Crim.A. 70/64

ARMAND STROUL

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal.
[June 22, 1964]
Before Olshan P., Landau J. and Cohn J.

Criminal law - administration of wrong *blood type - causing death by negligence - causal connection* - duty *of care - Criminal Code Ordinance, 1936, secs. 218, 219(e) and 231.*

The appellant, a qualified hospital laboratory technician, supplied blood for transfusion to a patient without making sure - by inspection of the label on the bottle containing the blood and carrying out certain prescribed tests - that the blood was compatible with that of the patient. The two were in fact not compatible and after being transfused with blood supplied the patient died. The appellant was convicted and sentenced in the Magistrate's Court and his appeal to the District Court failed. On appeal to the Supreme Court, two submissions in law were made: that the acts or omissions of the appellant were only of the nature of "acts of preparation" and the effective cause of the death were the acts and omissions of the hospital staff to whom the appellant had delivered the blood; that the appellant owed no duty of care to the patient since in the circumstances it was not to be assumed that the blood would be administered without examination by others of the hospital staff.

Held (1) The mere fact that others are negligent in carrying our their duties does not break the causal connection between a person's initial negligence and the ultimate result.
(2) Every person owes a duty of care to the eventual victim when he does an act which may endanger the life or health of another and he cannot plead in defence that he relied on the fact that others might or should later take steps to avoid the danger,

Israel cases referred to:

(1) *Cr.A.* 180/61 - *Baruch Alpert v. Attorney-General* (1962) 16 P.D.1416.

(2) Cr.A. 11/52 - *Joseph Menkes and Others v. Attorney-General* and Counter-appeal (1958) 12 P.D. 1905.

English cases referred to:

(3) *M'Alister (or Donoghue) v. Stevenson & Others* (1932) A.C. 562.

S. *Toussia-Cohen* for the appellant.
G. Bach. Deputy State Attorney. for the respondent.

COHN J. The appellant was convicted in the Rehovot Magistrate's Court of a crime under section 218 of the Criminal Code Ordinance, 1936 (hereinafter called "the Ordinance") in that he caused, by want of precaution not amounting to culpable negligence, the death of Dr. Bela Granadi. The Tel Aviv-Jaffa District Court, sitting on appeal, confirmed the conviction, but gave the appellant leave to appeal again to this Court.

The relevant facts, no longer in dispute, are as follows:

(a) The appellant worked as a "qualified laboratory worker" in the blood bank in the "Assaf Harofeh" hospital in Tzrifin. His task was *inter alia to* supply the operating theater of the hospital, from the stock in the blood bank, the blood required for transfusion of patients. For this purpose a sample of the blood of a patient is given to him; and it is well known, and the appellant knew, that not all types of blood intermingle and that the danger of immediate death exists if a person with one type of blood is infused with one of the other types which do not mix with his blood. The appellant's duty as, therefore, to inspect first the patient's type of blood and mark it with red pencil on the order form sent to him; to take from the refrigerator bottles of blood of the type which suit the patient's blood type and afterwards to do three "cross-breeding" tests, each according to a different method - that is to say, cross-examination tests of blood mixture of the patient's blood with the blood taken from the refrigerator, so as to know and confirm that they really mix. When the time comes for the blood transfusion, the responsible nurse in the operating theater ends a messenger to the blood bank, who receives either from the appellant or another employee in the blood bank

the bottles of blood intended for the patient concerned and which were put back, after all the said tests, into the refrigerator, marked with the patient's name and his blood type, and the order form attached to them.

(b) When on 19 December 1960 the appellant received a sample of the deceased's blood, he tested it and determined its type as required; afterwards he went to the refrigerator and took out bottles of blood from it, which stood in the place where, to the knowledge of the appellant, bottles of blood of the deceased's blood type stood. On these bottles the type of blood which they contain was marked. Had the appellant looked at them, he would have seen that the blood in one of the bottles was not of the deceased's blood type. The appellant relied, it seems, too much on the place where the bottles stood in the refrigerator, which was, as I have said, the place where the bottles of the suitable blood type stood, and he did not look at the labels of the bottles. Not only that, but he did not do the said "cross-breeding" test; he returned to the refrigerator the sample of the deceased's blood together with the bottles which he had taken from the refrigerator as aforesaid, marked as intended for the deceased, with the order form attached to them.

(c) On 20 December 1960, the day of the operation, a messenger from the operation theater came to the blood bank, and another employee in the blood bank went to the refrigerator, found the bottles for the deceased and handed them over to the messenger. Had she looked at the bottles, she would have discovered that the type of blood marked on one of them did not match the type of blood marked on the order form as the patient's blood type, but she also did not look.

(d) The messenger brought the bottles of blood to the operating theater, and when the person responsible in the theater at the time wanted to look at them and see if everything was as it should be, the doctor requested him to hand him the bottles of blood, and so he did; and the inspection was not done.

(e) The death of the deceased on the same day was caused by the transfusion of blood which was not of the type of the deceased's but of a different type which does not mix with it.

Before us Mr. Shlomo Toussia-Cohen, counsel for the appellant, tried to argue that although the appellant did not do all the "cross-breeding" tests which it was his duty to do as aforesaid, then at least he did some of them - or if he did not carry them out in the way that it was his duty to do, then at least he carried them out in a different way. At this stage we will not entertain such factual arguments, and we do not dispute the finding of the learned judge in the Magistrate's Court that the appellant did not do "cross-breeding" tests, not all of them or part of them (paragraph 19 of the judgment); and we agree with the evaluation of the learned judge that the appellant thereby was in breach of "an elementary obligation" imposed upon him. And furthermore, by writing the word "compatible" on the order form next to the serial numbers of the bottles of blood which he had prepared for the deceased, he created the wrong impression that he had actually carried out the required tests and found that the types of blood were compatible with one another.

Learned counsel for the defence raised two legal arguments: the first, that the acts or omissions of the appellant did not cause the death of the deceased, they were only within the "acts of preparation" of the acts or omissions of others who caused his death; and the second, that an offence of want of precaution is only committed when a duty of care is imposed on the accused in respect of the deceased, and here there was precisely no duty of care imposed on the appellant toward the deceased. I have not found any substance in these arguments.

As to the causal connection between the appellant's acts or omissions and the death of the deceased, it is sufficient for the prosecution to rely on the provisions of section 219(e) of the Ordinance which provides as follows:

> "A person is deemed to have caused the death of another person although his act or omission is not the immediate or not the sole cause of death -
>
> ...
>
> (e) if the act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or other persons."

Mr. Toussia-Cohen says what is involved are the acts or omissions of others which "accompanied" the appellant's acts or omissions - excluding acts or omissions of others which followed them. The word "accompanied", which the legislator used, indicates, according to this argument, the simultaneity in time of the said acts or omissions, as though they were all done or omitted simultaneously and not one after the other. Here, these were omissions by the rest of the hospital employees who were obliged, in his argument, to inspect whether the blood prepared by the appellant was really suitable for transfusion to the deceased, which occurred *after* the appellant's acts or omissions and not simultaneously with them; and therefore there is nothing in section 219(e) to constitute the appellant's act or omission as the cause of death by virtue of the law.

There are several answers to this argument: first, the legislator did not in using the word "accompany" adopt technical language at all; his purpose was to assume the existence of different acts and omissions, except for the accused's act or omission, which possibly also caused the victim's death; and it is irrelevant whether they came simultaneously or earlier or later - provided that all of them might have contributed to the death. Secondly, the pleader reveals a misunderstanding of the English language, if he thinks that this word means just to accompany simultaneously; in every dictionary, other meanings will be found in addition to that meaning, such as to supplement, to complete, to coexist, to be added to and not only simultaneously. And thirdly, and this to me is the main point: if you indeed say that the acts or omissions of the rest of the hospital employees did not "accompany" the appellant's acts or omissions in the meaning of this word in section 219(e), the result is not that only because of this are they regarded as the cause of death and not the appellant's act or omission. But the opposite is the case; if there had not been acts or omissions of others which accompanied, in the full meaning of that word in section 219(e), the appellant's act or action, then the appellant's act and omission remained the sole and immediate reason for the death, as stated in the beginning of the section. The mere fact alone that they were "accompanied" by acts or omissions of others as possible causes of the death, creates the problem which section 219(e) is meant to settle.

Accordingly the appellant's act or omission should be regarded as the cause of the death of the deceased, in spite of the possibilities (or even the certainty) that it was possible to avoid the disaster had the rest of the hospital employees subsequently examined the blood

prepared by the appellant for that purpose and before the transfusion. Because the rest of the employees are not standing trial before us, I see no need to inquire whether any duty was imposed on them to carry out such additional tests; but as regards the second submission of law I will assume for the benefit of the appellant that he did in fact rely on additional tests being done as aforesaid.

The submission, it will be recalled, is that no duty of care was imposed on the appellant in respect of the deceased and therefore his lack of care gives no cause for his being criminally charged. This argument rests on the rule handed down in the House of Lords in *Donoghue v. Stevenson* (3), that a person owes a duty of care towards all those to whom a dangerous thing of his manufacture might reach and in the circumstances one may suppose that the dangerous thing will reach that person without further examinations or changes. From the affirmative one arrives at the negative, that if in the circumstances it may be supposed that the dangerous thing will undergo further examinations before reaching that person, then the manufacturer does not owe that person a duty of care.

With due respect to this rule, the cases are not identical. First, there a bottle of beer was involved, in which the remains of a snail which certainly would harm were found, whilst here a prophylactic was involved. Secondly, it was possible to discover the remains of the snail, whether in the bottle before it was emptied or in the glass into which the beer was poured; here the danger of the prophylactic was hidden and could only be discovered by laboratory tests. Thirdly, and this is the main point, there the beer was not prepared for some particular person, either the plaintiff in the case or a specific, known person; here the blood was prepared for the deceased only and had to be prepared according to his real needs. To whom, if not to the deceased, did the appellant owe the duty to prepare the blood with the required care?

Rather, I agree with the submission of Mr. Bach, speaking for the Attorney-General, that the whole question, to whom the appellant owed a duty of care, does not arise at all in view of section 231 of the Ordinance, which imposes a duty on every person doing an act that might endanger the life or health of another to do it with reasonable care; and the section prescribes, at the end that a person who did an act as aforesaid in violation of this duty is regarded as having caused the consequences which result from this omission to the

life or health of any person. The appellant well knew how great the danger was to the patient's life if he received a transfusion of blood which did not mix with his own. The duty imposed on him, under section 231 was to prepare with reasonable care the blood for transfusion, that is to say, by taking all the steps and carrying out as aforesaid all the required and fixed tests in the matter. He violated this duty in that he did not take the steps and did not carry out those tests. He is criminally responsible for the consequence of his omissions, the death of the deceased, and it is immaterial that he relied or could have relied on the fact that others would later do the tests.

I am of the same opinion as the learned judges in the District Court, that as to the matter before us it is possible to draw an inference from the matter which was before this Court in *Alpert* (1). There, a doctor made a mistake in prescribing a medicine which, as prescribed, contained a quantity of poison sufficient to kill the patient. This prescription was directed to the chemist, and there was a clear duty on the chemist to check it and verify that the doctor really did not err in prescribing a quantity of poison which, also according to the knowledge of the chemist, could kill a person. Nonetheless, the doctor was found criminally responsible in that he was in breach of the duty of reasonable care placed on him. And if the doctor there was responsible, the appellant before us *a fortiori,* because there the act of preparing the medicine was the chemist's, whilst here the act of preparing the blood is the appellant's and precisely his task and responsibility.

I would dismiss the appeal against conviction.

The appellant also appealed against the severity of sentence. The District Court did not see fit to interfere with the sentence, and there is no need to say that it would not have given leave to appeal for a second time to this Court with regard to the penalty. The learned judge in the Magistrate's Court sentenced the appellant to one year's imprisonment, of that six months actual and six months on suspended sentence, and in addition to a fine of IL 1,000. In giving sentence the learned judge says:

> "Unfortunately the present is not a case of a mere inadvertent mistake, but an act of negligence done intentionally out of disregard for the elementary duties imposed on the accused.... The accused was capable

> of estimating the extent of danger to a person's life to be expected from his act ... and he was obliged... to pay respect to the essentiality of those means of care which medical science has prescribed in order to prevent danger to a person's life... .
>
> It is true that although the act was committed at the end of 1960, the prosecution for some reason found it necessary to lay an indictment only close to the end of 1962, and this delay was an injustice to the accused. But the seriousness of the accused's act is so great that one cannot attribute to this delay a decisive role in fixing the penalty. although I do not disregard it."

The main argument of learned defense counsel before us was that since the accident three and a half years have elapsed, of which two passed waiting for trial and eighteen months during trial, and fear of the law hovered over the appellant for all this long period. This is a consideration which should properly be taken into account in mitigating the appellant's sentence; but since we are convinced that the learned judge also took this consideration into account in mitigating the appellant's sentence, that is no longer ground for our interference.

The appellant was fortunate that he was charged with an offence under section 218 and not with a felony under section 212 of the Ordinance; and in view of the serious consequence of the appellant's act and omission, the punishment imposed on him seems to be too light.

The appeal against sentence is also to be dismissed.

OLSHAN P. I concur.

LANDAU J. I concur.

As to the interpretation of section 219(e), I expressed the opinion in *Menkes v. Attorney-General* (2) that this section, with its five subsections, does not exhaust all the

cases in which a person will be regarded as causing the death of another under sections of the criminal law which prescribe the criminal offences of causing death, among which is section 218. Section 219 was drafted on the basis of precedents in English case law, and its source is in section 262 of Steven's *Digest of Criminal Law,* prepared on the basis of the English case law (see 8th ed., p. 215). I have studied the English judgments mentioned by Steven as authority for his section 262(e), from which our section 219(e) is copied, and I have found that in all of them the accused's act or omission was "accompanied" by the victim's or a third person's act or omission in the narrow sense of the term, that is, the effect of two factors simultaneously and not one following the other. It seems to me that also according to this narrow chronological test, the case before us comes within section 219(e), since the appellant's negligence, expressed mainly in the failure to carry out the required tests, whilst noting "compatible", which is intended to testify that the tests were carried out, continued to have its damaging effect also when each of the other people, who could have avoided the accident, was negligent in fulfilling his duty, till the final stage in which the lethal blood was actually to be used. (Cf. *Alpert* (1) at pp. 1420-1421.)

Even if we use the flexible test outside section 219 which 1 suggested in *Menkes* (2): "if according to the facts the causal connection between the accused's act and the death is so strong that criminal responsibility for the death is to be imposed on the accused", there is no doubt that the requirements of this test were here fulfilled. Out of all the measures of care which should have been taken in order to prevent a disaster from transfusion of blood of an unsuitable type, the laboratory test which the appellant should have done was the basic and principal measure. Carrying out this test was entrusted to him and to him alone, in reliance on his special professional capability, and although others could have prevented the consequences of his gross negligence, none of them was obliged to do so by checking by some laboratory test, to do which was imposed on the appellant.

Appeal dismissed

Judgment given on June 22, 1964