
(2014) 09 RAJ CK 0005

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 3464 of 2013

Beena Choudhary and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482, 483 — Penal Code, 1860 (IPC) -
Section 270, 304A, 304-A, 337

Citation : (2014) 09 RAJ CK 0005

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J.

Bench : Single Bench

Advocate : Ramcharan Meena, Assistant Director [Prosecution], for the
Respondent

Final Decision : Disposed off

Judgement

Kanwaljit Singh Ahluwalia, J.?The lawyers are stated to be on indefinite strike.

2. Perused the contents of the instant petition.

3. Instant petition has been preferred under Section 482 Cr.P.C. read with Section 483 Cr.P.C. to assail the order dated 30.07.2012 passed by the Additional Chief Judicial Magistrate, Sawaimadhopur, whereby she had framed charges against the petitioners for offences punishable under Sections 270 and 337 I.P.C.

4. A further prayer has been made that the order dated 14.08.2013 passed by the Revisional Court below, whereby the impugned order passed by the Magistrate has been upheld be also set aside.

5. Succinctly stated the facts of the case are that complainant, Sanjay Kumar Singh on 02.06.2008 submitted a complaint to the Superintendent of Police, Sawaimadhopur stating therein that his wife was pregnant and she was brought to the Nursing Home, Mantown, which is owned and managed by Dr. Veena Choudhary. It is further stated in the complaint that the wife of complainant was admitted at Dr. Beena Choudhary's Nursing Home on 06.03.2008 and the

petitioner No. 1, Dr. Beena Choudhary, on the pretext that cesarean operation is to be conducted had accepted Rs.20,000/-. In the complaint, it is also stated that after operation was conducted, condition of the wife of complainant deteriorated, as due to negligence, petitioners had left gauze measuring 25x16 cm. in the body of the wife of the complainant.

6. Petitioner No. 1, Dr. Beena Choudhary, appearing in person has vehemently disputed the fact and submitted that no gauze was left inside the body of the wife of complainant while conducting surgery.

7. Petitioner No. 1, appearing in person submitted that the Investigating Agency, after a thorough investigation had found version given by the complainant to be false, resultantly the complainant filed a criminal complaint in the Court of Additional Chief Judicial Magistrate, Sawaimadhopur.

8. In the said complaint, the petitioners have been summoned to stand trial.

9. To safeguard the doctors, who perform surgery or give medicine, the Hon'ble Apex Court in the case of Jacob Mathew Vs. State of Punjab and Another, has held that it is an incumbent for the Court or the Investigating Agency to seek opinion of the expert by applying bolam test.

10. It will be apposite to reproduce here the guidelines enumerated in the case of Jacob Mathew [supra]:--

"50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed

"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence.

Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis.]

to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case at hand

53. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-

availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test."

11. In view of the guidelines prescribed by Hon''ble Apex Court, the order dated 30.07.2012 passed by the Additional Chief Judicial Magistrate, Sawaimadhopur and the order dated 14.08.2013 passed by the Revisional Court below are set aside. The matter is remitted back to the trial Court with the directions to comply with the guidelines issued by the Hon''ble Apex Court in the case of Jacob Mathew [supra]. The said Court after obtaining the opinion of the peers in the medical profession based upon bolam test shall pass fresh orders, after hearing all concerned to determine as to whether charges are to be framed against the petitioners or not.

12. With the aforesaid directions, the present petition stands disposed of.

13. Upon disposal of main petition, the stay application filed therewith does not survive and same is also disposed of.