GHANA LEGAL

THE STATE v. OHENE-KESSON AND MENSAH

Appeal 1961-11-24 SUPREME COURT GLR 708-716 Print

VAN LARE, SARKODEE-ADOO AND ADUMUA-BOSSMAN, JJ.S.C.

Summary

Criminal law-Abortion-Necessity for corroborative evidence confirming evidence by prosecutrix-Whether medical evidence affords sufficient corroboration.Criminal law and procedure-Conspiracy-Whether joinder of charge of conspiracy improper.

Headnotes

Wilhelmina Richter, a student nurse, disappeared on about the 28th June, 1960, and her disappearance was reported to the police. On the 11th July, she returned home by an ambulance of the Akuse Hospital in a very sick condition and was at once admitted to Korle Bu Hospital. She was suffering from general peritonitis and told the surgeon treating her that during her absence from home she had been given an anaesthetic and that an operation had been performed on her to procure an abortion. An operation for peritonitis was performed, in the course of which the surgeon was able to establish that Richter had been between five and six months' pregnant and had had an incomplete abortion.Kesson and Mensah were duly tried and

of attempting to commit abortion and Mensah with committing

abortion. The case against them consisted of Richter's evidence, an admission by Kesson that he sent Richter to see Mensah at Akuse [p.709] and wrote a letter, exhibit E to be given to Mensah, an admission by Mensah that Richter came to see him with the said letter, exhibit E, and that it was he who took her back to Accra by ambulance in a dangerously sick condition about ten days later. Otherwise both men denied the charges against them and offered explanations which were not extremely difficult to believe.During the hearing of this appeal, counsel for Kesson admitted that "exhibit E goes to the root of the case, and I must leave myself in the hands of the court." Exhibit E read as follows:"Korle Bu Hosp.27. 6. 60.Dear Mr. Mensah,Bearer, Student Nurse, Wilhelmina Richter is down for the thing about 4 months now and I have asked her to come to see you in order to help her.I tried to give some injections as you know and also dilated some 2 months ago but no success.You may give her some Penthatol to cover up the job.Thank you,Kwame."Counsel for Mensah argued that the joinder of the charge for conspiracy with the other charges in the information was wrongful, that there was no corroboration of Richter's evidence against Mensah as to the charge of causing abortion and the verdict was unreasonable and could not be supported by the evidence.

Judgement

APPEALS jointly against conviction for conspiracy to commit abortion and by the first appellant against conviction for attempting to commit abortion and the second appellant against conviction for committing abortion, by Acolatse, J. sitting with the aid of assessors in the High Court, Accra, on the 25th January, 1961. The facts are fully set out in the judgment.

JUDGMENT OF ADUMUA-BOSSMAN J.S.C.

Adumua-Bossman, J.S.C. delivered the judgment of the court. The two appellants (who will be referred to throughout this judgment simply by their surnames, Kesson and Mensah respectively) were together convicted on the 25th January, 1961, during the January Criminal Session of the High Court, at Accra, by Acolatse, J., sitting with

Session of the High Court, at Accra, by Acolatse, J., sitting with assessors, upon an information which charged them jointly with conspiracy to commit abortion, contrary to sections 49(1) and 245 of the Criminal Code1 and also individually with separate offences, that is to say Kesson, with attempt to commit abortion contrary to sections 44 (1) and 245, and Mensah with committing abortion contrary to section 245 of the said Criminal Code, and they have appealed against their convictions. The prosecution's case against them, as disclosed in the evidence of the first and principal prosecution witness, a girl who at the material time was in training at the Nursing School, Korle Bu, called Wilhelmina Richter (who will hereafter be referred to shortly as Wilhelmina) was to the following effect:

That about February, 1960, having missed her period and suspecting pregnancy, due, as she confessed in the course of her evidence, to some previous sexual indiscretions with a friend of hers called Mr. Quist, she approached Kesson, then a senior master for the training of nurses at Korle Bu, to assist her to destroy the suspected pregnancy so that she might resume normal menstruation. Kesson, although in no way responsible for her condition, agreed for some reason or other to assist her. He therefore arranged and she attended at his residence at Mamprobi, Korle Gonno, sometime early in April, 1960, where, having first injected her on the buttocks with a substance which she says was seclomycin, he made her lie down on her back on a bed and inserted an instrument into her private parts. Describing what took place, Wilhelmina said:

"The instrument was used for the object of effecting an abortion which was my main reason for going to him. I felt pains. I bled a little after I left . . . I reported after three days and told him nothing had happened ... He said he would write to one Mr. Mensah to perform the abortion for me".

In due course Kesson wrote a letter, which came into the hands of the police upon an unexpected search of Mensah's premises at Akuse [p.711] and was admitted at the trial as exhibit E, and despatched her with it to see Mensah at Akuse. The letter, which has turned out to be

the most damaging piece of evidence against both appellants, was in the following terms:

"Korle Bu Hospital

27th June, 1960

"Dear Mr. Mensah,

Bearer, Student Nurse Wilhelmina Richter is down for the thing about 4 months now and I have asked her to come to see you in order to help her.

I tried to give some injections as you know and also dilated some 2 months ago but no success.

You may give her some penthatol to cover up the job.

Thank you,

Kwame".

On the day next after the letter was written and handed to her, Wilhelmina travelled to Akuse and delivered it about 2 p.m. to Mensah at Akuse Hospital, who, after reading it, took her to his residence in Akuse town. Here he left her to wait in the house for him, but went back to her in the house about 6 p.m. with another man to whom he requested her to pay G5 as he was going to supply the instrument to be used. She paid G2 on account, not having the full amount demanded, and they then left her in the house and went away, and it was not till about 8 p.m. that she saw Mensah again. Describing what then happened, she said:

"I went to his bedroom upon instructions. He asked me to lie down on his bed and I obeyed. He gave an injection in the vein on my left arm; it was intravenous. I slept throughout the night till the next day when I woke up in another house round about 2 p.m. I felt severe pains in my arm and the lower abdomen . . . I felt very sick. There was nobody in the room when I woke up in the afternoon. Later I saw second accused at about 7 p.m. . . . He told me he had 'finished'. I remained in this

house till 11th July 1960. The second accused was feeding me. I did not regain my period. The second accused visited me from time to time during the period I was in the house. I complained to second accused that I was feeling very ill and he used to give me tablets and injections on my buttocks and thighs daily. I was discharging yellowish fluid. It was not menstrual flow. (Ultimately) I told second accused I wanted to return to Accra. He agreed to see to it that I was taken home".

And so it was that on the 11th July, 1960, when an ambulance of the Akuse Hospital had to proceed to Accra, Mensah, taking advantage of the situation, put Wilhelmina into it and himself accompanied her to Accra. Here, upon her parents seeing the alarmingly sick condition in which she was, they hurried her to Korle Bu Hospital where she was admitted forthwith. The story, at this stage, is taken up by Dr. Quartey who gave evidence before the committing magistrate and whose deposition, in his absence away from the country, was admitted as exhibit A. As surgeon specialist attached to Korle Bu Hospital he saw Wilhelmina on the 12th after her admission on the 11th July, 1960, and he said.

"I found that she was suffering from general peritonitis. On questioning the patient she admitted being given an anaesthetic and some operation being carried out to procure abortion about a week before admission. Her condition was very serious, but we decided to heal her with drugs to see if her condition would improve. [p.712]

On the 13th July, 1960, as her condition was not improving, I decided to operate on her. At operation, the diagnosis of general peritonitis was confirmed. The patient's condition at the end of the operation was very poor, and she required 3 pints of blood and other transfusions to revive her. The conception would be probably 5 to 6 months old . . . She was not pregnant when I operated. She looked as if she had had an incomplete abortion."

Dr. Quartey's operation just managed to save her, and after two months in the hospital she was discharged sometime in September, 1960. Meanwhile upon her disappearance on about the 28th June,

without giving the nursing school authorities any indication of her movements, the matron was obliged to report her disappearance to the police; and when her dangerous condition compelled her admission in the hospital, as Dr. Quartey said in his evidence, she was obliged to reveal the secret of all that had happened to her, and this led ultimately to the prosecution of the two appellants.

Kesson giving evidence in his defence, stated that in early April, Wilhelmina came to his house to consult him about "regaining her menstrual period". He then suspected her to be suffering from malaria which was prevalent at the time, and that the malaria had caused her to be anaemic resulting in a temporal suppression of her menstruation, so he advised her to take quinine tonic. He saw her about twice thereafter when she reported that there was no change in her condition. He again saw her in his office at the hospital about 4 p.m. on the 27th June, 1960, when she said she was afraid to tell her parents of her condition. Continuing his narrative he said:

"I felt at this time that the girl was worrying me and pestering my life about her condition which I suspected to be pregnancy. I wrote exhibit E for her to take to Mr. Mensah at Akuse, just to get rid of her, as I knew she could not absent herself from the nursing college to travel to Akuse on that day and back . . . as it was not a holiday. I did not put exhibit E in an envelope. In spite of exhibit E which I wrote, I never gave P.W.1 any injection for her condition at anytime. What I said in exhibit E is not true. I know P.W.1 is literate. If I had written something different from the contents in exhibit E dealing with her condition she would not have or would have lost her confidence in me. The reference to penthatol is an application to put her into temporary sleep and the words 'to cover up the job' are that when she wakes she would think I had done the job when I had not in fact. Penthatol induces false state of mind . . . I did not suspect pregnancy in P.W.1 during the month of April until June when I strongly suspected it. It is not true that I gave her an injection nor used an instrument in the private parts of P.W.1 to cause abortion . I deny each charge against me".

The foregoing explanations of Kesson constituting his defence, were not extremely difficult to believe, but were subtantially discredited by his answers under cross-examination, some of which answers, in so far as they affect his own case, were the following:

"I admit writing exhibit E. I mean suspected pregnancy when I (wrote) 'is down for the thing' in exhibit E . . . I meant second accused to see to the restoration of her amenorrhaea which means absence of menses, when I wrote in exhibit E 'I have asked her to come to see you in order to help her' . . . When I wrote further 'I also dilated some two months ago but no success' I mean, to open up the orifice. If the statement about the dilation is taken on its face value, it means I had dilated the orifice about the end of April . . . When I said her orifice I mean her vagina". [p.713]

It appears clear therefore, dealing for the time being with Kesson's case, that not only did exhibit E afford decisive affirmation and corroboration of Wilhelmina's allegations against him, but at the same time, it effectively discredited such explanations as Kesson put forward and thereby virtually destroyed his defence.

Turning then to Mensah's case, he also gave evidence and put forward explanations in his defence to the following effect: - That he met Wilhelmina for the first time at Akuse Hospital on the 28th June, 1960, when she delivered the letter exhibit E to him about 2.30 p.m. and he got to know that the letter bearing the signature "Kwame" was from Kesson; that after reading the letter he enquired from her as to what was actually wrong with her. Continuing, he said:

"She told me she was pregnant and told me something about first accused in regard to her condition. She told me she was feeling abdominal pains and dizziness, and that she had been sent to me to give her injections to relieve the pressure. My advice to her was that that particular injection had nothing to do with abortion and that she should return immediately to Accra. She did not say anything in reply and left me. The next time I heard of the girl was between the 30th June and the 1st July, 1960, from one Ametepe, a goldsmith at Akuse

June and the 1st July, 1960, from one Ametepe, a goldsmith at Akuse. He told me that the girl came to him and asked for me and he directed her to my house but she returned later and said I had driven her away. He told me he had accommodated the girl but he did not say in which house. I did not see the girl as from the 28th June until the 11th July, 1960, at Akuse . . . I saw the girl at Mr. Nartey's house on the 11th July. Mr Nartey is the chief goldsmith. According to information I received from Ametepe I went to the house to collect the girl to Accra on the government ambulance as I was travelling to Accra on it on duty. I brought the girl P.W.1 to Accra on the ambulance about 11a.m.".

In respect of this defence of Mensah, the only serious issue of fact which having regard to the prosecution's case, arose for determination, was whether or not it was he who tampered with Wilhelmina's pregnancy. If his story was true, he drove her away as soon as she came with the letter, and his witness Ametepe out of pity or kindness found her lodgings in the house of his other witness goldsmith Nartey, where, according to that witness Nartey, in answer to the first assessor; "the girl never went out" during the period of ten to eleven days, when admittedly she remained in the house in a poor state of health. Yet when she was carried to Accra by Mensah on the 11th July, 1960, and her parents sent her forthwith to the hospital where she was admitted and operated on the 13th July, 1960, there can be no doubt from Dr. Quartey's findings as a result of his operation, that her pregnancy about five to six months' old had been tampered with by unskilled hands as to put her in that dangerously ill condition in which the doctor found her. We have already made reference to the doctor's finding that "she looked as if she had had an incomplete abortion". The question therefore is-who was responsible for that in the interval of the girl's arrival at Akuse with the letter exhibit E which she delivered to and was accepted by Mensah, if it was not he, as she alleges, bearing in mind that on the admission of his own witness Nartey, the girl never went out of the house from the time she entered until Mensah came and took her away with the ambulance. There is moreover no suggestion that any person came to treat her while she was lying sick in that house of the witness Nartey.

[p.714]

In many of the sexual cases where the law has prescribed that it is necessary for corroborative evidence to be available confirming the prosecutor's or prosecutrix's evidence, it is now clearly settled that medical evidence of the prosecutor's or prosecutrix's condition consistent with his or her story afford adequate corroboration. In this connection it will be sufficient to refer to three decisions of the English Court of Criminal Appeal. The first is R. v. Clifford Dimes,2 where Hamilton, J. reading the judgment of the court said:

"The appellant was indicted for that he on 23rd August did feloniously unlawfully, and against her will ravish and carnally know Amy Dimes. Evidence was given that on 24th August, about mid-day, less than 24 hours after the offence, the girl complained to her mother, and in consequence of the complaint the girl's linen and underclothes were submitted for examination to a doctor and the girl herself was examined by the doctor, and her physical condition was found to be consistent with the account she gave of the prisoner's acts on August 23rd . . . It is contended . . . that the facts proved at the trial could not in law be regarded as corroboration, as they did not necessarily implicate appellant. . . . there was in this case corroborative evidence implicating the accused, not strong and ample, but sufficient. There was clear evidence that the girl was in appellant's company for many hours on August 23rd, and that they were alone together in appellant's bedroom for a considerable time. Then there is . . . the examination of the underclothes and girl by the doctor on August 24th, and his evidence as to the condition of her hymen and his statement as to her having been a virgin four or five days before his examination on August 28th".

The second is R. v. William Henry Cooper3 in the headnote of which it is stated that "Medical evidence that the bodily state of a child is compatible with her story, is corroboration thereof." Then in the judgment of Lord Reading C.J., for the court, it is stated that:

"As to corroboration of the girl's story, if it was accepted by the jury,

sufficient can be found in the medical testimony which is the main corroboration . . . If the jury believed the girl's story, it was proved that the appellant had slept with her on various occasions, and no other injury was suggested which would account for the dilation of her private parts or the rupture of the hymen. The jury came to the conclusion that the girl's story was true"4.

The third is R. v. George Coulthread5 where Avory, J., in the course of his judgment for the court stated "In the opinion of the court there was corroborative evidence that on the next day the boy's private parts were in a condition which indicated that there had been some interference with them".

In the case with which we are concerned therefore, the medical evidence of Wilhelmina's condition as testified to by Dr. Quartey standing alone, afforded adequate corroboration of her allegation against the appellant Mensah that it was he who, accepting the letter exhibit E, had tampered with her pregnancy in an effort to destroy it, treating her in the manner as she described. But when the medical evidence is reinforced by (a) the evidence of the letter exhibit E, (b) evidence of his conduct and utterances as deposed to by his friend Antwi - note for example, Antwi's [p.715] evidence that when he got to Akuse and saw Mensah, the latter told him that there was a certain girl who had brought a letter from Kesson, and Mensah asked him to take the girl back to Accra "as he had finished everything"- and (c) his own evidence as to how he eventually arranged and brought the girl in an ambulance to Accra, it seems to us that the case against him also is decidedly cogent and strong. In our considered view therefore the respective convictions of the two appellants were each amply warranted by the evidence on record.

In the case of the appellant Kesson at any rate his able counsel, Mr. Koi Larbi, honourably confessed as much when, after discussing awhile with the court the effect and significance of exhibit E, he stated, "I admit exhibit E goes to the root of the case, and I must leave myself in the hands of the court".

On behalf of the appellant Mensah however Mr. Francois pressed and urged certain submissions. He submitted firstly that the joinder of the charge of conspiracy with the other charges in the information was wrong and that the trial judge misdirected himself and the assessors in stating that the count for conspiracy was properly before the court. He expressed reliance on the case of R. v. Cooper and Compton.6 But, as clearly appears in that decision, it is only in cases where there is clear evidence of the actual commission of a substantive offence by two or more so that the prosecution is in a position and intends to submit to the court proof of the actual commission of the offence, that it is then held to be improper to join a count for conspiracy to commit the same offence. Here it is not suggested that both appellants together committed the first attempt to abort the girl in April, or the actual abortion on or about 28th June; on the other hand there was the evidence available that both were in agreement to effect the abortion, so the joinder of the conspiracy count was quite in order. We find no substance therefore in counsel's first submission.

Counsel also argued grounds 4 and 5 of the grounds filed on behalf of Mensah and submitted that there was no corroboration of the prosecution's evidence against the appellant Mensah as to the charge of causing abortion, and he called attention to a passage in the judgment of the learned trial judge where he said:

"I am aware and as I duly directed the assessors that there was no corroborative evidence at all upon this substantive charge of causing abortion to the complainant, except the testimony of the complainant alone that the second accused aborted her. It is very rare in cases of this nature to find corroborative evidence".

But it seems clear that in the context in which the learned trial judge used the word "corroboration" in the passage relied on, he was meaning the repetition of the girl's story by another witness, but not that there was no confirmatory evidence. It is significant that immediately after that passage he goes on to refer to the whole of the circumstantial evidence including "the deposition of Dr. Quartey read as evidence" and [p.716] comes to the conclusion that they all

constitute "cumulative evidence of criminal interference with the complainant". There is therefore no substance in this submission also, particularly as we have been at some length to point out how the girl's allegations against him have been corroborated.

Finally learned counsel dealt with ground 7 that the verdict is unreasonable and cannot be supported having regard to the evidence, and on this head spent considerable time criticising portions of the prosecution's evidence against his client and inviting us to take certain views of it different from what the trial judge and assessors have taken. We were not impressed by his arguments and found no good or sufficient reason to differ from the learned trial judge and the assessors in their findings of fact, as, indeed our critical examination of the case of the prosecution in relation to the case of each of the appellants earlier in this judgment was intended to and does indicate.

In the result we dismiss the appeal of each and both of the appellants.

Decision

<P>Appeals dismissed.</P>

Plaintiff / Appellant

Koi Larbi for the first appellant and G. R. Mc V. Francois for the second appellant.

Defendant / Respondent

K. Dua Sakyi with him Adjetey

Referals

(1) R. v. Dimes (1911) 7 Cr. App. R. 43

(2) R. v. Cooper (1914) 10 Cr. App. R. 195

(3) R. v. Coulthread (1933) 24 Cr. App. R. 14

(4) R. v. Cooper and Compton [1947] 2 All E.R. 701; 32 Cr. App. R. 102