Therapeutic Abortion

BY

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There has been considerable public discussion recently on the subject of therapeutic abortion. Up to now the discussion has proceeded on the assumptions that the present law on this subject in Rhodesia is obscure and that legislation is desirable. I do not accept either of these assumptions.

THE PRESENT LAW IN RHODESIA

Abortion is a common law crime in Rhodesia, the Roman-Dutch law, which is the common law of this country, having recognised this crime since early times. The defence that the abortion was performed for therapeutic purposes is also covered by the common law, we having an equivalent of the English Abortion Act of 1967.

In giving an opinion on a matter of common law a lawyer is attempting to forecast what the decision of the courts will be on proof of a particular set of facts. Sometimes the opinion will be expressed with hesitation, sometimes with certainty, depending on th lawyer's estimate, from his training and experience, of the strength and unanimity of the common law authorities or sources to which the court will be obliged to have regard when considering the particular set of facts.

My own training and experience lead me to believe that the present law on therapeutic abortion in this country can be stated with a very high degree of certainty.

The old Roman-Dutch writers Matthaeus (*ad* D. 47.5.1.5), Moorman (2.8.10) and Voet (47.11. 3) are unanimous in stating that abortion may lawfully be performed to save the mother's life. Their views (which differ from those of the Roman Catholic church, as might be expected from writers in the Protestant Netherlands) are conveniently summarised by Strauss in an article "Therapeutic Abortion in South African Law" published both in 42 *South African Medical Journal* 710 and 85 *S.A. Law Journal* 453. As Professor Strauss points out, there is no decision of the South African or Rhodesian courts on the question, but I regard it as beyond doubt that an abortion performed in good faith for the purpose only of preserving the life of the mother is not criminal in Rhodesia. No only are the old Roman-Dutch authorities, to which I have referred, clear on this point, but in the leading English case of *R. v. Bourne* (1938) 3 All E.R. 615

Macnaghten J. (at 617 A) took this as the starting point of his charge to the jury, and the Crown apparently conducted the prosecution on the basis that this was the law of England (see 1938 *M.L.R.* 237). So if our courts turn to the English common law for assistance, as they frequently do when the Roman-Dutch common law is uncertain or has failed to keep pace with modern conditions, they will find no difference.

On the question of whether it is lawful to terminate a pregnancy in order to preserve the health of the mother the old Roman-Dutch authorities are silent. This silence could be interpreted in two ways, and there is insufficient foundation for a conclusion either that they would or that they would not have approved preservation of the mother's health as a defence if the question had been put to them. If the question were to go before our courts, therefore, they would be in the not unfamiliar position of being obliged to reach a decision without any asistance from the old Roman-Dutch authorities or from the modern South African and Rhodesian case law. In such circumstances our courts habitually turn to the English common law for assistance, unless some statutory provision or difference in principle between Roman-Dutch and English common law on the question makes it inappropriate to do so. A recent example of this process is *S. v. Swart*, 1971 (3) S.A. 75 (R.,A.D.), which admittedly I criticised in 1971 *R.L.J.* 93 on the ground that Roman-Dutch authorities were overlooked, but this criticism is immaterial for present purposes. On the present question there is no relevant difference in principle between our law and English law, and no relevant legislation prior to the English Abortion Act of 1967, because s.58 of the Offences Against the Person Act, 1861, by including the word "unlawfully", left it open to the English courts to decide, as a matter of common law, in what circumstances it would be lawful to perform an abortion. The decision in *Bourne's* case was therefore a decision on the common law.

In laying down the English common law to the jury Macnaghten J. used the following words:

"The question that you have got to determine is whether the Crown has proved to your satisfaction beyond reasonable doubt that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl."

"No person ought to be convicted under s.58 of the Act of 1861 unless the jury are satisfied the act was not done in good faith for the purpose only of preserving the life of the mother."

"Life depends upon health ,and it may be that health is so gravely impaired that death results. . . . Of course there are maladies that are a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but a danger to health. Cancer is plainly a danger to life. But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life."

"Take a reasonable view of the words 'for the preservation of the life of the mother.' I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death".

"(The law) does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman".

This decision was followed in *R. v. Bergmann and Ferguson* (1948, see Glanville Williams, *The Sanctity of Life and the Criminal Law*, p. 154) and in *R. v. Newton and Stungo* (1958) Crim. L.T. 469, in the course of which latter case Ashworth J. directed the jury:

"The law about the use of instruments to procure miscarriage is this: 'Such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman'. When I say health I mean not only her physical health but also her mental health. But although I have said that 'it is unlawful unless', I must emphasise and add that the burden of proving that it was not used in good faith is on the Crown".

The only question which arises from these cases is whether in the 20 years between 1938 and 1958 Macnaghten J.'s extension of the concept of preservation of the mother's life to include protection from impairment of health so grave as to endanger life or to leave her "a physical or mental wreck" has been further extended so as to justify abortion in order to preserve the mother from any impairment of health whatsoever. I cannot think our courts would regard Ashworth J.'s direction in *R. v. Newton and Stungo* as effecting any such extension. The short report of the case in (1958) Crim. L.R. 469 and the full discussions of the facts in the same volume at pp. 600 ff. and in (1958) *British Medical Journal* 1242-8 give no indication that that was Ashworth J.'s intention; such an extension of the conception of preservation of life would be impossible to justify logically, and it is obvious that in practice the acceptance of preservation of health as a defence to a charge of abortion would lead to abortion on demand, since it would be impossible for the State to prove that a medical practitioner did not contemplate *any* impairment of the physi-

cal or mental health of the woman if the pregnancy were allowed to continue. I do not see how our courts could regard such a state of affairs as stated in *Bourne's* case at 620 G:

> "The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother".

Nor would it be consistent with the Roman-Dutch common law as stated by Matthaeus, Moorman and Voet.

It is clear to me therefore that the present law in Rhodesia goes as far as, but no further than, *Bourne's* case. It can be summed up by saying, provided always the medical practitioner acts in good faith: abortion for the preservation of the mother's life, yes, whether the threat to her life is immediate or more remote; abortion for the preservation of the mother from becoming a physical or mental wreck, yes; abortion for protecting the mother from lesser injury to her health, no; abortion for eugenic reasons, no: abortion for social or economic reasons, no. If specific questions are put — such as: what about rape, or a child or imbecile mother, or the effect on a mother of giving birth to a seriously deformed or handicapped child? — the answer must be, as in many areas of the common law, that the rules have been laid down and each case must be treated on its merits, the question in each case being whether the medical practitioner has conducted himself in accordance with the rules justifying abortion. If the State can prove that he has over-stepped the rules, he is guilty. Similarly, if a medical practitioner objects that the present law gives him no clear guidance on how remote the threat to the mother's life may be, or what prognosis is comprised in the phrase "physical or mental wreck", the answer is that, within the rules I have set out, he must be guided by his own conscience and sense of professional responsibility.

I am aware that I have expressed a view on the present law which is more definite than the views expressed by other writers, such as Hunt, *South African Criminal Law and Procedure,* Vol. II, pp. 311-12; De Wet and Swanepoel, *Die Suid-Afrikaanse Strafreg* (2nd ed.), p. 222; Gardiner and Lansdown, *South African Criminal Law and Procedure* (6th ed.) p. 1598; Gordon, Turner and Price, *Medical Jurisprudence* (3rd ed.), p. 207; Strauss and Strydom, *Die Suid Afrikaanse Geneeskundige Reg,* p. 254; Strauss, "Therapeutic Abortion and South African Law", 1968 S.A.L.J. 453, 457-9. The reason is that, unlike some of these writers, I have concerned myself with the specific question of what decision our courts would reach if an accused person raised the defence of lawful therapeutic abortion to a charge of criminal abortion. If the facts were sufficiently clear the courts could not by-pass the question by stating that there are no South African or Rhodesian cases in point and that legislation is therefore necessary. They would have to give a decision, and I have said what I consider it would be.

IS LEGISLATION NECESSARY?

For a number of reasons I consider that legislation to regulate therapeutic abortion in this country is not only unnecessary but undesirable. The demand for legislation comes in three different forms:

(a) legislate to restate and clarify the existing law;

(b) legislate to extend the existing grounds for therapeutic abortion;

(c) legislate to legalise abortion on demand.

Students of jurisprudence will appreciate how easily legislation introduced for purpose (a) can produce result (b), legislation introduced for purpose (b) can produce result (c) and legislation for purpose (c) can produce more far-reaching results.

Taking these points in reverse order, I doubt whether there is much support in this country for abortion on demand, so legislation for this express purpose is not likely, but whether the purpose is achieved directly or indirectly it must undermine the law's concern for the preservation of human life. Illogical as the law is sometimes, it is very vulnerable to attack on the ground of inconsistency. If it ceases to give a firm lead in the preservation of human life before birth, it must expect a weakening of public support for its efforts to preserve life after birth, and it is a trite observation that people's moral ideas and behaviour are to a considerable extent shaped by the precepts of the law. Look at it which way you will, a foetus is a human life and abortion on demand re-establishes the principle on which despots throughout the ages have operated, that it is permissible to take human life at will. If the law gives way on this principle it is not easy to forecast the consequences.

On the other hand it is very easy to forecast the consequences of legislating to extend the existing grounds for therapeutic abortion, because the example of the English Abortion Act of 1967

is before our eyes. Section 1 of the Act commences (the remainder of the Act being subsidiary to these two subsections):

"1. (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith —

(a) That the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant women's actual or reasonably foreseeable environment."

There is nothing in these subsections, or in the remainder of the Act, to indicate that the intention of the legislature was to legalise abortion on demand, yet it is notorious that that has been the effect of the Act.

The reasons for this state of affairs are presently the subject of an enquiry under the chairmanship of Dame Elizabeth Lane, a judge of the Family Division of the High Court, but whatever the findings of this enquiry may be, no lawyer should be surprised that the Act has produced the result it has produced. Any medical practitioner of average intelligence who wished to to set up an abortion on demand service would only require the assistance of one or more like-minded colleagues and a stock of simple questions to ask the pregnant women who consult him, and it would be impossible for the prosecution to prove that he had not performed his abortions in good faith for any of the purposes permitted by the Act. If, in drifting similar legislation, we sought to avoid this difficulty by placing the burden of proving his good faith on the practitioner, he would merely have to take care to keep convincing records. If we went further still and required proof to the satisfaction of the court of the facts on which the practitioner relied, rather than mere proof of his good faith in relying on those facts, the bona fide practitioner would have a very valid complaint that his whole career could be jeopardised because he had accepted in good faith facts which on subsequent examination could not be substantiated, whereas the mala fide practitioner would cover himself against this danger by taking even greater care over the preparation of his story, and increasing his fees to compensate himself for the extra risk. If we sought to eliminate the danger of collusion by requiring the second practitioner to be an individual or a member of a panel approved by the Minister, he or they would soon experience the same difficulty as prosecutors in being satisfied of the bad or good faith of the abortionist, and moreover would probably not enjoy the habitual exercise of the power of life and death over the unborn. I could continue with this catalogue of difficulties, but it is sufficient to say that I have not yet come across any form of legislative wording on which we could safely rely to prevent an extension of the existing common law grounds for therapeutic abortion from leading in practice to abortion on demand.

What about legislation for the most limited purpose of all — to set out the existing common law rules in the form of an Act? The demand for such legislation is very insistent, chiefly from medical practitioners of the highest integrity who feel threatened by the uncertainty of the present law and would prefer to see it set down in black and white by authority of Parliament. In the first part of this paper I have endeavoured to show that the present law is not as uncertain as they think. On that ground alone I would oppose legislation to restate the common law as unnecessary, but I go further and say that such legislation would be undesirable for a reason which arises out of the difference between common law and legislation. In short, the potential abortionist is presently held back by fear of the flexibility of the common law, whereas if the law were condensed into a few words of a statue he would immediately employ the best legal brains to advise him how to steer round those words. When I refer to the potential abortionist I deliberately avoid using words like "shady". There are many people whose views I respect although I cannot agree with them, who genuinely believe abortion on demand to be for the good of mankind. If by chance there are no such people in the medical profession in Rhodesia at present we must assume that there will be in the future. Add to the sincerely held views of such practitioners the knowledge that, as demonstrated in England, abortion is a lucrative specialization, and you have a number of people with a strong motive to avoid the law. Legal experience confirms what common sense indicates — that it is easier to avoid a rule

of law set out in a statute than one contained in the less precise wording of a judgement or a series of judgements. That is why in 450 B.C. the Roman plebeians sought to obtain from the patricians the initial codification of Roman Law in the Twelve Tables, and the wisdom of their insistence is confirmed by the history of almost any tax or companies statutes one likes to choose.

Opponents of the common law tradition talk about the arbitrariness of a system of judge-made law, in which nobody can be absolutely certain of the legal consequences of a questionable act until the act has been performed and subsequently tested in court. Supporters of the system point out that it is flexible rather than arbitrary, because the judges work within defined limits that enable their decisions on questions of law to be forecast with a considerable degree of accuracy, but judges nevertheless have the ability to correct or vary impressions given by the wording of previous judgments in a way that makes it very difficult to avoid the spirit of the common law while abiding by its letter. Because there are such strong motives for people to do exactly that with the law of therapeutic abortion I believe that to embody the present law in a statute for the sole purpose of clarifying it would be an error of the greatest magnitude.