

HH 88-03
Crb 5957/02
THE STATE
versus
CHRISTINE MAJARIRA

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 4 June, 2003

Criminal Review

CHINHENGO J: The accused pleaded guilty to a charge of culpable homicide. She was duly convicted and sentenced to twelve months imprisonment which was suspended on condition that she performed or completed 420 hours of community service at Budiro Primary School with effect from 31 October 2002. The record of proceedings was submitted for review on 7 April 2003 and placed before me on 19 May, 2003.

The facts of this case as admitted by the accused were that -

1. **The accused person resides at 745-200th Close, Budiro 1, Harare, and is not employed.**
2. On 6 May 2002, the accused person was in charge of Talent Mukono aged 2 years at 2088, Budiro 1, Harare.
3. Due to her negligence, the accused person left the bathroom unattended and there was hot water in a tin.
4. The now deceased person Talent Mukono approached the hot tin of water and went inside it resulting in her death.
5. The deceased sustained burns all over the body.
6. The deceased was admitted to hospital on the same date and passed away on 9 May 2002 as a result of the burns.
7. The deceased was examined by a Pathologist who confirmed the death was caused by severe burns.
8. The accused had no right to negligently leave a child unattended and hot water unattended."

CRB 5957/02

It is not clear from these facts why the accused who resided at house number 745 - 200^h Close, Budiro 1 was in charge of the child at a different house at number 2088 Budiro 1. It is not clear where the bathroom in which the tin with hot water was in relation to where the child was. It can be asked : was the child in the bathroom where the tin was when the accused left the child and the hot water tin? When it is said that the child approached the hot water tin and went inside it, is it being suggested that the tin with the hot water and the child were left by the accused in the bathroom? If the child was outside the bathroom, was there a door to the bathroom which the child opened to gain entry or was there no such door? When it is said that the accused had no right to negligently leave the child and the hot water unattended, what exactly did she do, or omit to do, in the circumstances which constituted the negligence alleged against her?

I think that the magistrate was aware of the insufficiency of the facts alleged because in putting across to the accused the elements of the offence the proceedings went as follows -

- "Q. Is it correct that you left some hot water in a bathroom unattended?
A. Yes.
Q. You were in charge of the deceased at the time?
A. Yes.
Q. The deceased then went into the bathroom and fell

CRB 5957/02

into the bucket which had hot water?

A. Yes.

Q. You agree that it was because of your negligence which caused the accused to be burnt by the water because you left it unattended?

A. Yes.

Q. You agree the deceased died as a result?

A. Yes.

Q. Any lawful right?

A. None.

Verdict : Guilty."

The facts put across to the accused by the magistrate are in some material respect different to those in the Outline of the State Case. The third question put to the accused by the magistrate suggests that the child was outside the bathroom and that the child walked into the bathroom and fell into the bucket with the hot water. This is not stating the same fact as contained in the Outline of the State case where the suggestion is strong that the accused left the child and the tin of hot water together in the bathroom.

The regional magistrate referred the matter for review because he considered that the sentence was so lenient as not to be in accordance with real and substantial justice. It seems to me that although this was the only criticism of the proceedings by the regional magistrate, he too understood the facts in a different way. In his letter of reference he stated that -

"Accused who is aged 23 with two children was left in charge of a 2 year old child. She left the child in a bathroom with boiled water in a tin nearby. The child got into the tin and got scalded. The child died three days later from scald injuries sustained".

The regional magistrate's appreciation of the factual position was that the accused left the child together with the hot water bucket in the bathroom and the child then climbed into the bucket and sustained

CRB 5957/02

the burns from which the child later died.

I have highlighted the lack of clarity in the facts of this case because the accused's conviction depended on the prosecution establishing that she was negligent. Negligence is not a concept that is readily understood by a lay person especially one, as the accused, who is not represented by a legal practitioner at her trial. Negligence requires that the prosecution establishes that the accused did not live up to that standard of care expected of all citizens. Negligence is not much concerned with personal moral blameworthiness but attributes liability to punishment of the careless person. He is punished regardless of the reasons why he did not meet the standard expected of all citizens. In Milton's South African Criminal Law and Procedure Vol 11, 3 ed at 365 it is stated that

-

"(4) The role of negligence in culpable homicide is thus to determine whether the killing was an accident (and thus not punishable) or an unlawful (albeit unintended) killing which is deserving of punishment. The test of negligence is formulated in such a way as to investigate whether in the circumstances the conduct of the actor bringing about the death of the deceased complied with established social norms of care in undertaking an activity which carries a risk of harm to other persons. In other words, the law -

'turns the criminality of [negligent] actions entirely on a calculus of utilities; how great the probability that life will be lost, how socially important the purposes served by the action, and how feasible the use of less risky measures to achieve the same purpose...[Unlike intended killings) these utilitarian

CRB 5957/02

assessments are the standard factors in judging unintended killings. [S H Kadish ' Respect for Life and Regard for Rights in Criminal Law' (1976) 64 Columbia LR 871 at 893].

(5) The test of negligence is formulated in terms of the notion of the 'reasonable man', a figure who is 'the embodiment of all the qualities we demand of the good citizen, a device whereby to measure the [criminal's] conduct by reference to community valuations' [Fleming 2 ed at 118]",

The concept of negligence and its role in culpable homicide cannot easily be understood by an unrepresented lay person.

The accused in this case, being a lay woman and unrepresented, was more likely [and I have no doubt she did] confuse, the personal moral/social blameworthiness arising simply from causation of death (in layman's terms) with the legal requirement that her conduct must be such as has departed from that expected of a 'reasonable man'. The accused must have felt a sense of responsibility (not legal but social) for the death of the child so that when she was asked whether it was her negligence that caused the death of the child, she readily admitted so.

The magistrate should have explained to the accused what was meant by "negligence", that is to say, the magistrate should have given her an explanation of what negligence in law meant. The magistrate could also have investigated fully how, what appeared to have been an accident, actually occurred. Questions such : where was the child when you left the bucket of hot water in the bathroom? Was the door to the bathroom, if any, closed when you left? Where were you going and how long were you going to be away? Such questions would, in my view, have assisted in determining whether in all the circumstances the accused acted

CRB 5957/02

negligently. Other questions such as to the relationship of the child to the accused and why she was in charge of the child away from her usual place of residence would also have been of some assistance. The accused's offence, if any, was really one of negligent omission. The magistrate should have done more to investigate the circumstances in which the child fell into the bucket of hot water. What the magistrate did was in fact to seek to prove the negligent omission by merely laying the allegation - "You agree it was because of your negligence which caused the deceased to be burnt by the water you left unattended".

The concept of negligence in culpable homicide has two components - the issue of foresight that death would be a consequence of the conduct in question because his blameworthiness arises from a failure to foresee the death in circumstances where the reasonable man would have foreseen it. The second component requires an assessment of what should have been done in order to safeguard against the death occurring. To arrive at the conclusion that the accused negligently caused the death it must be determined what steps should reasonably have been taken to prevent the death and whether the accused in fact took those steps because it is the accused's failure to take those reasonable steps which determines that the accused was negligent in bringing about the death - see Milton *op. cit.* at p 365. Negligence as a concept has a "certain chameleonic quality", to borrow Milton's words, which make it difficult for a lay person to fully understand.

I am satisfied that the failure by the magistrate to investigate the facts and the full circumstances leading to the death of the child in this case render it unsafe to uphold the accused's conviction even though she pleaded guilty to the charge. Her plea of guilty was not an informed one because there is no indication that she fully understood the charge and in particular the concept of negligence. The duty of the magistrate to explain the charge and the elements of the offence in a way calculated to inform the unrepresented accused of the nature of the charge in sufficient clarity and detail as will suggest to him whether he has any defence to offer has often been emphasized see *S v Machokoto* 1996 (2) ZLR 190 (H) per GILLESPIE J at 200 G - 201 F. In my view the accused was prejudiced by the magistrate's failure to discharge her duties as expected of her and by reaching a verdict based on a plea of guilty to a charge which was not sufficiently explained and in respect of which the accused was

CRB 5957/02

not fully informed. I hold that there has been a serious miscarriage of justice. I would quash the conviction and set aside the sentence.

In setting aside the sentence however, I do not consider that the regional magistrate's criticism of it as lenient is valid. In *S v Richards* 2001 (1) ZLR 129 (S) the Supreme Court stated the principle that in culpable homicide based on negligence, the accused is not being punished for his evil intent, for he had no intent at all, but for being careless, and that the function of punishment in such a situation is not so much to punish wrongdoing as to inculcate caution in the citizenry and encourage and foster attentiveness to the safety of others. It went on to say that the function of the crime of culpable homicide is as much educative as it is coercive. In that case the Supreme Court altered the punishment from an order to serve 245 hours of community service in lieu of a suspended sentence of imprisonment to a fine of \$4 000 or in default of payment one month's imprisonment.

If the conviction was proper I would have had no hesitation to confirm the sentence. In the result the conviction is quashed and the sentence is set aside. I would have ordered that this case be remitted to the magistrate's court for a retrial were it not for the fact that the accused has already served the sentence.

MUNGWIRA J, agrees.