

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Raymond* [2018] QSC 97

PARTIES: **THE QUEEN**  
v  
**MARIA LENA RAYMOND**

FILE NO/S: SC No 29 of 2018

DIVISION: Trial Division

PROCEEDING: Ruling

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: Ex Tempore on 27 April 2018

DELIVERED AT: Cairns

HEARING DATE: 27 April 2018

JUDGE: Henry J

ORDER: **The application for a ruling of no case to answer on count 2 is dismissed.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – ACTS INJURIOUS TO THE PUBLIC IN GENERAL – NUISANCES – MISCONDUCT RELATING TO CORPSES – duty for disposition of a human body or human remains – - whether the law imposes a duty to properly dispose of the dead - whether such a duty was imposed upon the accused

*Burials Assistance Act 1965* (Qld), s 3  
*Coroners Act 1958* (Qld) ss 12, 18, 21  
*Criminal Code* (Qld) s 236(a)  
*Registration of Births, Deaths and Marriages Act 1962* (Qld) s 30  
*Doodeward v Spence* (1908) 6 CLR 406, followed  
*Rees v Hughes* [1946] KB 517, cited  
*R v Stewart* (1840) 12 AD&E 1007, cited  
*Re Gray* (2000) 117 A Crim R 22, cited  
*Williams v Williams* (1882) 20 Ch D 659, cited

COUNSEL: N Rees and M Franklin for the Crown  
P Feeney and T Grau for the defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown  
Wettenhall Silva Osborne Butler for the defendant

- [1] HIS HONOUR: The prosecution case is that the accused gave birth to a baby which had completely proceeded in a living state from her mother prior to its death. She is charged with the manslaughter of her baby on the basis that her failure to meet her duty of care to the child imposed by the *Criminal Code* (Qld) was a substantial cause of the baby's death. That death is alleged, as a matter of inference, to have resulted from the baby being delivered head first into a toilet bowl, and not then being moved promptly to a position where it could breathe air, a necessary of life as distinct from the waters of the toilet bowl, into its lungs.
- [2] The accused's uncontradicted account is that she did not know she was pregnant, or giving birth, until the baby proceeded from her on the toilet at her home, where no one else was present. She claims that soon afterwards she wrapped her dead baby and walked to a house in her neighbourhood where there lived a woman she had seen about locally wearing a cross. She left it outside a door of the house and left.
- [3] The following day the upper torso of the baby was found on the front driveway of another house in the neighbourhood in circumstances suggesting dogs had been moving it about the local area. Whether she left it outside a house, as she describes, the circumstances suggest she did leave her dead baby's body somewhere out in the open, in a residential neighbourhood, where members of the public or animals, such as dogs, may encounter it. These events occurred in 1996. The accused told no one of her role in them for many years.
- [4] The accused's discarding of the body attracts another charge, namely, a breach of duty with respect to a corpse contrary to s 236 *Criminal Code*. At the time of these events s 236 provided:
- “Any person who, without lawful justification or excuse, the proof which lies on the person –
- (a) neglects to perform any duty imposed upon the person by law, or undertaken by the person, whether for reward or otherwise, touching the burial or other disposition of a human body or human remains; or
- (b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;
- is guilty of a misdemeanour, and is liable to imprisonment for two years.”
- [5] The charge brought is based on limb (a) of s 236, as it then was. It is:
- “That on a date unknown between the 1st day of May 1996 and the 6th day of May 1996 at Cairns in the State of Queensland Maria Lena Raymond without lawful justification or excuse,

neglected to properly dispose of a human being or human remains, which she was required to do by law.”

- [6] To remove doubt, I record that the prosecution case is advanced on the limited basis the “human being” or “human remains” referred to in the charge was of a child which had been born alive. The manner in which the prosecution advances the case does not require a determination of whether s 236(a)’s reference to a human body or human remains includes a stillborn child.
- [7] The charge alleges the accused was required by law to properly dispose of her dead baby’s body. The accused’s counsel submits she has no case to answer because there was no such legal requirement upon her. I proceed to determine this question in circumstances of pressing time and, while aided by counsel’s helpful reference to authorities and statutes, without reference to any authority particularly on point.
- [8] It will be recalled it is the charge, not s 236(a), which uses the language “neglected to properly dispose of”. The language of s 236(a) is, relevantly, “Neglects to perform any duty imposed ... by law ... touching the burial or other disposition of a human body or human remains.”
- [9] It follows the charge is premised upon the accused having had a duty touching the burial or disposition of her dead baby’s body, namely, a duty imposed by law to properly dispose of her dead baby’s body. The question then is whether the law imposes a duty to properly dispose of the dead and, more particularly, whether it imposed such a duty upon the accused.
- [10] The *Criminal Code* imposes no such duty. However, the fact it is a code does not preclude the duty to which it refers being imposed by some other law. As much seems obvious from the fact s 236(a) contemplates the existence of duties which are not imposed by the Code, for example, the duties imposed upon those who bury or dispose of bodies “for reward”. Once it is accepted that the duty or duties referred to by s 236(a) may be imposed by some law other than the Code, there is no reason why that law ought necessarily be confined to statute law and may not also include such common law as has not been extinguished expressly or impliedly by statute.
- [11] Such statute law as was in force in 1996, to which I have been referred, does not extinguish, indeed it barely touches upon, any duty to properly dispose of the dead. There existed a miscellany of statutory obligations triggered between death and disposition, such as the obligation to give notice of death (see, for example, *Registration of Births, Deaths and Marriages Act 1962* (Qld) s 30, *Coroners Act 1958* (Qld) s 12) and the obligation to procure a certificate or order prior to burial (see, for example, *Coroners Act 1958* (Qld) s 21).
- [12] The high point as to any duty to dispose of a body in the statutory context appears to be the *Burials Assistance Act 1965* (Qld), s 3 of which imposed a duty on the chief executive to cause to be buried or cremated deceased persons for whom such person’s relatives have not suitably arranged disposal of the body. Its provisions are, by implication, designed as a safety net for cases in which others have not properly

disposed of the dead, that is, it does not extinguish any common law duty such persons may have.

- [13] It is, on one view, surprising the legislature has not sought to further prescribe on whom a duty to dispose of the dead ought be cast. I do not accept the absence of such legislation means the common law duty has, by implication, been extinguished. It is hardly to be inferred the legislature's limited intervention in this field of the common law bespeaks a view that dead bodies may lay about undisposed of. Given there is no property in a body, it is, perhaps, not so surprising the legislature has, to date, refrained from prescribing or confining the range of persons upon whom the duty to dispose of the dead falls.
- [14] The common law requires the proper and decent burial of the dead – see *Doodeward v Spence* (1908) 6 CLR 406, 417. The duty has been described as being “in the nature of a public duty” – see *Rees v Hughes* [1946] KB 517, 523-524.
- [15] The duty, of ancient origin, is apparently premised on the requirements of public health and decency – see *R v Stewart* (1840) 12 AD&E 1007, 1009; *Doodeward v Spence* supra 414, 417, 422. For example, in *R v Stewart* at 109, it was said:  
*The feelings and interests of the living require and create a duty to carry the dead to the grave decently covered.*
- [16] In *Doodeward v Spence* at 422, Higgins J spoke of:  
*The imperious necessity for speedy burial (or other disposition) of the dead.*
- [17] Further, in S.G. Hume's article “*Dead Bodies*” (1956) 2 Sydney Law Review 109 (cited in a helpful analysis of authority by Chesterman J in *Re Gray* (2000) 117 A Crim R 22) it was observed:  
*Under the English legal system there has always been provision, as there must be under any civilised legal system, that the bodies of persons dying within the territory over which the system operates should be decently interred or otherwise disposed of so as to prevent the creation of a nuisance.*
- [18] The common law duty evolved in an era prior to electricity and of much statutory prescription of the need for official notification, post-mortem examination or certification prior to burial or cremation (see, for example, *Coroners Act 1958* (Qld) ss 12, 18 and 21).
- [19] I do not overlook the public health concerns driving the once imperious need for speedy burial may now be assuaged by refrigerated storage, but it must logically be an incident of the common law duty that if the body is not to be buried (that is, buried in a grave, tomb or at sea) or cremated promptly, it ought be safely stored in the meantime pending its disposal. Nor do I overlook that notification, post-mortem examination and certification may be necessary, but such requirements do not, by implication, extinguish the duty at common law to properly dispose of the dead. Rather, they inform the nature of the potential means by which that duty may be met. So, for example, it may be met

by initiating the proper disposal of the body by others, and by the movement of the body for the purposes of its examination or safe storage prior to burial or cremation.

- [20] The point thus developed is that in the modern era, however much officialdom may have slowed, and refrigerated storage allowed to be slowed, the process of ultimate disposition, there must remain a duty to at least initiate that process in order that the dead are properly disposed of.
- [21] I conclude that as at 1996 the common law imposed a duty to properly dispose of or initiate the proper disposal by others of the dead by:
- (1) burial (whether in a grave, tomb or at sea); or
  - (2) cremation; or
  - (3) moving the body for the purposes of its examination or safe and decent storage prior to burial or cremation.
- In this context disposal includes to cause disposal.
- [22] The question of who holds such a duty at common law requires no comprehensive analysis here. It may include spouses and executors – see *Williams v Williams* (1882) 20 Ch D 659, 662-665; *Rees v Hughes* [1946] KB 517. It may include a person under whose roof a deceased has died – see *R v Stewart* (1840) 12 AD&E 1007, 1009.
- [23] I readily infer that in circumstances where, as here, a baby died at a home where only its mother was present, and only its mother was aware of its death – at least if the prosecution case be accepted – that the law imposed a duty upon the mother to properly dispose of, or initiate the proper disposal by others of, her dead baby’s body by the means described earlier. Such means at least required her initiating the proper disposal of her dead baby’s body by others at least moving the body for the purposes of its official examination or safe and decent storage prior to burial or cremation.
- [24] In the present case there is evidence that, contrary to such a duty, the mother left the body out in the open in a residential neighbourhood. It follows there is a case to answer on count 2.
- [25] Before so ruling, it is necessary to dispense with another point. In advancing submissions on the above topic, the prosecution also sought to announce particulars of the charge not hitherto given. They were:
- “The accused, having given birth to a child born alive, neglected to properly dispose of the deceased by:
- (1) failing to promptly notify any authority of the death, and/or
  - (2) leaving the remains in a public place.”
- [26] They are not proper particulars in this case and ought be disregarded. The charge alleges a failure to properly dispose of the dead body, not a failure to give notice of its death. It is unnecessary to determine whether any duty to give such notice, to the extent it may exist, is, within the meaning of s 236, a duty “touching the burial or other disposition” of the dead. In this case that is not the duty alleged to have been breached

by the charge. The prosecution cannot rely upon it to prove a breach of the duty that is alleged by the charge.

- [27] As to the purported particular's reference to leaving the remains in a "public place", it is apt to confuse. Perhaps it results from the accused's claim she left it on a residential front door step, although such a location might more properly be described as private property to which members of the public can gain ready access. In any event, the act of leaving the baby's body out in the open is, in effect, evidence that the accused did not do that which she was obliged to do.
- [28] In the circumstances of this case, having regard to the nature of the common law duty discussed earlier, the prosecution case must necessarily be the accused, having given birth to a child born alive which then died, failed, without lawful justification or excuse, to cause the proper disposal of its body, or initiate the proper disposal of its body to be caused by others. Whether the jury regards the act of leaving the body on a residential doorstep, as the accused claims she did, is evidence of that failure, or, as was boldly suggested in the present argument, is evidence that she initiated the proper disposal of the body by others, is a matter for the jury.
- [29] In any event, for the reasons earlier given, my order is:

The application for a ruling of no case to answer on count 2 is dismissed.