CHITENGE v THE PEOPLE (1966) ZR 37 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, PICKETT J

13th APRIL 1966

Flynote and Headnote

[1] Criminal law -General interpretation of Penal Code - Section 4 of Penal Code construed.

Except where it is inconsistent to do so or where it is otherwise expressly provided, the Penal Code is to be interpreted in accordance with the law of England.

[2] Statutes - Interpretation of statutes - Use of English Law Penal Code.

See[1] above.

[3] Criminal law - Murder - Felony, killing in course of - Mens rea.

Paragraphs (a) and (b) of s. 180 of the Penal Code are exhaustive of felonies which have as their essence an intent to cause personal injury.

[4] Criminal law - Murder - Felony, killing in course of - Mens rea - English decisions.

Section 180 of the Penal Code must be interpreted in light of English decisions which determine in what circumstances a death caused in the course of a felony is murder.

[5] Criminal law - Murder - Felony, killing in course of - Dangerous and unlawful act.

If a person commits a felony while doing a dangerous and unlawful act and also causes the death of another person by such act, he is guilty of murder, and inadvertence in doing such act is no defence.

[6] Criminal law - Murder - Felony, killing in course of - Arson.

A homicide committed in the course of the firing of a dwelling house (arson) is generally murder, although the court leaves open the possibility that precautions by the defendant to avoid personal injury might affect this decision.

Cases cited:

(1) *Wallace - Johnson v R* [1940] 1 All ER 241.

(2) *Petero Sentali v R* (1953) 20 EACA 230.

(3) *Sironga Ole Gidi v R* (1953) 20 EACA 241.

(4) *Abdurabi v R* (1956) 23 EACA 555.

(5) *Handulwe v R* 1962 R & N 47.

(6) *R v Larkin,* 29 Cr. App. R 18.

(7) *R v Jarmain* [1946] KB 74.

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Statutes construed:

Penal Code (1965, Cap. 6), ss. 4, 180.

Criminal Code of the Gold Coast Colony, s 7.

Judgment

Doyle JA: The facts of this case are as follows. The appellant and a man named Njemba lived in a compound at Roussouw's farm, Kalomo. Their houses were beside each other. On the 23rd October, 1965, there was a beer party in the compound at which both appellant and the deceased attended. Sometime after sunset during the beer party appellant and deceased had a fight. Shortly afterwards appellant left the beer party leaving Njemba behind. Appellant being angry and intent on revenge went to Njemba's house of which the door was closed. He set it on fire and went away. Sleeping in the house was the deceased who had been staying with Njemba for about a week. He received burns of which he subsequently died. The appellant did not know the deceased and had no intention of injuring him, nor did he know that he was staying at Njemba's house though he had seen him and Njemba eating together. The appellant assumed that, as Njemba was at the beer party, there was no one in the house, but he made no investigation to ensure that this was so.

The learned trial judge found the appellant guilty by reason of the provisions of sub-paragraph (c) of s. 180 of the Penal Code. This section reads as follows:

' 180. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.'

The learned trial judge held that where the intent to commit a felony was proved, malice aforethought was established conclusively, a construction of the section with which this Court

agrees. He further held that the words 'a felony' meant 'any felony' and that in this respect the law of Zambia differed from the English law prior to the enactment of the Homicide Act, 1957. In support of this construction he relied on the case of *Wallace - Johnson v R* [1]. He also relied on a number of East African cases, *Petero Sentali v R* [2]; *Sironga Ole Gidi v R* [3] and *Abdurabi v R* [4]; and on a Federal Supreme Court case, *Handulwe v R* [5].

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It is for consideration as to whether these cases support and correctly support the view of the learned trial judge. *Wallace - Johnson v R* was a case decided in relation to a section of the Criminal Code of the then Gold Coast Colony. The Judicial Committee held that where a Code was intended to contain a full and complete statement of the law it was to be considered free from any glosses or interpolations derived from any expositions of the law of England or of Scotland. They so held in the following passage:

' The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of that colony. It was contended that the intention of the code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly, the language of the section under which the appellant was charged lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the code and the statement of the English law of sedition in *Stephen's Digest of Criminal Law*, 7th ed., arts. 123 - 126, quoted with approval by Cave, J, in his summing up in *R v Burns.* The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the colony is to be found. The code was no doubt designed to suit the circumstances of the people of the colony. The elaborate structure of s. 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the colony. It must, therefore, be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland.'

That case no doubt was correctly decided in relation to the section of the Gold Coast which it was considering. Indeed, if one examines the Criminal Code of the Gold Coast Colony, one will find laid down in s. 7 thereof in certain rules of construction. The material parts of s. 7 read as follows:

' 7. The following general rules shall be observed in the the construction of this Code, namely -

(1) . . .

(2) . . .

(3) In the construction of this Code a Court shall not be bound by any judicial decision or opinion on the construction of any other statute, or of the common law, as to the definition of any offence or of any element of any offence; and

(4) . . .'

This paragraph in effect lays down as a statutory rule of construction of the Code, the rule of construction arrived at by the Judicial Committee from different considerations. It is strange but it seems clear from the reports that s. 7 of the Gold Coast Code was never

cited to the Judicial Committee. The Penal Code of this Territory does not contain any provision equivalent to paragraph (3) of s. 7 of that Code. Indeed it contains a section in very different terms. Section 4 of the Penal Code of this Territory reads as follows:

' 4. This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.'

[1] [2] This on its face is a directive that the Code is to be interpreted, save where inconsistent to do so unless otherwise expressly provided, with the glosses and interpolations derived from expositions of the law of England. In the opinion of this Court it makes the case of *Wallace - Johnson v R* inapplicable.

Each of the Penal Codes of the three East African territories contains a section in terms identical to s. 4 of the Penal Code and each contains a section in terms identical to s. 180 of the Penal Code These cases and the case of *Handulwe v R* are therefore directly in point. Accordingly it is necessary to examine what they have decided. In *Petero Sentali v R* and *Sironga Ole Gidi v R* the East African Court of Appeal held that the paragraph in the Uganda and Kenya Codes equivalent to paragraph (c) of s. 180 was wider than the English law and included all felonies. In the latter case the Court expressly stated that the Penal Code of Kenya was a codification of the criminal law of Kenya and that in accordance with the rule in *Wallace - Johnson v R* it was to that Code they must turn to ascertain the criminal law. The effect of these decisions seems, however, to have been restricted by the later case of *Abdurabi v R* which expressed the view as an *obiter dictum* that paragraphs (ad and (b) of s.200 of the Penal Code of the then Tanganyika Territory, the equivalent of s.180 of the Penal Code of this territory, exhaustively dealt with the felonies where the essence of the offence was the intention to cause personal injury to the deceased and that paragraph (c) was concerned with all other felonies except those with the intent referred to. In the case of *Handulwe v R* the Federal Supreme Court came to the same conclusion in relation to s.180 of the Penal Code of this territory. It is interesting to note that the Judge who delivered the judgment in *Handulwe's* case was a member of the Court which decided *Abdurabi's* case and also to note that both courts pointed out the consequences, described by one court as appalling and by the other as intolerable, which would ensue if the law were other than they had determined. They each gave as an example the case where a person intentionally and unlawfully inflicted a minor cut or scratch. If death ensued from infection, then by reason of the fact that unlawful wounding is a felony in both the East African territories and this territory, the assailant would have been on the wide construction of paragraph (c) guilty of murder.

[3] This Court agrees that paragraphs (a) and (b) of s. 180 are exhaustive of felonies of which an intent to cause personal injury is the essence. If the further decision that paragraph (c) embraces all other felonies is correct, then the learned trial judge, though partly mistaken as to the purport of the cases to which he referred, was still correct in holding that as the death occurred in the course of the felony of arson, a crime in which intent to cause personal injury is not of the essence, the offence was murder.

[4] [5] An examination of the East African cases and *Handulwe's* case discloses no mention of s. 4 of the Penal Code and its equivalent sections in the East African Codes. No consideration appears to have been given to the effect of these sections, a fact which seriously undermines the authority of those cases. Section 4 appears to this Court to be a plain directive to construe the provisions of the Penal Code in accordance with English judicial decisions unless it is inconsistent to do so or it is otherwise expressly provided. There is no express provision forbidding this method of construction in the case of s. 180 of the Code nor does it seem to the Court that there is any inconsistency in using this method. The Court finds itself unable to follow *Handulwe's* case or the East African cases referred to in this judgment. In the opinion of this court s. 180 should be construed in the light of the English judicial decisions which determine in what circumstances a death caused in the course of a felony is murder. The Court considers that the law of Zambia in this respect is the equivalent of the English law prior to the enactment of the Homicide Act, 1957. That law has been succinctly laid down in the following passage from the judgment of the English Court of Criminal Appeal in *R v Larkin* [6]:

' Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently the doer of the act causes the death of that other person by that act, he is guilty of manslaughter. If, in doing that dangerous and unlawful act, he is doing an act which amounts to felony he is guilty of murder and he is equally guilty of murder if he does the act with the intention of causing grievous bodily harm to the person whom in fact he kills.'

The inadvertence where one is doing an unlawful or dangerous act in the course of committing a felony is no defence is further brought out in the case of *R v Jarmain* [7].

[6] It is for consideration, therefore, whether in this case the setting fire to a dwelling house was a dangerous and unlawful act. It was clearly unlawful but was it dangerous? The learned trial judge in the course of his judgment said the following:

' Consideration of the whole of the evidence leaves me in doubt as to whether the accused should have known or suspected that anyone was in the house when he fired it. I must give him the benefit of that doubt and determine his guilt or innocence on this charge accordingly.'

This Court finds it somewhat difficult to understand what the learned trial judge meant by this passage, but if it means that because the appellant did not know or suspect that anyone was in the house his act was not a dangerous one that was clearly a misdirection on the facts. Paragraph 2263 of *Archbold's Criminal Practice and Pleading,* 35th edition, cites *R v Serne,* 16 Cox 311 as an authority that where a dwelling house is fired and anyone in the house is burned to death the incendiary is guilty of murder. It may be that this is somewhat too widely stated. It is possible to conceive a case where a thorough search is made of a dwelling house and no one being found therein the house is fired. If in that case it turned out that some person had in fact been concealed for purposes of his own in some secret place his death might in those circumstances not amount to murder. It is not, however, necessary to decide the point in the present case which is very different. The Court has no doubt that, if a person goes to a dwelling house of which the door is shut and sets fire to it without finding out whether there is anybody inside, that is a dangerous act and it is of no avail for such a person to say that he lived near the owner of the house and that he did not know or think that anyone was staying with him. In this case the accused in the course of a felony caused the death of the deceased by a dangerous act; and he is therefore, in accordance with the law of Zambia, guilty of murder. The Court has come to this conclusion by reasoning very different from that of the learned trial judge but the result is the same, and the appeal is dismissed.

Appeal dismissed