IN THE COURT OF APPEAL OF BELIZE, A.D. 2004

CRIMINAL APPEAL NO. 10 OF 2003

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTION **APPELLANT**

AND

JULIANA CHOC **RESPONDENT**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mr. Kirk Anderson, Director of Public Prosecution for Appellant.
Mr. B. Simeon Sampson S.C. for the Respondent.

—

3 March & 18 June 2004.

MOTTLEY P.

1. The respondent was indicted for murder, the allegation was that, on April 12, 2002 she, by unlawful harm, “intentionally caused the death of a person (name unknown)”, her baby.

2. During the course of her closing address, counsel for the prosecution conceded that the prosecution had not established the offence of murder since it was not established that the respondent had the necessary intention to kill her baby. Counsel however invited the jury to find the respondent guilty of manslaughter.

3. In his summation, the learned Chief Justice told the jury that he did not think that in the interest of justice he could leave manslaughter to them for their consideration and therefore withdrew the issue of manslaughter from the jury. He, however, left to the jury for their consideration, the offences of causing injury to a child at birth and concealment of the body of a child under the provision of sections 114 & 115 of the Criminal Code Cap 101. The jury found the respondent guilty of concealment of the body of a child. She was sentenced to six months imprisonment.

4. The Director of Public Prosecution sought the leave of this Court, under the provisions of section 49(1) of the Court of Appeal Act Cap 90, to appeal against the ruling of the Chief Justice in which he withdrew the offence of manslaughter from the consideration of the jury. The Director alleged that the Chief Justice "erred in withdrawing the offence of manslaughter from the jury as there was sufficient evidence led by the Crown to justify the offence being left to the jury for their consideration". He further submitted that the

Chief Justice erred in withdrawing manslaughter from the jury because he had incorrectly interpreted the provisions of section 127(2) of the Indictable Procedure Act Cap. 96.

5. The Director is empowered to appeal by virtue of the provisions of section 49(1) of the Court of Appeal Act which states:

> *Without prejudice to any right of appeal granted to the prosecution by any other provision of this Act, an appeal shall be to the Court at the instance of the Director of Public Prosecution in the following cases:-*
>
> *(a) where a person tried on indictment has been acquitted by the direction of the Judge at the close of the case for the prosecution whether in respect of the whole or part of the indictment; or*
>
> *(b) where the Judge quashed the indictment;*
>
> *(2) An appeal under subsection (1) may be made on the following grounds:*
>
> *(a) …….*
>
> *(b) with leave of the Court or upon the certificate of the Judge who tried the accused that it is a fit case for appeal against the acquittal, or any grounds of appeal*

which involves a quest of fact alone or a question of mixed law and fact or any other ground which appears to the Court or Judge to be a sufficient ground of appeal.

6. The prosecution's case against the respondent was that the respondent had become friendly with Titus Cal with whom she had sexual intercourse twice a month for about a year. Cal alleged that the respondent told him that she was pregnant. He however could not recall precisely when he was told this as he did not take the respondent seriously and in any event thought she was joking. He subsequently changed his mind and advised the respondent to consult a doctor. He gave her money to assist in paying the doctor.

7. Constancia Chun told the Court that she, along with a Juliana Choc, not the respondent, went to use the use the toilet at the house of Antonia Cal in Punta Gorda. The toilet which was a pit latrine is situated outside of the house. On opening the door of the toilet, Ms. Chun observed the respondent using the toilet. She quickly closed the door and then returned to the house. Later she heard groans coming from the toilet,

8. These ladies returned to the toilet and spoke to the respondent. The respondent said that she had pains "in her belly and that her

period had started". Ms. Chun, at the request of the respondent, purchased Stayfree sanitary pads for her. Juliana Choc stated that she knew the respondent who lived in the same village and she would see her everyday. She had seen the respondent on 12 April, 2002. She did not appear to be pregnant.

9. On 15 April, 2002, the body of a baby was discovered in the pit latrine of the toilet at the house of Antonia Cal. The body was subsequently retrieved from the pit. Postmortem examination on the body revealed that the cause of death was asphyxia due to drowning in the toilet pit. It is clear that there was evidence that the body had a separate life from the mother and had lived for sometime. Dr. Raju, who examined the respondent, concluded that she had recently given birth to a child.

10. In her unsworn statement, the respondent insisted that she did not know that she was pregnant. She alleged that she "had my period every month so I never knew I was pregnant". She stated that, two weeks after she had her period, she was told that a child was found in the pit but she insisted it was not hers.

11. As earlier stated, the Chief Justice withdrew the offence of manslaughter from the consideration of the jury. It is against this action that the Director is seeking the leave of the Court of Appeal.

12. The Director submitted that his submission is “based on the principle in law that if one were to be a parent of a child and you fail to avert harm being caused to that child you have a duty under (the) Criminal Code”.

13. While there was evidence from which the jury could conclude that the respondent knew that she was pregnant, in our opinion, the evidence fell far short of what it required to found a charge of manslaughter.

14. Manslaughter is defined by section 116 of the Criminal Code Cap 101. The section states:

> *116 (1) Every person who caused the death of another person by any unlawful harm is guilty of manslaughter.*
>
> *(2) If the harm was negligently caused, he is guilty only of manslaughter by negligence.*

In section 96 of the Code, “harm” is defined as meaning “any bodily harm, disease or disorder whether permanent or temporary. By section 97 of the Code, “harm” is said to be unlawful if it is intentionally or negligently caused without any of the justification as set out in the Code.

15. In order to establish the offence of manslaughter, the prosecution would have had to prove that the respondent unlawfully caused harm to the baby. This is an essential ingredient of the offence. To do this, it was incumbent of the prosecution to prove that she either intentionally or negligently caused harm to the baby and that she had no justification as set out in the Code for causing such harm. It is not enough, in our view to prove that she knew that she was pregnant. During exchanges between the Director and the Court, the Director properly conceded that there was no evidence that the respondent knew when the baby was due or that it was full term or she was about to deliver. The prosecution was under a duty to lead evidence to show or from which it could be inferred, that she knew the approximate date when the baby was due and that it was full term. In addition, that she knew or ought to have known that she had gone into labour. It was not sufficient in the circumstances of the case merely to lead evidence that while the respondent was in the toilet she was groaning and ask the jury to draw the inescapable inference that she knew she was delivering the baby. It must be accepted that people in a toilet groan for all kinds of reasons. Thus, in our view, there was no evidence from which it could properly be inferred that she knew or ought to have known that she was about to deliver and that the birth of the baby was imminent.

16. If the prosecution had established these facts and the respondent had gone to the toilet without having any regard to the likelihood that she may have given birth to the child or recklessly and without any regard that she might, that would have been evidence which would have required the Chief Justice to have left the issue of manslaughter for the consideration of the Jury. In the absence of such evidence, the Chief Justice, in our view, was correct in not leaving that issue to the jury. [It would have been extremely dangerous to do so as it might have been an open invitation to the jury to indulge in speculation, which would be wrong].

17. The learned Director also submitted that the Chief Justice erred in leaving the offences under sections 114 or 115 to the jury having withdrawn murder and manslaughter from the jury.

18. Section 127(2) of the Indictable Procedure Act Cap. 96 states:

> *Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child, if it is not satisfied that the accused person is guilty of murder, to acquit him thereof and return a verdict of guilty of causing harm to such child contrary to section 114 of the Code or a verdict of concealment of the body of such child contrary to section*

115 of the Code if satisfied that the accused person is guilty of any such crime.

19. We did not consider that this was a ground on which the Director could appeal as the respondent had in fact been convicted.

20. For the reasons stated above the Court refused to grant leave to the Director to appeal in this matter.

MOTTLEY, P.

SOSA, J.A.

CAREY, J.A.