

REGINA

A

v.

FELIX ALEXANDER STANLEY EMBERSON & ANOTHER

[SUPREME COURT, 1976 (Grant C.J.), 23rd, August]

B

Criminal Jurisdiction

*Criminal law—abortion—onus on prosecution to satisfy court beyond reasonable doubt that operation not carried out in good faith for purpose of preserving the physical and mental health of the patient.*

A qualified doctor is fully entitled to carry out a therapeutic abortion which in his opinion constitutes a threat to the patient's physical and/or mental health. The termination of the pregnancy only becomes unlawful if the doctor does not form an opinion at all, or forms his opinion dishonestly. Provided that the doctor honestly and in good faith believes that the pregnancy should be terminated in order to safeguard the health of the patient, then he commits no offence even though his opinion is made in error. In arriving at his opinion, the doctor is entitled to take into account the social circumstances of the patient together with all other relevant factors. The onus is on the prosecution to satisfy the court beyond reasonable doubt that the operation was not carried out in good faith for the purpose of preserving the health of the patient.

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The first defendant was charged with unlawfully using an instrument on a woman with intent to procure her miscarriage, and the second defendant was charged with knowingly assisting. The summing up substantially changed what had previously been believed to be the law on abortion in Fiji.

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Trial in the Supreme Court on indictment for illegally carrying out an abortion. The relevant part of the summing up to the assessors is set out below:

GRANT C.J.: [23rd August 1976]—

F

It is now my duty to sum up. In doing so I shall direct you on matters of law and you must accept those directions. On matters of fact, however, it is for you to reach your own conclusions and should I express any opinions on the facts you are free to disregard them. After I have completed the summing up I shall adjourn so that you may retire and consider the case as a whole. You should consult with each other and consider all the evidence and then form your own personal opinions which need not be unanimous. When you are ready the court will re-assemble and you will then each be asked whether in your personal opinion each of the accused is guilty or not guilty of the offence charged.

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I direct you that the onus of proof rests upon the prosecution throughout to prove the guilt of each of the accused beyond reasonable doubt. No onus of proof rests on the defence and it is not for the accused to have to establish their innocence. If after considering all the evidence you are left in reasonable doubt as to the guilt of either of the accused then you must express the opinion that that accused is not guilty. And

H

A as the case against the second accused turns on whether she abetted the first accused, it follows on the evidence before you that if in your opinion the first accused is not guilty your opinion should be that the second accused is not guilty. On the other hand, if you feel sure that the prosecution have established the guilt of each of the accused then it is your duty to express the opinion that each accused is guilty and you should not allow fanciful possibilities, or possibilities remote from the circumstances of the case, to deflect you from doing your duty.

B You have paid the closest attention to the evidence throughout this trial and have been taking your own notes and I do not intend to take up any more of your time than is absolutely necessary. I shall not burden you by going through all the evidence again, particularly those parts which are common ground—but I shall explain the law as it applies to the circumstances of this case and refresh your memory of the salient features of the testimony you have heard.

C You are not concerned in any way with the law appertaining to abortion in England or any other foreign country. Nor need you concern yourselves with the provisions of the Fiji Constitution or the Penal Code. Your only concern is with the law as it relates to this case, and on that I shall direct you.

D The prosecution allege that the first accused, Dr Emberson a qualified and experienced medical practitioner, unlawfully used instruments on Mrs B. on the 26th August 1975 with intent to procure her miscarriage and that the second accused, Mrs Emberson the wife of the first accused and a family planning counsellor, knowingly assisted the first accused in that unlawful enterprise. That they were a husband and wife team, practising at the Emberson Clinic, the role of Mrs Emberson supplementing that of Dr Emberson.

E Now it is common ground that Dr Emberson did use instruments on Mrs B. on the 26th August 1975 with intent to procure her miscarriage. Thus the only matters for determination—the crucial matters for determination in this case—are whether Dr Emberson was acting unlawfully, and if so whether Mrs Emberson was knowingly assisting him. And these matters must be established by the prosecution beyond reasonable doubt on the totality of the evidence. The accused do not have to prove that they were acting lawfully—it is for the prosecution to prove that they were acting unlawfully.

F On the 26th August 1975 Dr Emberson used a Karman syringe and cannula to terminate the pregnancy of Mrs B—to procure her miscarriage—a Karman syringe and cannula being a medically acceptable technique, and a technique in which Dr Emberson is specially trained. It is for the prosecution to satisfy you that this operation was not carried out in good faith for the purpose of preserving the physical or mental health of Mrs B, for if a doctor honestly believes that a pregnancy should be terminated because to fail to do so would threaten the physical or mental health of his patient and holding that opinion he uses an instrument to terminate the pregnancy, he has not committed an offence. This is so even if the doctor's opinion was wrong so long as he formed the opinion in good faith; and in arriving at his opinion the doctor is entitled to take into account the social circumstances of the patient. That is not to say that a doctor is entitled to terminate a pregnancy solely because of adverse social or economic conditions—but that he may take them into account together with all other relevant circumstances pertaining to the patient in arriving at a genuine opinion as to whether continuation of the pregnancy poses a threat to her health.

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A qualified doctor is fully entitled to carry out what has been referred to in this trial as a therapeutic abortion—that is to say to terminate a pregnancy which in his medical opinion constitutes a threat to the patient's physical or mental health. The law is not so inhumane as to prohibit it, nor is the law so arrogant as to disregard the professional opinion of a doctor honestly arrived at. The termination of pregnancy only becomes unlawful—the abortion only becomes criminal—if the doctor does not form an opinion at all or forms his opinion dishonestly, and on that the prosecution must satisfy you beyond reasonable doubt.

I need hardly add that a doctor in private practice is perfectly justified in charging for his professional services and it is no part of your function nor mine to decide what is, or what is not, a reasonable fee for an operation terminating a pregnancy. Nor is it any part of your function to sit in judgment on Dr Emberson's skill as a doctor. That is not in issue.

It is the prosecution case that Dr Emberson did not form an honest medical opinion—in fact that he did not form any medical opinion at all—because he had no proper data on which to do so; that there was no question of his assessing whether the pregnancy constituted a threat to Mrs B's health, but that he carried out the abortion only for monetary gain and that Mrs Emberson was well aware of this and was a party to it. In other words, that neither Dr Emberson nor Mrs Emberson acted in good faith.

*Both defendants convicted.*