
(2016) 05 GAU CK 0038
In the Gauhati High Court
Case No : Crl. Pet. No. 79 of 2016

Arun Madhab Boruah (DR.)

APPELLANT

Vs

State of Assam and Anr.

RESPONDENT

Date of Decision : 11-05-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2016) 4 ACC 452 : (2016) 5 GauLJ 61 : (2016) 5 GauLR 175 :
(2016) 3 GauLT 376

Hon'ble Judges : Paran Kumar Phukan, J.

Bench : Single Bench

Advocate : Mr. D. Das and Mr. D. Talukar, Advocates, for the Appellant; Mr. K. Munir, Addl. PP and Mr. M. Chetia, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Paran Kumar Phukan, J.—This is an application under Section 482 of the Cr.P.C. filed by the petitioner for quashment of the Complaint Case No.992C/2015 and the consequential criminal proceedings and orders passed by the learned Judicial Magistrate, First Class, Kamrup taking cognizance of offence under Section 304A IPC against the petitioner and another.

2. The sequence of events leading to the filing of the petition in brief are that the younger sister of the respondent No. 2 for routine examination during her pregnancy initially approached one Dr. Amal Phukan of "Sanjivani Nursing Home", Jorhat and on examination, it was detected that the deceased woman had Bicornuate Uterus and the doctor advised the patient to consult another doctor at "Sristi Nursing Home", Diburgarh and one Dr. Bajaj of that Nursing Home after taking ultrasound reported that the pregnancy was on the left side of the rudimentary horn. Thereafter, another Gynaecologist, namely, Dr. Bhavani Chaliha was also consulted and on seeing the reports, he advised for termination of the pregnancy to save the life of the woman. The matter was again discussed by the respondent No. 2 complainant with the husband of the deceased woman

and they decided to take last opinion from the petitioner who is a reputed Gynaecologist of Sivsagar and accordingly, the deceased woman accompanied by the respondent No. 2 and her husband came to "Sampriti Nursing Home" at Sivsagar and on seeing the reports, the petitioner suggested that to save the life of the woman, the pregnancy had to be terminated and if allowed to continue she should always be kept near a Hospital to provide immediate medical attention if any problem occurred. The petitioner also advised that her level of Iron and blood should be kept under control. The petitioner doctor advised them to go for MRI in the Assam Medical College, Dibrugarh and accordingly, MRI was done on the next day which revealed "possibility of pregnancy in left sided rudimentary horn at unicornuate and unicornis uterus". The petitioner advised the patient for termination of the pregnancy after seeing the report and accordingly, operation was to be carried out on the next day and as advised by the petitioner, the deceased came to the hospital for termination of the pregnancy. However, the petitioner wanted to discuss the matter and obtain opinion of Dr. Shyam Baruah of Guwahati and accordingly, photos of the report was sent to him through the mobile phone of the deceased but Dr. Shyam Baruah who is a prominent Radiologist of Guwahati differed with the opinion of the other doctors and wanted to see the deceased and accordingly deceased was brought to Guwahati. Dr. Shyam Baruah who is the co-accused of the complaint suggested for ultrasound and on examination of the same assured that it would be safe to continue with the pregnancy much to the relief of the deceased woman and her relatives. Dr. Shyam Baruah even allegedly went to the extent of disclosing that he was ready to abandon his practise of 38 years if the child would not come to the earth. However, in his report, he had mentioned as follows:

Impression:

Normal 1st Trimester Scan

Bicornuate uterus with septum seen

Pregnancy in left non communicating horn.

3. On the next day, armed with the opinion of Dr. Shyam Baruah and his report, they visited the chamber of the petitioner with a box of sweets and showered praises on him for his suggestion. On that day, the petitioner suggested for fixing a ring pressure internally and it was explained that the ring pressure was to be fixed internally, the way a banana tree is given support when it bends when more bananas grow and accordingly, the ring pressure was fixed internally after fixation of which she was unable to take food properly and there was also difficulty in urinating etc. and the petitioner assured that those problems would be over within a few days.

4. After a few days, she started feeling unwell and the petitioner was sought to be consulted but since he at that time was in Chennai, she consulted Dr. Santanu Barthakur and he advised hospitalization and accordingly, she was admitted in

Dergaon Nursing Home. Her Haemoglobin level at that time was found to be abnormally low and suspecting internal bleeding and rupture of the uterus, it was advised that she be shifted to Jorhat Medical College and after infusion of two bottles of blood at Dergaon Nursing Home, she was brought to Jorhat Medical College where immediate surgery was performed by Dr. Runjun Doley and the male baby was removed but it was not alive. Suspecting septicaemia which is a serious condition, she was referred to Guwahati for better management and accordingly, she was immediately brought to Guwahati and admitted in International Hospital but in spite of the efforts put in by the doctors, she died on 28.01.2015 due to multi organ failure.

5. After the death of his sister, when the respondent No. 2 contacted the petitioner in his Nursing Home at Sivsagar, he was informed that his initial decision to terminate the pregnancy was the correct decision and he had made a mistake by referring her to the co-accused Dr. Shyam Baruah and due to his erroneous opinion the patient died. When contacted by the petitioner Dr. Shyam Baruah admitted having said that "if the child would not come to the earth, I would abandon my service" and when confronted, he allegedly replied that after saying so he examined the ultrasound report and accordingly submitted the report stating therein that the pregnancy was in the left non communicating horn and he had forgotten to say about the risk factor to the respondent No. 2 due to his age and busy work schedule.

6. The respondent No. 2 who is the brother of the deceased woman filed the complaint alleging criminal negligence and both of them have been arraigned as accused in the case. The co-accused Dr. Shyam Baruah filed a separate application under Section 482 of the Cr.P.C. for quashment of the proceedings against him and the Single Bench of this Court vide order dated 18.02.2016 quashed the proceedings against the co-accused Dr. Shyam Baruah holding that no case of criminal rashness or negligence has been made out against him.

7. Heard Mr. D. Das, learned Senior counsel assisted by Mr. D. Talukdar, learned counsel appearing for the petitioner and Mr. T.H. Hazarika, learned counsel appearing for the respondent No. 2, who is the complainant of the case.

8. Mr. D. Das, learned Senior counsel appearing on behalf of the petitioner submits that the learned Magistrate by taking cognizance against the petitioner under Section 304-A IPC on the basis of the complaint filed by the respondent No. 2 has committed serious error and he failed to take into consideration the observations made by the Apex Court in the case of Jacob Mathew v. State of Punjab reported in (2005) 6 SCC 1.

9. He further contends that medical negligence is not an ordinary type of negligence and the learned Magistrate should have evaluated the evidence by shifting through the materials brought on record to ascertain as to whether there is prima-facie material available pointing out reckless negligence on the part of the doctor.

10. Mr. Das, learned Senior counsel also contends that the petitioner is a reputed Gynaecologist of Sivsagar and his initial decision to terminate the pregnancy was correct but the anxiety of the woman to protect the child inside her made him to change his decision and wanted to obtain opinion of the co-accused Dr. Shyam Baruah who is also a prominent Radiologist of Guwahati and the opinion of Dr. Shyam Baruah coupled with the anxiety of the woman to protect the child made him to change his mind and he also cautioned that the woman would have to stay near a hospital for providing medical treatment in case of emergency.

11. In controversion, learned counsel appearing on behalf of the respondent No. 2 complainant submits that the petitioner being the consultant Gynaecologist should have relied on the radiological reports submitted by the co-accused instead of the verbal assurance and his conduct clearly demonstrate that there was negligence on his part. According to the learned counsel, the petitioner should not have allowed continuance of the pregnancy when it was known to him that it was risky and continuance of pregnancy would jeopardise the life of the pregnant woman, that such negligence and omission on the part of both the doctors are not in a permissible degree in a profession and both of them were responsible for the death of the deceased, they breached their duty to such an extent so as to attract criminal liability. He has strenuously submitted that a prima-facie case has been made out against both the doctors of criminal negligence.

12. Before adverting to the submissions advanced by the learned counsel, it is essential that the law relating to medical negligence be taken into consideration.

13. In Jacob Mathew case (supra), the Hon''ble Apex Court considered exhaustively the various aspects of negligence on the part of a doctor and laid down inter-alia as follows:-

"48. (5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

14. The Apex Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. The Court also emphasised the need to frame either statutory rules or administrative instruction incorporating

guidelines for prosecuting doctors on charges of criminal negligence.

15. The Supreme Court also issued guideline for examination of a competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

16. In *Empress of India v. Idu Beg* which has been referred to by the Apex court in *Mahadev Prasad Kaushik v. State of Uttar Pradesh* and another reported in (2008) 14 SCC 479, the Court observed as follows:

"25. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused persons to have adopted."

17. The Apex Court in the above referred judgment also observed as follows:-

"26. Though the term "negligence" has not been defined in the Code, it may be stated that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do."

18. Mr. D. Das, learned counsel by referring to the observations strenuously submits that the petitioner who is a reputed Gynaecologist having requisite skill in the discipline suggested the patient to stay near an equipped hospital to provide immediate treatment in case of emergency but she left for her house at Dergaon and there was sufficient delay in bringing her to Jorhat and to Guwahati for treatment.

19. That apart, he initially decided to abort the pregnancy but he was pushed to a state of confusion because of the opinion of the co-accused Dr. Shyam Baruah and due to this reason, he did not suggest termination after she came back from Guwahati with the report of Dr. Shyam Baruah and his assurance given before her. In such cases, no criminal liability could be attributed to him.

20. In the instant case, four doctors have been examined by the complainant respondent No. 2 in support of his case and all of them stated that it was a rare type of pregnancy and risk was associated with continuance thereof. According to Dr. Santanu Barthakur who is not a Gynaecologist, he knew that risk was involved. It is not their evidence that in every such cases death of the woman was inevitable. The next Dr. Runjun Doley who surgically operated the patient in the Jorhat Medical College was the associate professor of Gynaecology Department and according to him, the type of pregnancy was not advisable to be

continued as there were serious chances of rapture of the uterus. His statement reveals that there were "chances of rapture of the uterus". The third doctor examined by the complainant Dr. Gakul Das who is a professor of Gynaecology at G.M.C.H. stated that it was a rare condition and continuation of the pregnancy was always at risk and it is not advisable to be continued but if the patient consents she may be allowed to continue. Dr. Alaka Goswami who is also retired professor of G.M.C.H. and a reputed Gynaecologist of Guwahati and who treated the patient in the International Hospital also stated that if the patient does not want to take risk then she would suggest termination and even if she is allowed to continue with the pregnancy she would be kept under close observations.

21. On a critical analysis of the entire statement of the witnesses, particularly, the statement of the doctors, there is no doubt that the pregnancy was a rare type of pregnancy and always risk was involved in continuing with such pregnancy and termination is advisable as there is probability of rapture of the uterus, but in case the patient expresses her desire to continue she may be allowed to do so by keeping her under close observations.

22. In the instant case also it is an admitted fact that initially the petitioner wanted to terminate the pregnancy and he cautioned her that in case she wanted to continue she would have to stay near a good hospital for providing immediate medical treatment. He even suggested termination but when the patient came on the next day, he decided to take the opinion of the co-accused Dr. Shyam Baruah which is usually followed in complicated cases but his opinion pushed him to a state of confusion. Usually in such cases, a pregnant woman would also prefer to protect the baby inside her and the statement made in the complaint clearly reveals that she was happy when Dr. Shyam Baruah informed that she would be able to continue with her pregnancy and she even brought sweets to the petitioner being satisfied with his suggestion.

23. On an overall assessment of the complaint petition, the statement of the complainant, particularly, the statement made by the doctors, there is no room for doubt that the sister of the respondent No. 2 died due to rapture of the uterus and rapture was due to continuance of abnormal pregnancy, the continuance of which was always at a risk.

24. Now the pertinent question is whether criminality can be attributed to the petitioner for her death. So far the co-accused Dr. Shyam Baruah is concerned, the Single Bench has already quashed the proceeding against him in exercise of the power under Section 482 Cr.P.C.

25. The learned counsel for the respondent No. 2 complainant repeatedly urged before this Court that the petitioner being the consultant Gynaecologist should have relied on the reports instead of the verbal opinion given by Dr. Shyam Baruah and it is sought to be proved that he did not exercise the skill and competence which is expected of him to exercise and as such, he is criminally liable for negligence.

26. In Mahadev Prasad Kaushik v. State of Uttar Pradesh and another reported in (2008) 14 SCC 479, the Apex Court observed by referring to Jacob Mathew case (Supra) as follows : 31 32

"31. The Court observed that a physician would not assure the patient of full recovery in each and every case. He cannot and does not guarantee that the result of his treatment would invariably be beneficial much less to the extent of 100% for the person treated by him. The only guarantee which a professional can give or can be understood to have given by necessary implication is that he is possessed of requisite skill in that branch or profession which he is practising and while undertaking performance of the task entrusted to him, he would be exercising his skill with reasonable competence. In the light of the above test, the Court stated.

"18. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess".

32. The standard to be applied for judging whether a person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. It was further observed that mere deviation from normal professional practices is not necessarily evidence of negligence. An error of judgment on the part of the professional is also not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. Medical profession is often called upon to adopt a procedure which involves higher element of risk, but which a doctor honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow would depend on facts and circumstances of a given case. It was, therefore, held that the prosecution of the doctor was ill-founded and accordingly, it was quashed."

27. In the present case, having considered the submissions of the learned counsel appearing for both the parties and having gone through the statement of the witnesses recorded by the Court under Section 202 Cr.P.C. particularly the statement of the doctor, I am convinced that the death of the woman was due to continuance of her pregnancy which resulted in rupture of the uterus. The petitioner even knew that risk was involved and he suggested for termination but he became confused when he obtained the second opinion from the co-accused Dr. Shyam Baruah who is a reputed Radiologist in Guwahati. Moreover, it is found from the statements that in all cases death might not occur although it is advisable to terminate the pregnancy, if the pregnant woman is desirous of taking the risk, she may be allowed to continue with the pregnancy.

28. What has been clearly revealed in the case is that the petitioner doctor

wanted to save the life of the foetus along with the woman and his anxiety to do so prompted him to take the second opinion. From the facts of the case as projected by the complainant respondent No. 2, it cannot be said that he acted with recklessness or indifference as to the consequences or there was "gross" negligence on his part. He was called upon to choose between the "devil and the deep sea" and he had probably believed that he had chosen the lesser evil and acted accordingly.

29. Under such facts and circumstances, it cannot be said that he failed to exercise his skill which he undoubtedly possesses with reasonable competence and in the light of the observations given by the Apex Court in the above mentioned cases and keeping in view the entire aspects of the case, I am of the considered view that criminal negligence cannot be attributed to the petitioner and the learned Magistrate without proper appreciation of the entire facts and circumstances issued summons to him which in my view are liable to be quashed and set aside. Accordingly, the Complaint Case No.992C/2015 and all consequential orders arising thereof stand quashed and set aside.