REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI

CRIMINAL APPEAL NO 69 OF 1980

JOSEPH WARUINGE NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against his conviction and sentence at the Senior Resident Magistrates' Court, Nairobi, in Criminal Case No 1923 of 1979)

JUDGMENT

Section 243 of the Penal Code provides for various offences contained in eight paragraphs, the third of which (paragraph (c)) reads:

Any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person- ... (c) does any act with fire or any combustible matter, or omits to take precautions against any probable danger from any fire or any combustible matter in his possession; ... is guilty of a misdemeanour.

and, drawing on this provision, the prosecution charged the appellant as follows:

Charge. Reckless and negligent acts, contrary to section 243 (c) of the Penal Code. Particulars of offence. Joseph Waruinge Njenga: On 29th July 1979 at the 6th floor of the International House, Nairobi, within the Nairobi area in a manner so rash or negligent as to endanger human life, omitted to take precautions against a probable danger from combustible matter in his possession, namely, standard lacquer thinner and kerosene in that he, Joseph Waruinge Njenga, lit a cigarette with a match stick that caused an outbreak of fire.

He pleaded not guilty to what was set against him, the prosecution called its evidence, counsel for the appellant unsuccessfully argued that the charge was duplex and that in any event the prosecution had set up no case requiring him to answer, he made a statutory statement to the Court, and the trial magistrate convicted and sentenced him to serve one year's imprisonment. Being dissatisfied with the court's judgment, the appellant appealed to this Court on three grounds which he has expressed as follows:

1. The magistrate erred in law in not holding that the charge was duplex and in not dismissing it.
2. The magistrate erred in finding any intent on the part of the appellant in the absence of any evidence that he knew, rather than that he ought to have known, of any danger.

3. The sentence was manifestly excessive and also appears to reflect the confusion of the magistrate between recklessness and negligence.

The first ground of appeal is raised on the phrase “in a manner so rash or negligent” which appears in the particulars of the charge, the argument being that two offences have been charged in the alternative in one count (the one based on rashness, which involves knowledge if not intention; and the other based on negligence, which is inadvertence), so that, on the authority of *Cherere s/o Gukuli v R* (1955) 22 EACA 478, the count is duplex and bad. But whilst we have no decisions in the books to guide us, and we cannot (with respect) follow the trial magistrate’s reasoning, we do not find that the charge (which could otherwise the better have been drafted) is duplex. We accept, as counsel for the appellant asked us to do, that in the *Cherere s/o Gukuli* case, the Court of Appeal held that where two or more offences are charged in the alternative in one count the count is bad for duplicity and beyond repair, the defect being substantial and not formal; but it is the argument which was put to us by counsel for the Republic, based on the provisions of section 137(b)(i) of the Criminal Procedure Code, that we are concerned with one offence capable of being arrived at in one of two ways, which prevails with us. This paragraph provides that a charge (subject to the provisions of the Criminal Procedure Code) is open to objection neither as to its form nor its contents so long as it is framed in accordance with the provisions of the Criminal Procedure Code, and:

Where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in one of different capacities, or with anyone of different intentions. Or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

As we see it, the offence consists in the omission to take appropriate precautions, and it is the manner in which that omission is achieved that may be rash or negligent. What we say becomes, as we think, a shade clearer if the order of the words in section 243(c) is changed to read as follows: “Any person who omits to take precautions against any possible danger from any combustible matter in his possession, in a manner so rash or negligent as to endanger life, is guilty of a misdemeanour”. We have endeavoured, without conspicuous success, to consult the Indian law reports; but we have read and derive considerable assistance from *The Law of Crimes* by Ranchhoddas and Thakore (19th Edn) (1956) (which we refer to as “Ranchhoddas”), as will now appear.

At the beginning of this judgment we said that section 243 contains eight paragraphs, and we now add that six of those paragraphs, ie paragraphs (a), (b), (c), (d), (g) and (h), have their counterparts in sections 279, 280, 285, 286, 287 and 289, respectively, of the Indian Penal Code: Ranchhoddas, pages 637-655. There is not a word in the commentaries to any one of those sections (or for that matter in any other section) in which the expression “so rash or negligent” (or something similar) appears, to the effect that to charge that something was done or omitted to be done in this manner, is duplex; to the contrary. For instance, under section 279 we find: “Criminal negligence or criminal rashness is an important element in offences punishable under sections 279, 280, 284-289, 304A, 336-338”; under section 280 we have: “The immediate cause of the accident should be rashness or negligence on the part of the navigator”; and under section 285 there is:

The owner of a house in which a fire breaks out cannot be convicted under this section without proof of actual carelessness or an illegal omission from which rashness or negligence can be inferred,

and “Evidence. Prove (1) ... (2) ... (3) That such act was done rashly or negligently …”

Nor do we anywhere find the word “or” in italics where it appears in the expression to which we have just referred or some such similar expression, the usual way in which two different offences referred to in one expression is used. On the other hand, what we find is that, under section 304A (which is the offence of causing death by doing any rash or negligent act not amounting to culpable homicide), there is a specimen charge which reads:

I [name and office of magistrate, etc] hereby charge you [name of accused] as follows: that you, on or about the ... day of ..., at. .., caused the death of ... by doing a rash or negligent act not amounting to culpable homicide, to wit. .., and thereby committed an offence punishable under section 304A of the Indian Penal Code, and within my cognisance or cognisance of the Court of Session].

in which the word “or” towards the end of the form is in italics to indicate that the offence must be charged as being either within the magistrate’s cognisance or within that of the Court of Session, but not in that of one or the other. The charge before the court below was not, on our finding, duplex. This disposes of the first ground of appeal; but by way, as it were, of an addendum, counsel asked us to hold that (even if the offence was properly laid) the magistrate was yet in error in not stating whether he found against the appellant because of rashness or negligence. That appears to be so.

It is said that the words “rashness” and “negligence” are distinguishable, the one being exclusive of the other (Ranchhoddas, page 777) although in practice it may be none too easy to resolve in any given circumstances whether there was the one or the other; but, be this so or not, the distinction is thus described on page 639 of the same work in relation to section 279 (which corresponds to our section 243(a)):

Culpable rashess is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness. Culpable negligence is acting without consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

As we have said, we have not been able to get much help from the Indian cases but we derive some assistance from the local case, *Pope v R* [1960] EA 132, 139, quoting Rattanlal on the *Law of Crimes* (17th Edn) where we find:

A similar use of the alternative expression is common throughout the code in offences where a thing is said to be done “with the intention of causing a specified effect” or with the knowledge that “the effect is likely to be caused”. In such cases the prosecution need not prove and the Court need not find the intention as distinct from the knowledge; it is sufficient to prove or to find one or the other to have existed.

The Court held in the case before them (which had to do with fraudulent

false accounting) that the charge as framed was correctly drafted in the alternative, it being sufficient to support a conviction to prove either that the accused had falsified the document in question or that he had been privy to its falsification. It seems to us that, as in the charge with which we are now concerned, whilst a conviction is sufficient if it says that the accused person is guilty as charged, a Court should say which of the limbs in the particulars has been found to have been proved. Going to the facts before us, counsel for the appellant told us that the prosecution case was put forward on the basis of negligence

and that that is how the magistrate also found; but it is not so. The prosecutor told the magistrate:

Rashness or negligence are ascertained by one test ... [the appellant's] act resulted in the death of two persons ... [The appellant] had received instruction for the use of "thinner" and any other inflammable liquid. Striking the match in such circumstances is rashness. If he omitted to observe the said caution on the tins it is negligence.

and the magistrate held, "The action is thus full of both rashness and negligence."

The magistrate should have made a finding whether he founded his conviction on the one or the other, and he did not; but this does not, as we believe, preclude us (we being required to make our own assessment upon the recorded word this being a first appeal) from arriving at our own judgment on the matter. We find, anticipating what we shall say in respect of the next ground that the appellant took a deliberate, unjustifiable risk when he lit his cigarette in complete disregard of the consequences which he knew would be expected to follow from the instructions which he had received; and it was proved that he was rash.

In relation to the second ground of appeal, counsel urged upon us that negligence cannot exist in the abstract, so that the prosecution had to show (but it did not) that the appellant was possessed of knowledge that his otherwise innocent act of seeking to light a cigarette could have dangerous consequences because, unless he was conscious of those consequences, he could not be said to have disregarded them. He argued further that in any event (and assuming the appellant to have been negligent) negligence was not enough upon which a conviction under section 243 could properly be entered. That we do not accept. The prosecution, as we said under the previous ground, proved the appellant's guilt by what he did. A day or two after the event, the police charged the appellant with the detailed offence and he, a man of some education, replied, "I agree with the charge as read to me. Further to that, I would say that due to my negligence, the fire broke accidentally". But leaving that aside, and without referring to the evidence of anyone else, one witness (Mr Adamji, a maintenance engineer with a firm called Queensway Corporation) told the Court:

I know the [appellant] who is an assistant painter sometimes referred to as artisan employed by the said Queensway Corporation. He is employed for the last about one and a half years ... The label on exhibit 1 is of standard lacquer thinner ... Our employees are trained to use this thinner and kerosene and they are instructed not to smoke when they are using any inflammable liquids ... The [appellant] is aware of these instructions. Whenever they carry out such a job as removing carpets, not to smoke ... The [appellant] has carried out in the past such cleaning work with standard lacquer thinner ... The [appellant] has several times in the past used standard lacquer thinner and knows well that it is inflammable. The [appellant] is well acquainted with the container of thinner and the smell of it. ... It is not that the [appellant] should have been aware of the label on the thinner, but he is aware that thinner was inflammable. The [appellant] was told about the use of thinner, turpentine several times, and their danger ...

It is true that in his statutory statement to the Court the appellant denied that he had ever been told that the thinner was dangerous; but the magistrate did not, believe that, as we do not. There are, of course, degrees of rashness and negligence and as Ranchhoddas has it:

It is not every little trip or mistake that will make him so liable. The question whether the accused's conduct amounted to culpable rashes or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient considering all the circumstances of the case. Moreover, in applying the above criterion it is necessary to

avoid being influenced by the prejudice arising out of the loss of a life which is so dominant a factor in accident cases.

The distinction between the negligence which is sufficient ground for a civil action and the higher degree which is necessary in criminal proceedings is sharply insisted on in several cases. Simple lack of care such as will constitute civil liability is not enough.

We are not concerned here with a situation giving rise only to civil liability. There was complete disregard for the safety and lives of others, a patent crime against the State deserving punishment. It is perfectly true (as counsel for the appellant said) that the incident occurred on a Sunday when the building in which the appellant was working would be expected to have few enough people in it; but he was not entitled to take it that there would be no-one who would come in to work; and, whoever might or might not be expected to be in it, there were other people together with, and in close proximity to, the appellant. In our finding, no prudent and reasonable man with the knowledge possessed by the appellant would have sought to light a cigarette as and when he did. He exercised no caution at all.

As for the third ground of appeal, we are asked to say that there was no more than momentary inattention on the appellant's part and so he did not deserve to be awarded a custodial sentence. Beyond what we have already said, this is not so even on the appellant's case. He told the police that he had decided to smoke and he told the Court (although it differs from his police statement to which we have referred) that he did not know that there was any danger involved. If this is so, the question of inadvertence cannot be said to have been part of his case. But it is of no consequence in view of our findings. In any event, sentencing is essentially a matter for the trial court, and we do not think that we have the right to interfere with a lower court's exercise of its discretion in regard to it, unless it has been shown that there was a miscarriage of justice; *Harries v R* (1921) 8 KLR 186. It is true that later cases instance when a Court may interfere, these being summarised in *Wanjema v The Republic* [1971] EA 493; but these are, as we say, instances, and the criterion is whether or not there has been a miscarriage of justice. Certainly we are not entitled to interfere because we would not have awarded what was ordered. But we think that the sentence awarded was by no means too much.

We, making our own assessment upon the written word, have no doubt about the appellant's guilt, and the appeal is dismissed.

Appeal dismissed.

Dated and delivered at Nairobi this 26th day of March 1980.

TREVELYAN

JUDGE

Z.R CHESONI

JUDGE