

THE PEOPLE v ZULU (1968) ZR 88 (HC)

HIGH COURT

EVANS J

6th SEPTEMBER 1968

Flynote and Headnote

[1] **Criminal law - Medical treatment given without reasonable skill - Duty of care.**

Pursuant to Penal Code, section 190, a person undertaking to administer medical treatment has a duty to use reasonable care in doing so.

[2] **Criminal law - Manslaughter - "Culpable negligence" defined.**

For purposes of section 176 of the Penal Code, "culpable negligence" is that conduct which goes beyond a mere matter of compensation between subjects and shows such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

[3] **Jurisprudence - Reception of English law - English law used to define words in Penal Code, section 4 of the Penal Code construed.**

Since the expression "culpable negligence" is not defined by any Zambian law, it is to be construed in accordance with English criminal law (Penal Code, section 4).

Cases cited:

(1) *R v Bateman* 19 Cr. App. R 8; [1925] All ER 45.

(2) *Andrews v DPP* [1937] AC 576; [1937] 2 All ER 552; 26 Cr. App. R 34.

Statute construed:

(1) Penal Code (1965, Cap. 6), ss. 4, 176, 190.

Zulu, Director of Public Prosecutions, for the People

McLellan - Shields, for the accused.

Judgment

Evans J: The twenty - eight - year - old accused is charged under section 176 of the Penal Code with manslaughter, the particulars being that, on 14th January, 1968, at Lusaka, he unlawfully killed Emily Shawa (a sixteen - month - old child, hereinafter called "the deceased").

The *onus* rests throughout upon the State to prove, upon the evidence and beyond reasonable doubt, all the essential elements of the offence

[The learned Justice here reviewed the factual arguments of the State and the accused.]

Upon the whole of the evidence, I find the following facts proved beyond reasonable doubt:

(1) On or about 9th January, 1968, the deceased was sick, suffering from vomiting and diarrhoea. Having been given some medicine obtained from a chemist in Lusaka, her condition improved, but her parents decided to have her injected. I here observe, from long judicial experience in this country, that many relatively unsophisticated Zambians, such as the deceased's parents, regard an injection (of what, they know not) as a general panacea. There was evidence from the deceased's father that the giving of injections by people without medical qualifications is a common practice in the compounds.

(2) The deceased's mother made arrangements with the accused's cousin (Elliman Banda) for him to give the deceased some unspecified injection, presumably a drug of his choice.

(3) At about 7 p.m. on the 14th January, and for an agreed fee of 7s. 6d., the accused injected the deceased within the order of 10 cubic centimetres of chloroquine, which is a drug used for the treatment of malaria and which is not dangerous when administered in a correct dosage but is very harmful, often causing fatal cardio - vascular collapse, when an overdose of it is given to a child. For a female child aged eighteen months, the maximum safe dosage is approximately 1½ cubic centimetres.

(4) Within minutes of receiving the injection (which, apart from the drug used and its quantity, seems to have been properly administered), the deceased died, the cause of death being cardiac arrest - acute heart failure - following an overdose of chloroquine.

This is not a case of causing the death of a person by doing an act unlawful *per se* (such as giving an injection of penicillin, contrary to section 3 (2) of the Penicillin Ordinance); it

is a case of manslaughter by negligence, and it is necessary to consider the relevant law. The material part of section 176 of the Penal Code reads:

"Any person who by an unlawful . . . omission causes the death of another person is guilty of the felony termed 'manslaughter'. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health . . ."

And section 190 of the said Code provides, so far as is material:

"It is the duty of every person who, except in a case of necessity, undertakes to administer... medical treatment to any other person . . . to have reasonable skill and to use reasonable care ... and he shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to observe or perform that duty."

[1] I have no doubt that the accused undertook to administer medical treatment (by way of an injection) to the deceased. He was therefore under a duty in law to have reasonable skill and to use reasonable care in administering it. I find that he possessed no skill and used no care, except in the pure mechanics of giving the injection. He had no medical training and no knowledge of the properties or usage of chloroquine or of its correct dosage. Accordingly, he was in breach of the said duty, which is a duty tending to be preservation of life or health, and [2] it remains to consider whether his failure to discharge it amounted to "culpable negligence" - section 176 of the Penal Code. [3] That expression is not defined in any Zambian law, so, by virtue of the provisions of section 4 of the Penal Code, it is to be construed in accordance with English criminal law. [2] The word "culpable" is not defined in such law, but it was used by judges in many old cases, and the test applied in England since 1925 to determine whether the negligence in a case amounted to a crime was laid down by Hewart, L.C.J., in *R v Bateman* [1], as follows:

"In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as 'culpable', 'Criminal', 'gross', 'wicked', 'clear', 'complete'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, In the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

That test has been approved and applied in many cases since *Bateman's* case, notably in *Andrews v D.P.P.* [2], and I am content to apply it here when determining whether the accused's omission - to discharge the duty mentioned in section 190 of the Penal Code - amounted to "culpable negligence". Having applied the test, I am satisfied beyond reasonable doubt that the said omission, which caused the deceased's death, amounted to "culpable negligence" and was therefore unlawful. Accordingly, I find the accused guilty and convict him of manslaughter as charged.

Accused convicted as charged.