



JUDICIARY OF
ENGLAND AND WALES

R

-v-

Nkosiyapha Kunene and Virginia Kunene

In the Central Criminal Court

28 February 2014

Sentencing Remarks by Mr Justice Singh

[The Defendants may remain seated for now.]

Introduction

1. This is on any view a tragic case.
2. The Defendants have both pleaded guilty to the offence of gross negligence manslaughter. They were the parents of Ndingeko Kunene, who was born on 1 January 2012. He died on 14 June 2012. He was found to have been suffering from florid rickets resulting from severe vitamin D deficiency.
3. Although at one point it was not entirely clear, it has become clear as a result of discussions that have taken place between the parties during the course of this sentencing hearing that there are no material disputes of fact. Those discussions have led to further written bases of plea being filed by both Defendants today. The Crown opened the hearing on the basis of its Case Summary. The facts, events and dates set out in that summary are not disputed on behalf of the Defendants, although they have drawn attention to certain other matters in their

bases of plea. Reference should be made to all of those documents for greater detail. I hope it will suffice for present purposes if I summarise the facts.

Factual summary

4. From birth Ndingeko had medical problems. On the day he was born he was moved for a day or two to the Special Care Baby Unit because of his low weight and difficulty in establishing breast feeding. However, he was discharged from hospital on 6 January. A care plan was put in place for visits by Social Services and community midwives. Before he was discharged, the Defendants said that they would bring him to hospital if he was unwell. It is emphasised on behalf of the Defendants that Ndingeko's vitamin D deficiency was not diagnosed at that stage, nor was Mrs Kunene given advice about taking supplements, which would have been important in particular because she was going to breastfeed exclusively and in view of her ethnic origins and her vegan diet.
5. Over the following weeks Ndingeko was visited by health visitors on a number of occasions. However, Mrs Kunene did not attend the scheduled 8 week check up on 8 March and Ndingeko was not seen by a health care professional again before 14 June.
6. From April 2012 it was appreciated by the Defendants that their son was unwell. However, his health fluctuated over the next two months. Although he was not visited by healthcare professionals as such, Mrs Kunene's sister is a midwife and did visit on occasion. On 9 April she noted that Ndingeko had apparently lost weight and his breathing was wheezy. She and another relative, who is a health visitor, expressed concerns more than once and asked Mrs Kunene to consult her

GP. She said that she would do so but would speak to her husband first. It is clear that, because of their own religious beliefs, the Defendants did not in fact seek medical assistance, nor did they seek advice for example from the NHS Direct helpline.

7. Both Defendants are strict Seventh Day Adventists. However, their views (in particular Mr Kunene's) appear to be very extreme and do not reflect the official doctrine of that church. On the other hand, it has been emphasised on behalf of the Defendants and, in particular Mrs Kunene, that they have not refused all medical interventions at all times. For example, a vitamin K injection was accepted shortly after the birth although it had initially been refused.
8. On 14 June 2012 Mr Kunene arrived home at around noon having done a night shift and was told that Ndingeko was not feeding properly. He noticed that his son's health had deteriorated. He appreciated that this was something serious and that his son might be close to death. He thought that he was suffering from low blood sugar and was dehydrated, so he prepared a solution of salt and water for him. Ndingeko took this and straight afterwards breastfed.
9. Mr Kunene went to bed at about 3:00 pm. Shortly afterwards Mrs Kunene took their son upstairs to have a nap and laid him in bed next to his father. Mr Kunene waited until his son fell asleep before allowing himself to follow.
10. Later Mr Kunene was woken by his wife, who said Ndingeko was lifeless. Mr Kunene took his son downstairs and tried CPR to no avail.

The admitted offence of manslaughter

11. Importantly, Mr Kunene accepts, as he said in interview, that he realised when he returned from work that day that Ndingeko might die and decided not to call for medical assistance. On that basis he accepts that he is guilty of gross negligence manslaughter.
12. Mr Kunene accepts that he advised his wife that it would be a sin in the eyes of God to call for medical assistance as he had made a vow that he would await guidance from God before doing so.
13. Mrs Kunene has, in a written basis of plea which is agreed by the Crown, pleaded guilty to the offence of gross negligence manslaughter only on the basis of the omission to act to call for medical attention on 14 June itself. She accepts that she realised that her baby was very unwell and at risk of death but did so only on that day. She adds that on that day itself she did wish to seek medical attention for the baby but Mr Kunene said that this would be a sin.
14. Mrs Kunene says that her religious convictions were a significant factor in her deference to her husband's view that medical attention should not be sought and her omission to call for medical attention.

Legislation and guidelines

15. The maximum penalty for manslaughter is life imprisonment.
16. By virtue of section 143(1) of the Criminal Justice Act 2003 this court must consider an offender's culpability as well as any harm which the offence caused.
17. There is no specific guideline issued by the Sentencing Council or its predecessor for gross negligence manslaughter. However, general guidance is to be found in

the guideline issued by the former Sentencing Guidelines Council on 'Overarching principles: seriousness'.

18. It is not suggested on behalf of the Crown that an indeterminate sentence would be justified in this case. Nevertheless it is suggested that Schedule 21 to the 2003 Act is of some relevance. This is because it provides a clear indication by Parliament of its wish to see sentences for homicide increase by comparison to the previous position. As Lord Judge CJ said in R v Wood [2010] 1 Cr App R (S) 2, at para 23: "this coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before."
19. In R v Reeves [2013] 2 Cr App R (S) 21, which was a case of gross negligence manslaughter, at para 13, Treacy LJ said: "it is now beyond argument that the effect of the Criminal Justice Act has been to lift the level of sentencing in such cases... In short, the fact that a death has resulted from criminal conduct is to be given rather greater recognition than hitherto. Of course all cases are fact specific but the principle holds good. What might have been seen as a general indicative figure of two to two and a half years after a trial for this kind of case in the past can no longer apply."
20. The court explained that the death of the victim was by definition great harm and that on the facts of that case the Appellant's culpability was high since she had totally abandoned her responsibilities as a mother. In that case there was mitigation in the form of the Appellant's previous good character and absence of any other suggestion of ill treatment of her children. A sentence of 3 years and 9

months after a guilty plea was upheld on the basis that the starting point after trial would have been 5 years and a discount of 25% was appropriate given its timing.

21. The Crown submit (and I accept) that some indirect assistance can be gained from the guideline issued by the Sentencing Council on offences of child cruelty. If Ndingeko's life had been saved, the Crown submit (and I accept) that the Defendants' conduct before 14 June 2012 would have fallen at least within the third level of that guideline. For that level the guideline suggests a starting point after trial of 36 weeks imprisonment and a range of 26 weeks to 2 years, where the offence involves more than one incident of neglect, not amounting to long-term behaviour, or a single incident of long-term abandonment. However, in the present case, there was the additional significant fact that Ndingeko died and the Defendants accept that they are guilty of manslaughter.

Aggravating and mitigating features

22. In my view, the aggravating features of this case are these:

- (1) The victim, as a baby, was particularly vulnerable.
- (2) The Defendants failed to heed warnings from relatives that they should seek medical help from April 2012 onwards at a time when he was apparently unwell.

23. It is accepted on all sides that the following are mitigating features:

- (1) The good character of each Defendant. Mr Kunene is now 36 years of age and Mrs Kunene is 32. They are a dedicated and humble couple.
- (2) The fact that the Defendants were otherwise apparently good and caring parents of their son.

(3) The complete absence of any evidence to suggest that Ndingeko had been assaulted or ill treated by his parents.

(4) Not only have the Defendants lost their first child, Mrs Kunene has since had a miscarriage.

24. I have taken into account Professor Nussey's evidence that both the Darent Valley Hospital and Northumberland Medical Centre played a part in failing properly to advise the Defendants and to prescribe vitamin D supplements (Ergocalciferol). The necessity and use of that supplement (which are suitable for vegans and all the more important as Mrs Kunene is of African origin) was never explained to either of the Defendants. I have also taken into account the evidence of Dr Allgrove and Dr Barnard in this context. As I have already mentioned, Ndingeko's vitamin D deficiency was not diagnosed in the early days after his birth and before he was discharged from the neo-natal unit.

The Pre-Sentence Reports

25. I have read the pre-sentence reports in the case of each defendant.

26. The report in respect of Mr Kunene realistically accepts that an immediate custodial sentence is likely in this case. On his behalf counsel has urged me to consider suspending any custodial sentence.

27. The report in respect of Mrs Kunene also accepts that immediate custody is a real possibility but suggests that consideration be given to whether the sentence could be suspended. This has been urged upon the court by counsel on her behalf at the hearing before me.

28. I am unable to accept those submissions in view of the seriousness of this case.

Appropriate sentence

29. As I have already said, the sentence must fit the facts of each case. I accept that this was not as serious a case as that in Reeves on its facts. Nevertheless, the defendants have by their pleas accepted that they were guilty not just of negligence but gross negligence. Furthermore, they accept that they realised there was a risk to Ndigeke's life, at least on 14 June itself. They had a particularly high degree of responsibility for his health and welfare, as his parents, but they decided not to call for medical assistance that day. I accept that Mr Kunene's culpability was higher than that of Mrs Kunene, who wanted to call for medical assistance that day but deferred to his view. Furthermore, the background of the preceding two months is important. Although the Defendants did not appreciate the risk of death, they did realise that their son was unwell but did not seek or obtain medical assistance.

30. The secular courts of this country apply the secular law of the land. They do so equally to all who come before them. The law respects the right of everyone to freedom of thought and belief. However the right to manifest one's religion is not absolute. It is limited in particular by the rights of others. The state has a particularly important duty to protect the right to life, especially when a young child is concerned.

31. In my view, having regard to all the circumstances of this case, including aggravating and mitigating features, the appropriate sentence after trial would have been 4 years for Mr Kunene; and 3 years for Mrs Kunene. This is because of the difference in their degree of culpability, for reasons I have already set out.

32. I propose to give them about 25% credit for their guilty pleas. I do not give full credit of one third in view of the time at which the pleas were entered, which was a few weeks before the trial date but not at the earliest reasonable opportunity. This is in fact greater than would normally be the case for pleas entered relatively close to the trial date but this is because the Crown have urged upon me that a more generous approach is justified in this case, since the Defendants' pleas in substance reflect admissions they made to the police at their interviews and because discussions between counsel were taking place about the possibility of pleas being entered before they were.

[The Defendants should now stand.]

33. Mr Kunene: the sentence of the court is imprisonment of 3 years.

34. Mrs Kunene: the sentence is imprisonment of 2 years and 3 months.

35. Unless released earlier, each of you will serve one half of your sentence and will then be released on licence until the end of your sentence. While on licence you will be liable to recall by the Secretary of State.

[The Defendants can be taken down.]

Postscript

36. There is one further aspect of this case which I should mention. Ndingeko Kunene's case was known to Social Services and health authorities from an early

stage in his life. I have been informed that a Serious Case Review has already taken place and is due to report shortly.

37. It is to be hoped that all necessary enquiries will have been made by those authorities to establish that everything was done to protect Ndingeko's life that could reasonably have been done.

38. It would not be appropriate for me to comment further since I have not heard what others who are not parties to these proceedings and are not represented in court may have to say about these matters.