to be likely to cause harm.

(iii) Reckless and negligent acts contrary to Section 343 (1) (*f*) of the said Code in dispensing or administering medicine or poisonous or dangerous matter to the said Kalu.

The learned Assistant Judge who tried the case without a jury found the appellant not guilty on the second count but guilty on the first and third counts, sentenced him on the first charge to three years' imprisonment with hard labour and on the third to a fine of £100 or twelve months' imprisonment with hard labour to run concurrently with the punishment awarded on the other charge, and refused bail pending an appeal.

On appeal the West African Court of Appeal quashed the sentence on the third charge, affirmed the conviction on the first charge, but varied the sentence to a fine of £500 and in default of payment to imprisonment with hard labour for twelve months. The appellant's case states that as a result of this conviction his name was struck off the local medical register by the Board of Examiners for Nigeria.

The fine was paid but the appellant petitioned His Majesty in Council for special leave to appeal from the conviction and sentence of the Court of Appeal and on the 27th November, 1941, his petition was granted by His Majesty in Council. Pursuant to this leave their Lordships heard the appeal on the 28th and 29th of October last.

At that hearing the Attorney-General on behalf of the Crown, whilst maintaining that it was open to him to support the conviction on the third charge on the ground that the sentence alone had been quashed, admitted that if the conviction for manslaughter should not be upheld, the conviction for negligent dispensing or administering medicine could not be supported. It accordingly becomes unnecessary for their Lordships to consider either the propriety of recording a conviction on the two counts or whether the evidence would support a conviction on the third count.

The sole question is whether sufficient grounds were shown to persuade their Lordships that the case was one in which it would be proper for the Board in accordance with the principles upon which it acts, to advise His Majesty to grant the petition of appeal against the decision of the West African Court of Appeal upholding the conviction for manslaghter recorded by the learned Assistant Judge.

The facts giving rise to the charge may be briefly stated. The appellant in the course of his medical practice was touring the Owerri Province in May, 1940, and the inhabitants of the districts of Asaga and Akanu were notified that they could be treated by him on the 6th and 7th of that month.

According to a list kept by the appellant 78 persons were treated at Asaga of whom 57 were children: 44 of these of whom 36 were children were dealt with on the 6th May and 34 of whom 21 were children on the 7th. On the latter day the appellant proceeded to Akanu where 61 persons were treated of whom 33 were children and the remainder adults.

With a few exceptions the patients appear to have been suffering from an endemic disease known as yaws which attacks both adults and children causing lesions and ulcerations on all parts of the body and in particular on the lower limbs and feet.

Two methods of inoculative treatment for this disease are now well recognised, the injection (i) of N.A.B. an arsenical preparation and (ii) of Sobita, which consists of sodium bismuth tartrate as given in the British Pharmacopœa, and is a trade preparation supplied to the doctor by a drug company in the form of a powder. It is now common ground that the proper dose for an adult is three grains and for a child one.

The appellant was accustomed to use the second specific and on his visit to Asaga and Akanu used it in the case of nearly all his patients though apparently not in every one.

Following his treatment ten children died and there seem to have been some other cases of sequent illness, but the history of the latter was only lightly developed.

All the ten children who died came from Asaga and so far as their Lordships are able to ascertain from the evidence five were inoculated on the 6th and five on the 7th May. No illness was reported from Akanu.

The charge relates to one of these children, viz.: Kalu Ibe. At the trial, besides the testimony of his mother and half-brother, evidence as to his symptoms was given by Dr. Ibiam, a qualified medical practitioner, who had been called in to treat him but not until ten days after the inoculation. In corroboration of this evidence the deposition was put in of Miss Margaret U. B. Reid, a District Mission worker of the Church of Scotland at Asaga, who had seen this boy a day earlier. From this evidence it was apparent that he was suffering from stomatitis induced by bismuth poisoning. There was no doubt and indeed no dispute but that this poisoning resulted from the injection, and both Dr. Ibiam and a Dr. Henry, who was also called for the Crown, inferred that the subsequent death was caused by an overdose. The defence on the other hand maintained that Kalu Ibe was peculiarly susceptible to the effect of bismuth and therefore unexpectedly succumbed to a dose which would have been harmless in the case of a normal child, and that in any case the negligence (if any) did not amount to criminal negligence.

In order to show that the injection given was too strong and to negative the suggestion that the boy's death was due to an exceptional reaction to sobita in his case, the Crown tendered evidence of the symptoms, illness and death of nine other children. In their Lordships' view this evidence

was rightly received. The learned Judge speaks of it as being " evidence of a course of conduct resulting in these various consequences of which the death of Kalu Ibe was only one." In their Lordships' view, no question as to a course of conduct arises, but the summing up goes on: " The evidence is admissible in proof that Kalu Ibe's was not an isolated case which might conceivably be due to mere inadvertence or idiosyncracy in relation to bismuth in Kalu Ibe himself." If the words ' inadvertence or ' are omitted this statement, in their Lordships' opinion, expresses the true ground for the admission of the evidence, and its propriety is perhaps better explained by the Court of Appeal when its President says: " The evidence of the illness and death of other persons was tendered not to prove the bad character of the appellant, nor to prove a course of conduct or system but to establish one of the essential points which the prosecution had to establish . . . to show that such a large proportion of the other children who were similarly injected by the appellant at the same time and place had reactions similar to those of Kalu Ibe as to prove that his reaction could not be due to his own idiosyncracy and therefore must be due to an overdose."

According to the appellant's own evidence, he himself dissolved the powder in sterile water and carried a 20-oz. bottle made up for the day's work: made up as he said fresh the same day. Strictly speaking, this evidence would lead one to suppose that the mixture injected at Asaga on the 7th was made up separately from that injected on the 6th, and if this were so some question might arise as to the admissibility of the effects of that administered on the latter date. But the appellant's counsel before their Lordships withdrew any objection to the admissibility of the evidence as a whole because he was anxious to make use of the argument that many of the patients on both days were unaffected—a result which could not, as he maintained, have been reached if the mixture had been dangerously strong.

Even if only the events of the 6th May are to be considered, not less than five children out of thirty-six, so far as their Lordships are able to ascertain, died after the first day's treatment; and from the description of the symptoms the Courts in Nigeria were plainly justified in inferring that the cause was stomatitis resulting from bismuth poisoning.

No doubt an overdose might be given in one of two ways, either by injecting too much of a proper mixture or by injecting the right quantity of too strong a preparation. In the former case, the evidence would not be admissible as showing that because the appellant had been careless in one administration he was likely to be negligent in another. But it is clear that the charge was based upon the latter suggestion and therefore the evidence was admissible as tending to show, from the effect produced, the strength of the mixture in the bottle.

The question therefore for their Lordships to determine is whether it is proved that the appellant negligently prepared too strong a mixture on the morning of the 6th May, and if so, whether that one act amounted to criminal negligence.

Various other acts of negligence were at one time suggested by the prosecution, viz.: that the accused failed to instruct his patients to come back after injection and took no adequate steps to treat them after he was informed of their illness.

These suggestions were subsequently withdrawn, and were rightly discarded by the learned trial Judge in his summing-up. It is therefore unnecessary for their Lordships to pronounce upon his criticism of the appellant's excuse, when he returned to Asaga on the 17th after having been informed of his patients' illnesses, that the fault was his ' boy's ', and of his failure to treat them further. Their Lordships would only observe in passing that he did come back, that out of his own pocket he provided mouthwash and milk, that he endeavoured without success to enlist an assistant to continue the treatment: that the excuse, admittedly false and recognised to be false at the time it was made by those who heard it, was put forward when the appellant was in the midst of a hostile mob, some armed with knives, who were at least threatening him and one of whom tried to kill him, though he ultimately managed to escape.

The learned Trial Judge found that the appellant negligently prepared too strong a mixture and that his negligence was criminal. In his summing-up he points out that the negligence on which the case rests lies not in the manner in which the accused proceeded but in what he injected, and relies upon the evidence as to the deaths of the other nine children and upon that of a government medical officer called for the defence who said that he only knew of ten to twelve cases of severe reaction in 1,000 to 2,000 sobita injections given by him and that he would be shocked at a proportion of ten to fourteen out of seventy.

The learned Judge goes on to ask whether on this evidence it can be said that the accused was guilty of negligence in a criminal degree in causing the death of Kalu Ibe.

No complaint can be made of what he says in reference to the degree which the Courts have held essential to constitute a criminal offence of negligence. He quotes the observations of Lord Hewart L.C.J. in *R.* v. *Bateman* (1925) 94 L.J. (K.B.) 791:

> " A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State,"

and adds from Halsbury's Laws of England (Hailsham Edition), Volume 9, sub-title Criminal Law: " What amount of negligence is to be regarded as gross is a question of degree for the jury, depending on the circumstances of each particular case."

Both statements are true and perhaps cannot safely be made more definite, but it must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. The further words spoken by the Lord Chief Justice in the same case are, in their Lordships' opinion, at least as important as those which have been set out:

> " It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime."

How necessary it is to keep this distinction in mind may be illustrated by reference to two cases.

In a note to *R.* v. *Noakes* (1866) 4 F. and F. 920 it is said:

> " It is impossible to define it (i.e., culpable or criminal negligence) and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinions."

That was a case in which a customer sent two bottles to a chemist, one for aconite and the other for henbane. The chemist by mistake put the aconite into the henbane bottle with the result that the customer took 30 drops of the former and died of it. Erle C.J. left the case to the jury, but "put it strongly to them that they ought not to call upon the prisoner for his defence: the case was not sufficiently strong to warrant them in finding the prisoner guilty on a charge of felony."

So in *R.* v. *Crick* (1859) 1 F. and F. 519.

Pollock C.B. summing up in a case in which the prisoner, who was not a regular practitioner, had administered lobelia, a dangerous medicine, which produced death, said in his summing-up:

> " If the prisoner had been a medical man, I should have recommended you to take the most favourable view of his conduct, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck."

The two cases quoted are of course only examples, but in their Lordships' view they do rightly stress the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

It is unfortunate that in the present case the two doctors called for the Crown were accustomed to use N.A.B. and had little if any practical experience of sobita, with the result that no information was forthcoming as to what excess of strength in the mixture would be required to produce the observed consequences in a normal patient and how widespread

amongst the medical profession is or ought to be the knowledge o danger of an overdose. It may be conceded that both N.A.B. and s are dangerous drugs if not properly used, as Dr. Ibiam said, bu known margin of error is nowhere referred to.

The Trial Judge ends his summing-up by saying:

> " The question now is, on this evidence, can it be said tha accused was guilty of negligence of criminal degree in causing the of Kalu Ibe? We have heard that sobita is supplied in powder which has to be dissolved in water in a certain strength. Evidentl involves no matter of any particular technical finesse. But accus giving these injections managed to make at least eleven persons gi ill with symptoms of the most revolting order. In the single vi Asaga when he gave the injection to Kalu Ibe out of a total of 78, were eight other cases besides this boy—a proportion of over 11 per serious casualties all like Kalu Ibe, through overdose of sobita.
>
> One would think that in travelling the countryside, as i accused's practice, giving these injections on what may be ter wholesale scale, to these somewhat primitive people who have knowledge of what to do if anything goes wrong and little acc medical assistance, he would at least make as certain as is hu possible that he injects the correct doses. In my view the conc is inescapable that accused acted with a degree of negligence tha only be described as criminal."

If, as their Lordships have indicated, the only negligence on reliance could be placed is the single act of dissolving the powder in before giving the inoculations, it is immaterial that the symptoms revolting or that the result was to make many persons ill: the ac already taken place and its observed consequences which only sl themselves at a later date could not add to its criminality. egligence to be imputed depends upon the probable, not the result. It is unfortunate that the learned Judge nowhere in what he finds the negligence to consist unless it be in its fata sequences in so large a number of instances. If one may judge fr reference to the fatal consequences in the case of the other childr seems to have thought that one death might have been due to inadve whereas ten could not, and to have forgotten that one act only co complained of, viz.:—the mixing of too strong a solution in making preparation. To hold this opinion is to impute to the accused re acts of negligence as if he were to be blamed for want of care in th of each injection instead of the one act of carelessness in prepari mixture to be injected. Moreover, the learned Judge in the penu paragraph of his summing up, quoted above, so far from cons whether gross negligence has to be proved, appears to think it enc the appellant did not make as certain as is humanly possible that he i the correct doses.

Their Lordships cannot accept the view that criminal negligen been proved merely because a number of persons have been made ill after receiving an injection of sobita from the appellant coupled finding that a high degree of care has not been exercised. They do no that merely because too strong a mixture was once dispensed and a n of persons were made gravely ill, a criminal degree of negligence was

In coming to this conclusion their Lordships do not find the in substantial disagreement with the judgment of the Court of in Nigeria save in one respect, viz.: in their understanding of the g upon which the learned Judge based his decision. That Court apprehend did not itself pronounce upon the facts but inquire whether the finding of the Court below had sufficient evidence to it. It did not consider whether the learned Judge had sufficiently his mind to an analysis of the acts said to constitute a felony and degree of care required of a professional man against whom a charge is preferred.

Nor are their Lordships conscious of departing from the rule they have laid down for their own guidance in considering whet should allow an appeal in a criminal matter. " The exercis prerogative ", said Lord Haldane in *Dal Singh* v. *The King-Empero* 44 I.A. at p. 137, " takes place only where it is shown that injust

serious and substantial character has occurred. A mere misdirection on the part of the Court below, as for example in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor does the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below ".

Their Lordships are not in any circumstances prepared to differ from the Courts below in a criminal case for any less cogent reason than those required by this statement. In this particular case, however, in their view the distinction between civil and criminal liability has been inexactly drawn, the ground upon which a criminal charge is based ill defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death. In the result the case is one in which they consider that they ought humbly to advise His Majesty to allow the appeal and quash the conviction.

JOHN ONI AKERELE

v.

THE KING

DELIVERED BY LORD PORTER