

(1900) 01 MP CK 0028
In the Madhya Pradesh High Court
Case No : 516 of 2016

Bhagvan Deen Singh & Anr.

APPELLANT

Vs

Bihari Prajapati & Anr.

RESPONDENT

Date of Decision : 01-01-1900

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 397](#), [Section 401](#), [Section 174](#)
- Calling for records to exercise powers of revision - High Courts powers of revision
- Police to e

Citation : (1900) 01 MP CK 0028

Hon'ble Judges : Ved Prakash Sharma

Bench : Single Bench

Advocate : Rahul Sharma, Pankaj Wadhwani

Final Decision : Allowed

Judgement

1. Petitioner above-named, against whom a charge under Section 304 of the IPC has been framed by the learned trial Court, vide order dated 23/02/2016 passed in ST No. 102/2016, has challenged the same under Section 397/401 of the Code of Criminal Procedure, 1973(for short "the Code").

2. Prosecution story, briefly stated is that on 25.07.2013 complainant Mayabai gave birth to a male child in a hospital at Agar by way of normal delivery. After being discharged, the child was brought for treatment to District Hospital, Ujjain; however, on being advised by the concerned doctor, he on 30.07.2013 was admitted in R.D. Gargi Hospital, Ujjain. It is alleged that during treatment the child was shifted to ICU ward of the hospital because of some medical complications. Allegedly, while in ICU ward, the child fell down on the ground from the child trolley because glass of one side of the trolley was in a broken state. As per prosecution, due to fall the child sustained a head injury and next day i.e. on 08.08.2013 succumbed to the same. On post- mortem, it was revealed that the death of the child occurred because of intra-cranial hemorrhage

due to head injury. "Merg" No.62/13 under Section 174 of "the Code" was registered in this regard. During enquiry, it was found that the child fell down on the ground because head side glass of the trolley in which the child was kept, was in a broken condition. It was further revealed that at the relevant time, petitioner Sapna Tomar-a nurse, was looking after the ICU ward and the incident had occurred because of negligence on her part. On the basis of "Merg" enquiry, First Information Report bearing Crime No.425/14 was registered against the petitioner at Police Station-Chimanganj Mandi and after usual investigation, a charge-sheet was filed against her for offence under Section 304 of IPC.

3. The learned trial Court, vide the impugned order had framed a charge for offence under Section 304 of the IPC against the petitioner which is a matter of challenge before this Court.

4. The learned counsel for the petitioner, referring to Section 299 of the IPC, which defines "Culpable Homicide" and inviting the attention of this Court to the statements of Mayabai- the mother of the child, Karan-the father of the child and Ramnarayan-the grand father of the child, recorded during investigation, has submitted that these witnesses have not stated that the petitioner had an intention to cause death of the child or that she, intentionally, caused a bodily injury to the child which was likely to cause death. It is further submitted that though these witnesses have attributed negligence on the part of the petitioner, however, it is not the case of the prosecution that the petitioner did any act knowingly that by such act, she was likely to cause death of the child. The contention is that from the material filed along with the charge-sheet, it cannot even prima-facie be said that the necessary ingredients to constitute "Culpable Homicide", as defined under Section 299 of IPC are not made out, therefore, the petitioner deserves to be discharged for charge under Section 304 of IPC.

5. Per contra, learned counsel for the State has submitted that a new born child has lost his life because of the utter negligence and carelessness on the part of the petitioner, therefore, she must be imputed with the knowledge that because of negligence on her part the child could have fell down on the ground resulting in his death.

6. Heard learned counsel for the parties and perused the record.

7. Section 299 which defines culpable homicide runs as under:

"299. Culpable homicide.- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

8. Section 304-A of IPC which deals with causing death by negligence, runs as under:

"304A. Causing death by negligence.-- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be

punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

9. A conjoint reading of Section 299 and 304-A of IPC indicates that where death is caused by rash and negligent act without there being an intention on the part of accused to cause death or an intention of causing such bodily injury as is likely to cause death or the knowledge that he by such act is likely to cause death, the offence will come within Section 304-A of IPC. In this regard the observations made by the apex Court in *Naresh Giri Vs. State of M.P.*, (2008) 1 SCC 791, which are apposite, run as under :

"6. Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done, in all probabilities, will cause death. This provision is directed at offences outside the range of Section 299 and 300 IPC. Section 304-A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304-A.

7. Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any mens rea, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

11. In *Syed Akbar v. State of Karnataka*, (1980) 1 SCC 30, it was held that "where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews v. Director of Public Prosecutions* (1937) (2) All ER 552) simple lack of care such as will constitute civil liability, is not enough; for liability under the

criminal law a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied "reckless" most nearly covers the case. "

10. From the aforesaid, it clearly emerges that unless the act is done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that death is the likely result of such act, it will not be covered under Section 299 or for that matter Section 304 of IPC.

11. There is no allegation against the petitioner that either she intended to cause death or that she intended to cause such bodily injury to the child which was likely to cause his death. Obviously, the prosecution wants to bring its case within third part of Section 299, where the death is caused by an act done by a person with the knowledge that such act is likely to cause death. In the instant case, the question is whether the requisite degree of knowledge can be imputed upon the petitioner, who as per prosecution, at the relevant time was deputed as nurse in the ICU ward ?

12. The fact that head side glass of the child trolley was broken, by itself, may not be sufficient to impute knowledge, even prima-facie, to the petitioner that the child will fell down from the trolley causing such injury which may lead to his death. Though, allegedly, in this case, the death of the child occurred as he fell down on the ground from the broken side of the trolley, resulting in head injury and leading to his death, however, that degree of knowledge which is necessary to bring an act within the third category of Section 299 of IPC definitely cannot be attributed to the petitioner as all the witnesses have alleged about her negligence.

13. Otherwise also, it does not appear to be likely that ordinarily a child will fell down from the head side of the trolley and will sustain such injury which may cause his death. Therefore, necessary knowledge on the part of the petitioner so as to bring the act of the petitioner within the mischief of Section 299 r/w Section 304 of IPC is totally missing.

14. Resultantly, prima-facie, a charge for offence under Section 304 of IPC is not made out against the applicant. The learned trial Court has not taken the aforesaid aspects into consideration while framing the charge, therefore, the impugned order cannot be sustained.

15. As a fall out of the above, this petition is allowed and the petitioner is discharged with regard to offence under Section 304 IPC. The learned trial Court will further examine as to what charge(s) is made against the petitioner and will proceed, accordingly.

CC as per rules.