

IN THE FEDERAL COURT OF APPEAL
KADUNA JUDICIAL DIVISION
9TH MARCH, 1979. FCA/K/84/78
CORAM:- M. NASIR, M. L. UWAIS, A. ADEMOLA, JJCA

DR. DUNG ISTIFANUS PAM-TOK APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Miscarriage - Offence of causing miscarriage - To clear himself of the charge - The burden was on the appellant to show that he acted in good faith - For the purpose of saving the life of the deceased.

CRIMINAL LAW - Miscarriage - Offence of causing miscarriage - The failure of the appellant to follow the normal procedure in treating the deceased - Tend to support the case of the prosecution.

CRIMINAL PROCEDURE - Defence of the accused - Was well considered by the trial court - Before finding him guilty.

FACTS

The appellant was charged before the High Court Jos, of causing miscarriage contrary to s. 232 of the Penal Code and of culpable homicide not punishable with death contrary to s. 224 of the Penal Code. The deceased a student of a secondary school, was pregnant early in 1977. The deceased accompanied by her friend P.W.7 consulted the appellant a medical doctor at the General Hospital, Jengre. The deceased asked the appellant to abort the baby. The appellant took the deceased to the theatre at the General Hospital and performed an operation on her. The appellant did not issue hospital card to the deceased, neither did he enter the operation he performed in the theatre register. The deceased subsequently complained of pain in her abdomen. Her condition deteriorated. All efforts made by other doctors at the General Hospital, Bauchi

where she was later admitted was to no avail. She finally died on 8th June 1977. The appellant in his defence said that he performed the operation to save the life of the deceased.

At the conclusion of trial, the learned trial Judge acquitted and discharged the appellant of the charge of culpable homicide not punishable with death but convicted him of the charge of causing miscarriage. Dissatisfied, he has now appealed to the Court of Appeal Kaduna Division, against the conviction.

ISSUE FOR DETERMINATION

Whether the failure of the learned trial judge to adequately consider the defence of the appellant did not occasion a miscarriage of justice.

HELD (Unanimously dismissing the appeal per judgment delivered by UWAIS JCA)

Defence of the accused

1. In reply Mr. Gumut, Acting D.P.P. submitted that the appellant's defence was fully considered by the trial Chief Judge. He referred to the part of the appellant's evidence under cross-examination where appellant said the deceased was not ill at all when he saw her and her general condition was quite satisfactory. He interposed, why did the appellant perform the operation since the deceased's condition was sound and she was not in danger of losing her life? We are of the view that the appellant's defence was well considered by the learned Chief Judge as it is clear from his summing up of the evidence as quoted above. (p. 1111 G)

Offence of causing miscarriage

2. The offence of causing miscarriage under S.232 of the Penal Code is defined as follows:

"Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both" (Underlining is ours)

To clear himself of the charge the burden was on the appellant to

show that he acted in good faith for the purpose of saving the life of the deceased. The evidence adduced by the prosecution showed the contrary. (p. 1112 B)

Failure to follow the normal procedure in treating the deceased

3. The failure of the appellant to follow the normal procedure in treating the deceased by issuing a card to her and entering the operation he performed in the theatre register tend to support the prosecution case. We do not therefore see how the failure to consider the appellant's defence, if at all, could have occasioned miscarriage of justice. (p. 1112 D)

REPRESENTATION

G. Brown-Peterside for Appellant

R. D. Gumut, Ag. D.P.P., Plateau State, for Respondent

CASE REFERRED TO

Abgyuluwa v. Commissioner of Police (1961) ALL N.L.R. Part IV at pp. 850

STATUTE REFERRED TO

Penal Code, ss. 224 and 232

JUDGMENT DELIVERED BY UWAIS JCA

The appellant was charged before Belgore C. J. in the High Court, Jos of causing miscarriage contrary to S.232 of the Penal Code and of culpable homicide not punishable with death contrary to S.224 of the Penal Code. He was acquitted and discharged of the latter charge but convicted of the former. He was now appealed against the conviction.

The facts of the case as found by the learned Chief Judge are as follows. The deceased, a student of a Secondary School, was pregnant of a child early in 1977. She complained to Adamu Ilyasu, P.W.8, whom she thought put her in the family way, of abdominal pain and P.W.8 contacted a Dr. Ogynyemi of Bauchi General Hospital who prescribed "menstrogen" tablets and "prostigmin" injection without seeing the de-

ceased. The tablets together with the injection and a syringe added by P.W.8 were taken to the deceased in her school by P.W.8, who is a pharmacist, with a written instruction on how the tablets and the injection should be used. The deceased was to administer the injection on herself.

B This she did and both the tablets and the injection failed to procure her abortion.

C Towards the end of March, 1977 the deceased went to Jos and complained to her friend, Hamsatu Umaru, P.W.7, about the pregnancy she was carrying. She made the same complain to Appollos Mandang, P.W.11, who took her to one Dr. Miri, P.W.10 and asked the doctor to cause her abortion. Dr. Miri turned down the request. As a result the deceased decided to go to Jengre to see the appellant on 1st April, 1977. She was accompanied by P.W.7. At Jengre, they saw the appellant at the D General Hospital and he was consulted. He directed the deceased and P.W.7 to go to his house and wait for him. Later he joined them in the house and he advised the deceased to return to Jengre three days later.

E On 4/4/77 the deceased and P.W.7 were taken back to Jengre in a car belonging to P.W.11 and driven by him. After waiting for hours in the house of the appellant, the appellant arrived and took them with him to the theatre at the General Hospital. The appellant invited the deceased F into the theatre while P.W.7 and P.W.11 waited outside. After an hour or so the appellant and deceased emerged from the theatre and the appellant asked all the three - the deceased, P.W.7 and P.W.11 to go away. On their way back to Jos in the car of P.W.11 the deceased complained of pains in her abdomen and she was unable to sit down. From Jos the deceased left G for Bauchi and on 16th April, 1997 she was admitted at the General Hospital, Gombe with temperature, abdominal pain and foul smell discharging from her vagina. She also had toximia caused by "attempted abortion". On being examined by a doctor she was found to have been pregnant H for about three months and was partially aborted. She was first attended to by Dr. Dose Mohammed who carried out an operation on her for the evacuation of the remnant of pregnancy from her uterus. The operation was conducted twice firstly by Dr. Dose Mohammed and sec-

ondly by Dr. Ivanasor on 23rd April, 1977 and 4th May, 1977 respectively. As the condition of the deceased deteriorated after the operations she was transferred to the General Hospital, Bauchi for the attention of a specialist. Dr. Kasim, P.W.13, a consultant gynecologist, after diagnosis found that the deceased was suffering from "Peritonitis" arising from a B pelvic condition. She was placed on extensive treatment with antibiotic. She however did not respond to treatment and further complications set in. Dr. Rijwani, P.W.3, the chief Consultant Surgeon at the Hospital took over her treatment. He decided to operate on her and the Operation took C place on 16th May, 1977. On opening her abdomen P.W.3 found pockets of pus in the uterus and a collection of pus in her upper abdomen. The uterus was perforated and this led to passage of faces through the uterus and the passage of pus into to the abdominal cavity. Her condition never improved despite the operation, and she finally died on 8th June, 1977. D

Before us, of the three grounds of appeal filed with the Notice of Appeal the second and third grounds were abandoned by Mr. Peter-side, learned counsel for the appellant, and these were accordingly struck-out. The remaining ground argued, which is ground 1 reads: E

"That the learned trial judge erred in law in failing to consider my defence adequately and this error occasioned miscarriage of justice."

In his submission, Mr. Peterside complained that the defence of the appellant was not fully considered. He said that although the appellant F admitted performing the operation to bring about the miscarriage, it did not matter if the operation was illegal or not, but what was important is the reason the appellant gave for carrying out the operation, especially as it was not in dispute that the appellant was a qualified medical practitioner. To Support this contention, counsel argued that Dr. Miri did not G examine the deceased as the appellant did and submitted the if Dr. Miri had examine the deceased perhaps he would have come to the same decision, as the appellant, to perform the abortion on the deceased. He then cited Abgyluwa & Ors v Commissioner of Police, (1961) All N.L.R. H Part IV at pp. 850 and 851 to show that the defence of the appellant however stupid must be adequately considered.

It will be pertinent to refer to the evidence-in- chief of the appel-

lant at the trial in extenso. This evidence is as follows:

"..... About April 1977 I was at general Hospital, Jengre as a Medical Officer. I saw a patient by name Aida Phillip (Deceased) in company of one other lady and two men sitting in my parlour. This lady
 B (P.W.7) was the one I saw in my parlour with Aida Philip that day. As I was seeing Aida Philip with her for the first time, I asked her what I could do for them. Aida Philip then said she would like to see me. I asked her to join me in my own car and others followed in the car they came with. That was about 7 p.m. At the Hospital I invited her (the
 C deceased) into the room near the theatre. She explained to me she was pregnant and I took her to the theatre. She told me she was three months pregnant. She told me she started having pain on her way from Kaduna to Bauchi and she started bleeding. She said she had waist and abdominal pain and that she was bleeding from the vagina. I qualified at A.B.U. as a doctor in July 1973 and I did my housemanship in Martala
 D Muhammed Hospital, Jos. I took her into the theatre. She was about 24 years old, short and she had a powerful muscle of the abdomen. The
 E eye-lid was dilated to about 4 centimetre. I concluded that she had an incomplete abortion. She was bleeding from the vagina and the blood was in clots indicating incomplete abortion. I told her I could not save the pregnancy and the way out was to remove the remaining pregnancy. I
 F had to do that to prevent her bleeding to death. I explained this to her and she consented to my performing the operation I advised her to stay on admission but she insisted on continuing with her journey. I then agree to perform the operation. I discharged her after the operation and she left Jengre the same day. After the operation I administered procaine
 G penecilin and streptomycin injections."

Under examination by the trial court the appellant said that he treated the deceased officially and admitted that he did not issue her with a card. On being cross-examined he said that normally all operations
 H must be recorded in the "Theatre Register" and he admitted after examining the "Theatre Register, that he made no entry in respect of the operation he performed on the deceased. He finally said that he saw the deceased only once. That is on the day that the operation took place. That

is the substance of the appellants defence at the trial. He did not call any witness.

In considering the appellant's defence the learned Chief Judge said:-

"The accused in his evidence said the deceased Aida Philip was in transit from Kaduna to Bauchi and complained of abdominal pains and on examination she was bleeding in clots through the vagina. To save her life he decided to terminate the pregnancy by taking her to the theatre where in an operation he removed the foetus. As against this evidence, there is the evidence of Dr. Miri who said deceased approached him for illegal abortion which he declined. There is the evidence very vividly given, of P.W.7 Humsatu Umaru, of how she and Aida Philip first went to Jengre on 1/4/77 and accused gave appointment for 4/4/77, the day he took Aida to the Theatre. There is evidence of Appollos Mandang about the visit to Jengre and how he and P.W.7 and Aida Philip waited in the house of the accused and how the accused finally came from Jos and led them to Hospital where he performed the operation. The story of saving life of Aida Philip is a fabrication by the accused to hide his crime under cloak of legality. The accused never entered the presence of the deceased in his hospital in any records. No card was opened for the patient and the theatre register never revealed any entry in respect of the operation the accused performed to remove foetus. The accused admitted that physically Aida Philip could walk and was in no danger of her life, nonetheless he performed the operation. I believe the accused deliberately decided to perform the operation to procure voluntarily the abortion or miscarriage of the child carried by Aida Philip. I find the accused guilty as charged under S.232 of the Penal Code and he is accordingly convicted."

In reply Mr. Gumut, Acting D.P.P. submitted that the appellant's defence was fully considered by the trial Chief Judge. He referred to the part of the appellant's evidence under cross-examination where appellant said the deceased was not ill at all when he saw her and her general condition was quite satisfactory. He interposed, why did the appellant perform the operation since

the deceased's condition was sound and she was not in danger of losing her life?

We are of the view that the appellant's defence was well considered by the learned Chief Judge as it is clear from his sum-
B ming up of the evidence as quoted above. The offence of causing miscarriage under S.232 of the Penal Code is defined as follows:

*"Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose
C of saving the life of the woman, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both"*
(Underlining is ours)

To clear himself of the charge the burden was on the appel-
lant to show that he acted in good faith for the purpose of saving
D the life of the deceased. The evidence adduced by the prosecution showed the contrary and the failure of the appellant to follow the normal procedure in treating the deceased by issuing a card to her and entering the operation he performed in the theatre register
E tend to support the prosecution case. We do not therefore see how the failure to consider the appellant's defence, if at all, could have occasioned miscarriage of justice.

Finally there is no substance in the appeal and it is accordingly
F dismissed. We affirm the conviction and sentence.

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