Kitekei'aho & Tonga v R.

Court of Appeal
Morling, Ryan and Quilliam, JJ
Appeals No.2/1991 & 2A/1991

7 June, 1991

Criminal law - manslaughter by negligence - duty of care must exist
Criminal law - sentence - infanticide and manslaughter
Manslaughter - by negligence - duty of care must exist
Evidence - confession - discretion to admit
Sentence - infanticide and concealing birth - mitigating features
Sentence - manslaughter - secondary offender - mitigating features

Appellant Kitekei'aho was convicted, on her pleas of guilty, of infanticide and concealment of birth and sentenced on them and incest charges to a total of 4 years imprisonment. The dead child was the child of an incestuous and abusive relationship with her father. The appellant Tonga was convicted, after trial (see [1990] Tonga L.R. 201) on counts of manslaughter and concealment, she being the de facto wife of the father of the other appellant. She was sentenced to a total of 3 years imprisonment. The father, on charges of incest and concealment, was sentenced to 7 years imprisonment.
Tonga appealed against convictions and sentence. On the concealment charge the Crown conceded that conviction could not be upheld and it was set aside. On the manslaughter charge it was argued that she had no duty of care; the Crown contending that she did in that she had assisted with the birth, gone away, returned and stood by while Kitekei'aho suffocated the baby. It was also claimed that the confession by her should not have been admitted in evidence.

HELD:
Rejecting the appeal against conviction (manslaughter) but allowing both sentence appeals:-

1. Tonga had a duty of care to intervene, so far as the child was concerned;
2. The trial judge did not exercise his discretion wrongly in admitting the confession;
3. The sentence of imprisonment of Kitekei'aho would be set aside. The circumstances of an incest victim, of young age, who gives birth to a child and then acts as here, can be seen as mitigating factors and not aggravating.

4. The sentence of Tonga to imprisonment would also be quashed
5. Both would be placed on probation (Kitekei'aho on special terms).

Judgment (Tonga)

This is an appeal against conviction (see [1990] Tonga L.R. 201) and sentence in respect of two charges. The first charge is manslaughter by negligence and the second a charge of concealment of death. The appellant was sentenced to 2 years imprisonment on the manslaughter charge and 1 years imprisonment on the concealment charge. Both sentences were to be served consecutively.

At the outset we must say that given the attitude of the Crown the appeal against conviction and sentence in respect of the concealment of death charge must succeed. The Crown now take the view quite properly in our view that the conviction in respect of the concealment charge cannot be upheld and as a result, the Court is only concerned with the manslaughter charge.

The facts of this matter are quite disturbing. The appellant had resided in a de facto relationship with one Sione Kitekei'aho for some years. Sione's daughter had come to live with them at about the age of 12 and it appears to us that almost from that time down to the present time or at least until the present charges were laid, Sione committed incest on a continuing basis with his daughter. Inevitably the result was that she became preganant and from the information before us, this must have occurred when she was about 18 years and 3 months of age.

That has some significance because there was no criminal responsibility devolving upon her until she attained the age of 18. In December 1988 she gave birth to the incestuously conceived child and the allegation of the Crown was that the appellant assited with the birth, went away for a short time to attend to her children and returned to find the mother of the child suffocating the baby to such an effect that the child died. The Crown case was that she stood idly by for at least 3 minutes while this occured and that she had a duty care to intervene and save the child from its death.

The appellant says that there was no duty of care, that the duty lay solely with the mother. This simply cannot be accepted by the Court. The appellant had accepted responsibility during the birth of the child and she was vitally involved in that aspect of matters. She went away simply because of an emergency with another child and returned once the emergency had been dealt with. She then entered the room, or at least stood in the door way while the killing of the child occured. It is beyond belief really that in those circumstances anyone could suggest that she had no duty as far as the child was concerned and we agree entirely with the learned trial Judge's reasoning on this point.

The appellant also argued that the learned trial Judge erred in exercising his discretion to admit the confession made by the appellant, because she was not cautioned. That of course is quite incorrect because the document shows quite clearly that a caution was administered. A further ground of attack on the statement was that the appellant was frightened because of the attitude taken by the interviewing officer. We seem no merit in that aspect of the appeal either. The learned Judge had a discretion having heard the evidence and seen the witnesses as to whether or not the statement should be admitted. He reached the conclusion quite clearly that the statement had been taken quite properly; that there was no unfairness or any improper behaviour on the part of the interviewing

officer and that in the circumstances, the statement should be admitted. We are unable to say that the discretion was exercised other than properly and we cannot accept the appellant's submissions with regard to the statement (see 1990 Tonga LR. 201 at 202 and 207)

Accordingly in so far as the conviction on the manslaughter charge in concerned we are not disposed on either ground to find that the appeal against conviction has been made out and the appeal against conviction is dismissed.

As to the sentences imposed we have already indicated that we do not accept that the sentences were appropriate. The whole circumstances of this case, the situation of the appellant and the daughter who gave birth to the child, were clearly dominated by the principal offender, Sione Kitekei'aho who has been sentenced to 7 years imprisonment. For reasons which we will give later we intend to quash the sentence of imprisonment in respect of the daughter Lasimei and in those circumstances it would seem to us quite inappropriate to impose prison sentences on Fahiva. She played the minor role in this tragic affair. Her inaction in coming to the aid of the baby will no doubt continue to distress her for the remainder of her life.

She will be sentenced to a period of probation for a period of 2 years. No doubt her counsel will explain to her the consequences of breaching that probation.

Judgment (Kitekei'aho)

This Appeal comes before the court in a rather unusual way. Last week we dealt with an appeal by Fahiva Tonga against conviction and sentence, and during the course of that hearing, it became apparen to us that another co-defendant, the appellant in this case, Lasimei Kitekei'aho may have been in a position to file an appeal against the sentence imposed upon her in respect of matters arising out of the same set of circumstances as those in the Fahiva Tonga appeal.

We accordingly indicated to counsel for the Crown that we might be prepared to entertain an appeal filed out of time on behalf of Lasimei. That duly occurred and was granted. The appeal has now been filed and it is against the sentences imposed upon her.

On the 14th of January, 1991 Lasimei was sentenced to a total of 4 years imprisonment on four charges, 2 1/2 years imprisonment on a charge of infanticide and 6 months imprisonment on a charge of concealment of birth. The concealment charge was to be served concurrently with the infanticide sentence.

The circumstances broadly speaking were as follows:

At about the age of 12 the appellant had gone to live with her father, she having previously lived with her mother, her parents having separated sometime earlier. The father was living in a de facto relationship with Fahiva Tonga, the appellant referred to earlier in this judgment. She was subjected almost continually during her teenage years to a life of degradation and humiliation at the hands of her father by way of an incestous relationship, forced upon her we have no doubt, by her father. When she was approximately 18 years and 3 months she became pregnant to her father and this age has some significance given the criminal law liability which an eighteen year old and over has in respect of the incest. A child was born at the end of 1988.

During the birth of the child, the midwife at the scene was Fahiva Tonga. She left the room to attend to her children, and returned to find the appellant Lasimei obviously in a state of distress, suffocating the baby which died after a short time. After that, the

father of the child (and the father also, of course, of the appellant) buried the baby and concealed the birth. The matter did not come to the attention of the authorities until Lasimei was again pregnant to her father. The charges which were the subject of the sentencing on the 14th of January, 1991 were then laid. The learned Judge during his remarks on sentencing dealt with various maximum sentences which were available to the Court and with recommended sentences which had been agreed upon, it seems between the Magistrates and the Judges in the Supreme Court here in Tonga. He accepted that the father had the dominating role in the events. He went on to say that the Court accepted that the appellant was not wholly the victim so far as the incest was concerned. In addition he remarked that if the appellant had not taken part of her own free will, it could not have gone on so long and noted that the incest started again after the first baby. He said "Indeed, it seems that you had a favoured position in the family as a result. You knew what you were doing was seriously wrong so you must bear your responsibility." With all during respect to the learned trial Judge, we find it difficult to accept this reasoning. We have had the advantage of reading a psychiatric report which dealt with the background of the appellant. It is clear from that report that the appellant has missed out on very significant part of her life. The careless joys of a teenager which all young people are entitled to have been denied to her. It is quite clear from the report that the appellant when she was living with her mother was raped by her mother's boyfriend. She did not receive any significant psychological support from anyone then, quite the contrary - she sought refuge with her father who totally abused her and the trust which reposes in a father.

The situation there was even worse because it really amounted to the almost daily sexual abuse by him of the appellant. She was subjected to a situation where she must have been quite powerless for at least 7 years until the birth of the second child and in these circumstances the court must take cognisance of the fact that she was the ultimate victim of her father's depraved behaviour and accordingly the sympathy which the court has for her must be translated in a tangible manner as far as she is concerned. The learned Judge went on to deal with the infanticide charge and indicated that in England prison sentences had not ben imposed for the last 10 years because it was believed that the welfare of society does not demand imprisonment for young women who do this. He did say that those charges did not involve incest and that English society is different. "I believe that Tongan culture and society still demands prison sentences for both incest and infanticide." We must respectfully disagree with that reasoning because it seems to us that the situation of an incest victim who gives birth to a child in circumstances such as Lasimei did must amount to circumstances and factors in favour of mitigating the offence, not aggravating it. Not only has the mother given birth to the child of her father but she has clearly in this case been subjected to an ongoing situation of the utmost degradation. We doubt very much whether any culture or society would in those particular circumstances demand prison sentences on these two charges. In fact the sympathy ingredient for this unfortunte young woman must be as high as any case we have had to deal with.

Further, imprisonment in this case would serve no useful purpose. The imprisonment of her father for 7 years is in our view all that society can now demand of this family. It seems from the file that the appellant has spent some 8 months at least prison up to the present time and we will bear that in mind when fixing the appropriate sentence. Once again we face the daunting prospect of the lack of probation facilities here in Tonga. There is, we understand, no probation officer able to supervise a probationer nor to give

guidance in a case such as this, regarding the trauma that this young woman has suffered over the years. Fortunately we have had the advantage of hearing from Dr. Puloka the author of the psychiatric report presented to the Court. Dr Puloka stated that the appellant needed counselling and assistance and that he is prepared to give same.

We think that a term of probation of 18 months would be appropriate in this case in respect of all three charges and that the provisions of section 199 should be given effect to by ordering that the appellant be placed under the supervision of Dr. Mapa Ha'ano Puloka, the officer in charge in the Psychiatric Ward the Ministry of Health, Nuku'alofa, Tonga, so that he can provide her with counselling and guidence during that time, with
210 a special condition that she reside where directed by Dr. Puloka..