Reynolds & Melville v R [2008] NTSC 30

PARTIES:	DENISE CARMEN REYNOLDS AND: TONI LEANNE MELVILLE v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	20720787 and 20720786
DELIVERED:	11 August 2008
HEARING DATES:	28 July 2008 and continuing
JUDGMENT OF:	RILEY J

CATCHWORDS:

APPLICATION – No case to answer – directed verdict of not guilty – negligence causing the death of a child – matter for the jury to determine

Criminal Code s 43AL, s 149; Community Welfare Act s 43(5)(d), s 52

Doney v R (1990) 171 CLR 207
Everuss (unreported, Supreme Court of Victoria, 17 June 1987)
R v Lavender [2005] 222 CLR 67
May v O'Sullivan (1955) 92 CLR 654

R v Nicholls (1874) 13 Cox CC 75
Nydam v R [1977] VR 430
R v Porritt [2008] ACTSC 33
R v Madhavi Rao [1999] ACTSC 132
R v Yvette Monique Saunders (unreported, Northern Territory Supreme Court, 13 October 1999)
R v Shah (unreported, Northern Territory Supreme Court, 18 May 2005)
R v Smith (1993) 117 A Crim R 298
R v Taktak (1988) 14 NSWLR 226

REPRESENTATION:

Counsel:

Applicants:	J C A Tippett QC and S Cox QC
Respondent:	R Coates and H Roberts

Solicitors:

Applicants:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Reynolds & Melville v R [2008] NTSC 30
No 20720787 & 20720786

BETWEEN:

DENISE CARMEN REYNOLDS

AND:

TONI LENNE MELVILLE
Applicants

AND:

THE QUEEN
Respondent

CORAM: RILEY J

REASONS FOR RULING

(Delivered 11 August 2008)

[1] In this matter the Crown has closed its case. Mr Tippett QC and Ms Cox QC, who appear on behalf of the respective accused, have made submissions that there is no case to answer and that there should be a directed verdict of not guilty.

[2] In such an application the issue is not whether the individual accused ought be convicted but, rather, whether she could be convicted: *May v O'Sullivan*[1].

[1] (1955) 92 CLR 654 at 658

Following the decision of the High Court in *Doney v* R[2], if there is evidence, even if it be tenuous or inherently weak or vague, which can be taken into account by the jury, and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury. There is no power in the trial judge to direct a jury to enter a verdict of not guilty on the ground that, in the view of the judge, a verdict of guilty would be unsafe or unsatisfactory. Such a conclusion is the preserve of an appellate court.

[3] In *R v Smith*[3] Coldrey J adopted the observations of Hampel J in *Everuss*[4] where Hampel J said:

> "The correct test is whether the accused can lawfully be convicted, that is whether the Crown's evidence taken at its highest, can support a verdict of guilty by a properly directed jury, applying the correct standard of proof. The question whether the accused can properly be convicted is a question of law, based though it must be on the judge's examination of the facts. But it does not depend on the judge's view of the credibility of witnesses or the existence of competing inferences. It is concerned with whether the evidence is capable of proving the elements of the charge against the accused. In a case which depends upon circumstantial evidence, the question must depend on whether in the trial judge's view such evidence is capable of excluding conclusions other than one of guilt."

[4] With respect, I agree. That approach was applied by B F Martin CJ in *R v Yvette Monique Saunders*[5] and by me in *R v Shah*[6] .

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[2] (1990) 171 CLR 207
[3] (1993) 117 A Crim R 298
[4] (unreported, Supreme Court of Victoria, 17 June 1987)
[5] (unreported, Northern Territory Supreme Court, 13 October 1999)
[6] (unreported, Northern Territory Supreme Court, 18 May 2005)

[5] In the present case the Crown asserts that each of the accused had a duty in relation to the child, Deborah, who was at relevant times in the care of each of them and was at all times under the age of 16 years. The Crown relies upon s 149 of the Criminal Code which provides as follows:

> Duty of person in charge of child or others
>
> It is the duty of every person having charge of a child under the age of 16 years or having charge of any person who is unable to withdraw himself from such charge by reason of age, sickness, unsoundness of mind, detention or other cause and who is unable to provide himself with the necessaries of life –
>
> (a) to provide the necessaries of life for that child or other person; and
>
> (b) to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of the child or other person and to take all reasonable action to rescue such child or other person from such danger.

[6] The Crown also relies upon the relationship which existed between the accused Ms Reynolds and the child and, separately, between the accused Ms Melville and the child, as described in the evidence of the various witnesses including in the records of interview of each accused. In relation to Ms Reynolds there existed a formal written agreement entered into by her with Family and Community Services governing the relationship between herself and the child. For the purposes of the present application there is no submission on behalf of Ms Reynolds that she did not owe a relevant duty of care. On the other hand there is a submission on behalf of Ms Melville that

she did not owe a relevant duty of care to the child. I will deal with that submission in due course.

[7] The Crown alleges that in breach of the duty each accused owed to the child they each omitted to seek medical attention for the child. The Crown asserts the omission caused the death of the child. The Crown relies upon the evidence of medical experts that, in the absence of medical intervention, death was inevitable.

[8] The case for the Crown is that the omission on the part of each accused amounted to negligence causing the death of the child. Reliance is placed upon s 43AL of the Criminal Code which is in the following terms:

> Negligence
>
> A person is negligent in relation to a physical element of an offence if the person's conduct involves –
>
> (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
>
> (b) such a high risk that the physical element exists or will exist,
>
> that the conduct merits criminal punishment for the offence.

[9] To warrant a finding of manslaughter of this kind the Crown does not have to establish an intention on the part of an accused to cause death. It is not necessary to prove that the accused foresaw the danger. This form of

manslaughter exists "because of the importance which the law attaches to human life". The Crown must prove an act, or an omission to perform an act, in circumstances which involve such a great falling short of the standard of care that a reasonable person would exercise in the circumstances, and such a high risk that death would follow, that the conduct merits criminal punishment. It involves an objective test. See the discussion in *Nydam v R*[7], *R v Taktak*[8], *R v Madhavi Rao*[9], *R v Porritt*[10] and especially *R v Lavender*[11].

[10] The submission of Mr Tippett QC, who appeared on behalf of Ms Reynolds, is that, taking the Crown case at its highest, the signs or symptoms known to the accused prior to the collapse of the child shortly before her death did not, objectively assessed, suggest that death would follow from a failure to seek medical treatment. That submission was adopted by Ms Cox QC on behalf of Ms Melville. Whilst the child may have been "very sick" at the relevant time, Mr Tippett QC submitted there was nothing in the signs or symptoms displayed to Ms Reynolds which, objectively assessed, could lead to a finding that a failure to seek medical attention would give rise to a high risk of death.

[11] Whilst there is some force in the submission made by Mr Tippett QC, applying the test I have set out above, it is my opinion that there is

[7] [1977] VR 430
[8] (1988) 14 NSWLR 226
[9] [1999] ACTSC 132 at par 129 et seq
[10] [2008] ACTSC 33
[11] [2005] 222 CLR 67 at 87 and 88

sufficient evidence available to require the issue to be decided by the jury. In considering the application the case for the Crown must be taken at its highest. The information available to the jury includes evidence from which it may be found that the condition suffered by the child was such that she was in extreme pain over a substantial period of time. The pain was of sufficient intensity to cause her to scream and to cry. There is evidence which, if accepted by the jury, indicates that the legs of the child were purple from the knees down and were "veiny" and swollen. She was, at times, unable to walk unaided and on other occasions unable to walk at all. There is evidence that on the day before her death she was unable to get off the couch. There is evidence of signs in relation to the child which may lead to the conclusion that the condition of the child significantly deteriorated over a period of a week or two and, possibly, that the deterioration was ongoing and accelerating. In the circumstances, in my opinion, there is a basis upon which a jury, properly instructed, could find that, at the relevant time for each accused, a reasonable person would conclude that there existed a high risk of death in the absence of medical intervention. The precise medical condition underlying the signs demonstrated by the child may not be known but, nevertheless, signs may be found to indicate a condition that leads to a conclusion that a high risk of death existed in the absence of medical intervention. There is a basis for finding that in those circumstances there was a great falling short of the

standard of care that a reasonable person would exercise and that the omission merits criminal punishment.

[12] In my opinion it is appropriate to leave the issue to the jury to determine.

[13] Ms Cox QC, on behalf of Ms Melville, submitted that there should be a verdict of acquittal by direction in relation to Ms Melville based upon the ground that there was no evidence before the jury on which the jury could find that the accused owed a relevant duty to the child. She pointed out that the guardianship of the child rested with the Minister pursuant to s 43(5)(d) of the Community Welfare Act which, pursuant to s 52 of the Act included the obligation to provide medical care for the child. Further, the child was placed under foster care with Ms Reynolds who became the legal delegate to whom the obligations were entrusted. It was submitted that Ms Melville held a role akin to an unpaid babysitter and that she did not ever assume a duty to seek medical treatment for the child. The highest her duty could be put would be in an emergency to have contacted Ms Reynolds who was the lawful carer of the child. It was for Ms Reynolds to act if she considered it necessary.

[14] Killing by omission is not an offence unless the thing omitted was something that the person had a legal duty to do. It must be a legal duty not a mere moral obligation. In order that homicide by omission may be criminal, the omission must amount to culpable negligence: Stephen, *History*

of the Criminal Law of England quoted in *R v Taktak*[12]. There must be more than the negligence required to create a civil liability. In *R v Taktak*[13] Yeldham J said "In *R v Nicholls*[14] Brett J directed the jury that "if a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy... or other infirmity, he is bound to execute that charge without... wicked negligence." The question here is whether there was evidence for the jury that the appellant had voluntarily assumed the care of a helpless human being."

[15] In the present case Ms Cox QC relied heavily upon the approach adopted in *R v Taktak*[15] where, in the circumstances of the case, the question posed was whether the accused had voluntarily assumed the care of the deceased and so secluded the helpless person as to prevent others from rendering aid.
Ms Cox QC submitted that, on the evidence in this matter, Ms Melville could not be found to have assumed that responsibility. She did not seclude the child. However, the circumstances in the case of *R v Taktak*[16] were quite removed from those in the present case. In that case the accused had taken a stranger of short casual acquaintance who was suffering from a drug overdose from a public area to a private place. It was held that in so doing he had assumed a duty to care for the deceased girl who was helpless and by

[12] (1988) 14 NSWLR 226 at 236
[13] (1988) 14 NSWLR 226 at 246
[14] (1874) 13 Cox CC 75 at 76
[15] (1988) 14 NSWLR 22
[16] (1988) 14 NSWLR 22

moving her had removed her from a situation in which others might have rendered or obtained aid for her.

[16] In the present case the situation is quite different. It is not a situation where someone is taking responsibility for a stranger. On the evidence available it is open to the jury to determine that at relevant times Ms Melville assumed and stood in a position of loco parentis in relation to the child and that, for the purposes of s 149 of the Criminal Code, she had charge of the child. The evidence revealed that when Ms Reynolds was absent from the home Ms Melville regularly assumed responsibility for the child. She did so for substantial periods of time. The child was her niece. In her record of interview Ms Melville described herself as being "the main carer" when Ms Reynolds was not present. She acknowledged that she was "responsible" for Deborah. She said that if she believed the deceased required medical treatment she would have taken her to the hospital. She did not suggest that she would first seek the approval of Ms Reynolds or anyone else. She said that if Ms Reynolds did not take the child to the hospital she would have done so herself if she thought it necessary to do so. Whilst there is material in the record of interview that may be thought to qualify her characterisation of her role, and whilst there may be an argument to the contrary of the Crown case, there exists an evidentiary basis for the jury to conclude that Ms Melville owed a relevant legal duty to the child. The issue is one for the jury.