MALTA

COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

MAGISTRATE DR.
CLAIRE-LOUISE STAFRACE

Sitting of the 14 th October, 2013

Number. 1306/2011

A

-vs-

B

The Court,

Having seen that the accused B holder of identity card number X

Was charged:

That between the 24th December 2006 and the 25th December 2006, with having at St Luke's Hospital in the Maltese Islands, through imprudence, carelessness, unskillfulness in his art or profession, or non observance of regulations, caused the death of Oliver Cauchi of I.D. 130252(M); and

Moreover, in the same period, place, time and circumstances as a public officer or servant over which it was his duty to watch or which by virtue of his office he was bound to repress.

Seen the request by the prosecution on pronouncing judgment or in any subsequent order, sentence the person convicted or the persons convicted, jointly or severally, to the payment, wholly or in part, to the registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, including such experts as would have been appointed in the examination of the process verbal of the inquiry, within such period and in such amount as shall be determined in the judgment or order ai termini of Article 533 of Chapter 9;

Seen all documentation exhibited;

Heard all evidence;

Seen the note of the Attorney General dated twenty fifth (25) day of June two thousand and twelve (2012) where consent is being given for this case to be treated and decided summarily under Articles 225, 141 and 23 and 533 of Chapter 9 of the Laws of Malta;

Seen that accused gave his consent that this case be treated and decided summarily by this Court;

Seen and heard submissions both verbal and written by both parties;

Seen all acts of the procedures.

Having considered that;

That the accused was being accused of involuntary homicide of Oliver Cauchi under Section 225 of Chapter 9 of the Laws of Malta.

FACTS OF THE CASE

The facts of this case are that a certain Oliver Cauchi died at St Lukes Hospital on Christmas eve of 2006 after a series of complications. Oliver Cauchi was a person with a serious heart condition In fact he had one heart failure and he had serious difficulties of respiration and chest pains. This lead to this hear rate being very weak. Apart from this, Oliver Cauchi suffered from diabetes which was so severe that he often complained of numb legs especially when he was lying in bed and therefore this meant that he had *peripheral neuropathy*.

Oliver Cauchi also complained of *intermittent claudication* which meant that he had pains in his lower leg because of lack of circulation in the arteries of the leg. To top it up, Oliver Cauchi was a big smoker in a region of 30 sigarettes a day which made him even more in the danger zone.

All these complications lead to the necessity of performing a *coronary artery bypass grafts* since an *angioplasty* was ruled out as being too dangerous and this by Profs Albert Fenech.
The operation of *artery bypass* was performed for the 7th September 2006 with a team of specialists under the supervision of C was to be conducted, one of which was the accused whose task was that of *endoscopic vein harvesting.* It is important to point out that due to Oliver Cauchi's ill health, he had a very high risk in the operation which was at 5% and therefore he was rated as a very high risk patient in the operation.

Mr Kevin Schembri from the same team as mentioned started off by opening the chest so that the accused could perform the vein harvesting from the upper limb. This meant that he had to explore all the veins to see which was the best one to harvest and transfer to the chest, but

soon he realised that the veins were badly formed so much so that he drew the attention of C who was his superior to have his opinion. One must add that veins are all thinner than arteries but in this case, and this due to the fact that Oliver Cauchi had all those health problems for years, all the veins and arteries looked practically the same.

After that B showed the vein to C, they decided that the former could harvest that one. Upon cutting the vein they all realised that there was something wrong in it in that it looked more like an artery than a vein and when they took the *clamp* that was holding the harvested vein, a lot of blood came out of it which meant that it was truly an artery (*superficial femoral artery)* not the *saphenous vein*.

C immediately performed a bypass in the leg and then the operation of coronary bypass continued with a new vein being harvested. Subsequently, Oliver Cauchi was admitted to Cardiac Intensive Care Unit in a stable condition.

Soon after the operation it resulted that Oliver Cauchi's left leg was cold and it was realised that there started a *contracture*. C immediately consulted a vascular surgeon Mr Mark Schembri to see what can be done. On examination, Mr Schembri decided to operate the leg to avoid amputation and a *graft* was made to the one previously made by C to an artery at the back of the knee. Subsequently a *fasiotomy* was performed to reduce the tension of the lower limb and this after consultation with Prof Frederick Zammit Maempel who is an *orthopaedic surgeon.* A plastic surgery was performed by Mr Francis Darmanin to remove any dead skin in Oliver Cauchi's legs also medically known as *debridement.* Oliver Cauchi was also treated in an isolation room during this period and he also suffered from a *pulmonary oedema* which is basically a heart failure twice. During all this period Oliver Cauchi was also treated with the drug *warfarin* which basically is a drug for thinning the blood and *aspirin* which serves that purpose too. During this period of time Oliver Cauchi was seen by a number of specialists as well.

Progress was made from then onwards until Oliver Cauchi was released from hospital. However in the first week of December 2006, Oliver Cauchi's left toes started to become bluish in colour and Mr. Mark Schembri, who was consulted for the matter, was of the opinion that Oliver Cauchi's left limb was to be amputated. C was of the opinion that before, what is known as *magnetic resonance angiogram* be performed to check whether there is any blood flowing in the arteries of that limb. This was done on the 20th December 2006 and in fact it showed that no blood was around the arteries and therefore the findings of Mr Schembri that the leg was to be amputated was correct. It was decided that there was no hurry to perform the amputation so that Oliver Cauchi could go home for the Christmas week and the operation was therefore scheduled for the 6th January 2007.

On the evening of the 23rd December 2006, Oliver Cauchi was found unconscious in a pool of blood at his home on the sofa by his son. He immediately called his mother who in turn called an ambulance. In the ambulance *CPR* was performed and on arrival to hospital Oliver Cauchi had fixed dilated pupils and no pulsation. It transpired that there was also some blood coming out of the left thigh. During all the period Oliver Cauchi remained with fixed dilated pupils even when Mr Schembri performed the left leg amputation which was done without anaesthesia. It also transpired from the medical file of Oliver Cauchi, that the anaesthetist removed from his stomach around a litre and a half of blood and continued to loose blood all through that period of time. Oliver Cauchi was certified as clinically dead on the 25th December 2006 at three (3) o'clock in the morning.

THE MAGISTERIAL INQUIRY

After Cauchi's death, a magesterial inquiry was opened where various experts were appointed to help the investigating Magistrate to reach her conclusions. These were Dr. Mario Scerri, Profs Marie Therese Camilleri

Podesta` and Dr Ali Salfraz, Profs. Godfrey Laferla and Mr Alex Attard. From the findings of the magisterial inquiry it transpired that Cauchi suffered from *gastrointestinal bleeding* which lead to his death since the blood that came out was very dark in colour and this was synonimous of the blood coming out from the stomach.

In that from the acts of the inquest, two things transpired; that there was no trace of the amputated leg, therfore the experts appointed couldn't examine it; and that the three experts Dr Scerri, Prof Laferla and Mr Attard were not aware and did not take consideration of the findings of the autopsy when they finalised their report.

In a few words, and since their report is in the Maltese language, they attributed a lot of the blame on C in that he did not involve a vascular surgeon when the harvesting was made, that he did not inform the competent authorities of the mistake in the harvesting and also said that the accused acted on the instructions of C.

ASPECTS OF THE LAW AND JURISPRUDENCE

The accused B is being charged under Articles 225 and 141 of Chapter 9 of the Laws of Malta according to the note of renvoir of the Attorney General.

Article 225 (1) states:

"Whosoever, through imprudence, carelessness, unskilfulness
in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine (multa) not exceeding eleven thousand and six hundred and forty six euro and eighty-seven cents (11,646.87)".

Article 141 then states:

"Saving the cases where the law specificaly prescribes the punishment to which committed by public officers or

servants are subject, any public officer or servant who shall be guilty of any other offence over which it was his duty to watch or which by virtue of his office he was bound to repress, shall, on conviction, be liable to the punishment laid down for such offence, increased by one degree".

The elements of what is commonly known as manslaughter was analysed by the English House of Lords in the case ***R. Prentice and R Sullman***[1] where it was stated that for this offence of manslaughter in the medical profession there must be:

- the indifference, on the defendant's behalf, to an obvious risk of injury to health;
- actual foresight of such risk coupled with a stubborn determination to run it all the same;
- knowledge of such risk accompanied by an intention to avoid it
but also coupled with such a high degree of negligence that a jury feels justifies conviction.

The notion of negligence or *culpa* was further analysed by the Italian author Francesco Carrara who defines it as:

"La colpa si definisce – la volontaria omissione di diligenza nel calcolare le conseguenze possibili e prevedibile del proprio fatto".[2]

In the Maltese case ***Il-Pulizija v. Saverina sive Rini Borg et.***[3] the Court held that:

"L-imprudenza tigi mill-agir ta' xi hadd minghajr ma jiehu l-opportuni kawteli".

In the English case ***Bolam v. Friern Hospital Management Limited*** the Court said:

[1] (1994) QB 302

[2] F. Carrara, *Programma Del Corso Di Diritto Criminale,* Vol I (Parte Generale), 80, p. 88.
[3] (1998); [LXXXII.IV.247]

"The standard of an experienced surgeon/etc must alwaysbe guaranteed. Failure to measure up to this standard (an average yardstick of reasonableness) in any way and to any degree will therefore constitute negligence. An error of clinical judgment, even though made in good faith may amount to negligence and lead to a physicians liability if in reaching his judgment he failed to exercise the legally requisite level of skill".

In another English judgment ***Whitehouse v. Jordan***[4] the House of Lords said:

"To say that a surgeon committed an error clinical judgment is wholly ambiguous, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising 'clinical judgment' may be so glaringly below proper standards as to make a finding of negligence inevitable".

Additionally in ***Hucks v. Cole***[5] the court stated that:

"So a doctor is not to be held negligent simply because something goes wrong. It is not right to invoke against him the maxim res ipsa loquitur save in an extreme case. He is not liable for mischance or misadventure".

It is therefore concluded that if the surgeon takes all necessary care and precautions as was his to take in such circumstances, then he is not criminaly responsible.

In this ambit, reference is made to the author Laurent where he stated that:

"Non e' possibile determinare in modo generale il limite delle responsabilita' dei medici. Spetta al magistrato ravvisarle in ciascuno specie, secondo i fatti e le

[4] House of Lords, 1 ALL ER 267, WLR 426 HL, 1981
[5] Court of Appeal (UK), Transcript No. 1968/181, 4 MED LR 393

ciscostanze, che possono infinitamente variare, non perdendo mai di vista quel principio fondamentale che deve sempre servigli di guida, val dire che per aversi responsabilita' professionale a d'uopo che taluno abbia commesso colpe non usando le volute vigilanze sopra se' medesimo o sui propri atti, o dando prova di ignoranza imperdonabile nell-esercizio della sua professione; spetta ai tribunali applicare questa massima con discernimento. . .".

CONCLUSIONS

From the acts of the proceedings it became amply evident that the patient, Mr Oliver Cauchi was very ill, with severe heart problems, he was diabetic and at the same time smoking thirty cigarettes a day apart from other complications he had.

This made him at a very high risk when undergoing an operation and the fact that Mr Cauchi had *ischemic heart disease* and that he was very thin, as Mr Kevin Schembri stated in his witness (fol 70) this made his arteries more narrow than a normal healthy human being.

This was also confirmed by Profs Albert Fenech in his testimony at fol 136 by saying that:

"He (referring to Oliver Cauchi) *was a diabetic, poorly controlled diabetic, the diabetes was not very well controlled and it had been present for some quite time, which has relevance to this case because diabetes changes the appearance and the feel of blood vessels. He was also a significant smoker and had been persistently smoking in spite of the fact that he had been told that he had a problem with the circulation of the legs and there was another condition he had, he had vascular disease which leads to the circulation into the legs was significantly impaired."*

Mr Kevin Schembri continues to say in his evidence at fol 71 that:

" . . . Now, during the vein harvest, C was coming in and out of the theatre and I remember correctly, when B was harvesting the artery, he was not so happy about it and I remember him asking C to see if this is good enough. And C had come in, had a look, I was – you have to imagine, the table was up high here, I am harvesting here and someone on the other side doing another piece of operation, another art of the operation. C had told him no, no it is ok and he continued to harvest this vessel. At that stage no one knew what it is".

In the detailed version of events by the accused on the 25th January 2013 before this Court, he explained on oath how he became a consultant and how he came to Malta in C's team recommended by a friend of his. He said also that until Oliver Cauchis's bypass operation was made, he had performed some one hundred and fifty vein harvestings.

He continued to explain the day of operation, how the doctors involved met to consult and how C explained to them the clinical history of the patient. The accused said that since the patient had a high mortality rate of 5%, he was at a very high risk which meant that all the team had to work fast because the heart couldn't take forever on a cardiac pulomary machine.

Important to note how the accused explains how is the procedure of vein harvesting. He says at fol 168 of his testimony:

"Your Honour when we do it in every operation, when you start from the groin it is to make a small incision in the groin, this is normal anatomy, as you can see we make about incision here what we want to do this little blue vessel here, this is a saphenous vein, this is what we want to take and what we take in every case ok. Now this saphenous vein is just below the skin, there is nothing there ok. You can make an incision to the skin, you spread the fat a little bit and he was a very thin man and he was ugly in fat, you find it and then we have a special

look which is very, very short like about a centimetre, you hook this vein and then you follow it down, easy. The problem was . . . right vessel in here this is the femoral artery ok, but these arteries you can see is very deep,this is covered by thick muscle ok, in this case it is about five (5) centimetres deep, so it's quite deep and there are a lot of muscle on top of it covering it. So really we never ever encounter the artery ok, so the only vessel is the vein ok. Now there is a further thing in this case because obviously we wanted to be, well I wanted to be absolutely certain that it was the correct one and artery have a pulsation ok that is sycronised with the heart ok. But this vessel has no pulsation whatsoever. So the problem in this particular case was the number one the artery where it wasn't suppose to do, this is an atomic look really but if he was healthier ok, then the artery would have a pulsation ok and then it would have been easier to detect that it was the wrong vessel."

He continues to say at fol 170 that:

"We just basically normally continued to follow the vessel and I actually felt, put my finger around ok because we always do for two reasons. Number 1, we want the thickness whether it is good quality and also you know you want to check it is the right one and if it's an artery there is pulsation, you feel it, it's like when you put your finger on your wrist, the same thing and then you say hang on it is not the right one and I stop ok. But in this case there was no pulse and you are just beneath the skin. So I said I called C and I said: C this to me it doesn't really feel right, but not because I thought it was an artery because I said I want to make sure he was happy to use that vein, because for me was a vein ok, to do a bypass ok, because we always as to the surgeon are you happy with what I'm taking".

He explained as well that is is only when they had a look in the vessel that they realised it was an artery since it had calcification. They could not have known this until it was cut. He said how C was quick enough to do a graft to the cut artery and then obviously they proceeded to

harvest another vein from the right leg since he could not find any from the left leg.

On a question by the defence to the accused as to whether the operation was successful, he replied:

"I think so because you know the patient came to us essentially in heart failure, you can see from the hospital notes that he was on a lot of heart failure medication known to man, but it wasn't enough anymore ok, so he had these two bypasses and he survived to episode of heart failure while he was in intensive care and if this bypass on heart done he would have died for sure".

The accused explaines that he had a very good relationship with Oliver Cauchi and that they became friends with Cauchi sharing with him his feelings about not being to able to work any more and how the accused and other persons from the medical team all went to his funeral when he died.

He explained that clinically, he had no other involvement with Oliver Cauchi but as part of the medical team of C, he was present when he was admitted to emergency on Christmas eve since C was abroad, and that he was continuously informing C of what was happening.

The accused also confirmed that when Oliver Cauchi was found in a pool of dark blood, this means that it had come from his stomach since the juices from the food tend to make the blood darker. Obviously, this tallies with the findings of the post-mortem that Oliver Cauchi died because of a) hypobolimic shock; and b) gastro intestinal bleeding.

Finally the accused commented that:

"This all confirms that he died of, nothing to do with the initial operation. You know he died of caustic bleeding. . . .gastritis beforehand, plus aspirin and warfarin contribute to this condition. . . . .

. . .(fol 190) he was taking protective pills for the stomach. So I think that C did absolutely everything by the book – he put him on the appropriate medication for the heart, he put him under protection for the stomach, and despite of this, he got some ulcer. But, you know, you see, these are human beings, you know, you try to prevent as much as you can, sometimes you win, sometimes you lose".

Finally, the Court makes reference to the findings of the experts appointed by this Court differently presided in the proceedings Police v. C which experts were also confirmed by this Court as presided where they concluded in their report that:

"F'dawn ic-cirkostanzi ahna tal-fehma li l-pazjent miet kawza ta' emoragija sostanzjali probabilment mill-istonku, possibilment mill-ferita fit-thigh jew mit-tnejn minhabba kundizzjoni tad-demm li tissejjah DIC (disseminated intravascular coagulation). Din hija kundizzjoni imprevedibbli li taffettwa pazjenti morda hafna bhal Oliver Cauchi, fejn id-demm ma jibqax jaghqad u jmutu minn emoragija generali".

Therefore, it is amply evident to this Court that during all instances of the bypass operation performed by accused and his colleagues and as supervised by their consultant C, that all diligence needed by their profession was exercised and there could be no other way that they could have performed a better job.

The accused was performing a specific task, that of vein harvesting, he was fully qualified to do the job, and apart from that, he was all the time in consultation with his consultant C who in turn fully endorsed what he was doing.

Therefore, and after seeing Articles 225, 141 and 23 and 533 of Chapter 9 of the Laws of Malta, finds accused **B** not guilty of all the charges brought against him and consequently frees him from all of them.

< Final Judgement >

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