
(2020) 02 BOM CK 0074

In the Bombay High Court

Case No : Criminal Application (Apl) No. 631 Of 2019

Dr. Ashok And Anr

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 04-02-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 304, 304A

Citation : (2020) 02 BOM CK 0074

Hon'ble Judges : Sunil B. Shukre, J;Madhav J. Jamdar, J

Bench : Division Bench

Advocate : R.M. Daga, S.V. Kolhe, D.R. Upadhyay

Final Decision : Allowed

Judgement

Sunil B. Shukre, J

1. Heard. Admit. Heard forthwith by consent of the learned counsel for the parties.

2. By this application, the applicants have sought quashing of First Information Report registered vide Crime No.129/2018 at Police Station, Dattapur,

District Amravati, for an offence punishable under Section 304 read with Section 34 of the Indian Penal Code. The FIR has been registered on the

basis of the complaint lodged by respondent No.2 against the applicants. The respondent No.2 has alleged that his deceased son, Sagar, was given

treatment by the applicants for two days i.e. 21.05.2017 and 23.05.2017 for the ailment of cough cold and fever. He had also complained of chest

pain. According to the respondent No.2, the treatment, which was given to his deceased son, was improper and it resulted into his death on

25.05.2017. In the last paragraph of the complaint, the respondent No.2 has alleged gross negligence in administering treatment to his deceased son on

the part of the applicants and that being the sole cause of his death.

3. Shri R. M. Daga, learned counsel for the applicants submitted that in no case any offence punishable under Section 304 read with Section 34 of the

Indian Penal Code could have been registered against the applicants and even for the aspect of negligence, the report dated 11.07.2018 issued by

District Civil Surgeon, General Hospital, Amaravati favours the applicants, when this report says that there was no negligence whatsoever on the part

of these applicants in treating the deceased Sagar on 21.05.2017 and one more day thereafter, before his death on 23.05.2017.

4. Learned A.P.P., relying upon the reply filed on behalf of the respondent No.1 submits that the previous report dated 28.06.2018 submitted by the

District Civil Surgeon, Amravati clearly indicted the applicants in crime registered against them and even though the subsequent report of the District

Civil Surgeon dated 11.07.2018 gives a clean chit to the applicants, the subsequent report deserves to be rejected in view of the earlier inculpatory

report submitted by the Civil Surgeon.

5. Learned counsel for the respondent No.2 submits that it has emerged in the investigation made so far in this case that even though it was required

of the concerned Rules that diagnosis is made by the doctor who gives the prescription, the applicants, who examined deceased Sagar on 21.05.2017

and 23.05.2017 and had issued prescription and certain medicines to him, did not diagnose the illness suffered by the deceased and therefore, it speaks

volumes about the gross negligence on the part of the applicants. He further submits that even though the report dated 11.07.2018 issued by the Civil

Surgeon, Amravati states that there was no negligence on the part of the applicants, the previous report dated 28.06.2018 shows something against the

applicants and, therefore, it would not be a fit case for quashing the F.I.R. at this stage.

6. On going through the allegations made against the applicants in the F.I.R. filed on 10.07.2018, the reply of the prosecution and the two reports of

the Civil Surgeon dated 28.06.2018 and 11.07.2018 and also written submission of the respondent No.2, we are of the view that there is great

substance in the argument of the learned counsel for the applicants and no merit in the argument put across the bar on behalf of both the respondents.

7. From the F.I.R. itself, it could be seen that the father of deceased Sagar, the

complainant, had only alleged negligence on the part of both the applicants in giving treatment to his deceased son and nothing more. He has stated in the F.I.R. that his son was given treatment by the applicants on 21.05.2017 and also 23.05.2017 at which time, these applicants prescribed certain medicines to deceased Sagar, which he indeed consumed. It is also stated that subsequently, in the morning of 25.05.2017 deceased Sagar, who was then taking treatment at the Government Hospital, died and the complainant i.e. respondent No.2 suspected that his death was caused probably because of various kinds of injections, 10 to 12 in number, that were administered to his deceased son through saline water on each of the two days his son was treated by both the applicants. The complainant has also stated that the treatment that was given to his son at the applicant's hospital on two days i.e. 21.05.2017 and 23.05.2017 was for only two hours, thereby showing that Sagar, for rest of these days was not in the hospital and was at home or somewhere else. The complaint further shows that there was no treatment given by the applicants to the deceased for the whole day at 24.05.2017 and that the deceased was taken to Government hospital in the morning of 25.05.2017 because the deceased had complained previous night of severe cough and chest pain. In fact, respondent No.2, as seen from the complaint, has admitted that deceased Sagar was not an indoor patient at the hospital run by the applicants and the treatment that was given to him at the hospital was for about two hours on the two days of 21.05.2017 and 23.05.2017.

8. So, the F.I.R. has been filed purely on the basis of the suspicion that the complainant nurtured against the applicants. It is significant to note that death of Sagar had occurred in the morning of 25.05.2017 but, the respondent No.2, the complainant, preferred to remain silent in the present case till he filed a complaint against the applicants on 10.07.2018. The complaint has been filed after a delay of more than 01 year and there is absolutely no explanation given in the F.I.R. regarding such inordinate delay in filing of the complaint. It is well settled law that in criminal cases, delay of even one hour, forget several days or years, can be crucial as, passage of time after the commission of the offence enables the complainant and witnesses to fabricate stories and use their imagination in exaggerating the facts of the case and, therefore, in many cases, delay in filing of the F.I.R. has been

treated as fatal to the prosecution. Of course, all will depend upon the facts and circumstances of each case and it is possible that even if there is inordinate delay in filing the F.I.R., still, it may not spoil the prosecution case because of the presence of other relevant facts and circumstances on record of the case. However, such does not appear to be the case here and unexplained delay and that too inordinate one, which has occurred in the present case, has damaged the case of the prosecution beyond repairs, and it could be seen to be so at this stage itself when, the allegations made against the applicants by the complainant are taken into consideration.

9. In the case of Jacob Mathew Vs. State of Punjab and Anr., reported in (2005) 6 SCC 1, being alarmed by the tendency of unhappy family members, perhaps irked by untimely death of their near relative, filing complaints of gross medical negligence against the medical professionals hastily, making reckless allegations, Honâ??ble Apex Court issued a slew of directions to be followed before registration of crime for gross medical negligence against the medical professionals. The Honâ??ble Apex Court also analyzed the concept of gross medical negligence and explained what it takes to bring the case within the parameters of Section 304A of the Indian Penal Code.

10. Speaking about what amounts to gross medical negligence, the Honâ??ble Apex Court held that, negligence in the context of medical profession necessarily falls for treatment with difference and it said that to infer rashness and negligence on the part of a professional, in particular, a doctor, additional considerations apply. It further held that the case of occupational negligence is different from one of professional negligence, in the sense that a simple lack of care, an error of judgment or an accident, is not a proof of negligence so long as the doctor follows a practice acceptable to medical profession of the day and till then, a doctor cannot be held liable for negligence merely because a better alternate course or method of treatment was also available. It also held that just because a more skilled doctor would have chosen a particular course of treatment and the doctor â?? accused has not done so, it would not amount to any professional medical negligence so as to attract the provisions of Section 304A of the Indian Penal Code. While judging the alleged negligence, standard of common man has to be applied, observed the Honâ??ble Apex Court.

11. After laying down the law that should govern the field, Honâ??ble Apex Court in Jacob Mathew, issued further directions regarding precautions

that need be taken in such cases before offence/s is/are registered against a medical professional under the provisions of the Indian Penal Code. In

paragraph No.52 it has laid down that, 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 doctor

â?" accused. It also directed the Investigating Officer to be extra cautious in such matters when it said that before proceeding against the doctor

accused of rash or negligent act or omission, he must 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 the well

established legal test, the Bolam test, to the facts collected in the investigation. It also cautioned the investigating officer against arresting the doctor

accused of rashness or negligence, in a routine manner, simply because some charge has been levelled against him although, it would be a different

matter, if by way of an exception, arrest of the doctor is seen to be absolutely necessary for furthering investigation or for collecting evidence or for

making effective investigation.

12. Now, coming back to the complaint which was belatedly filed in the present case, we must say that this complaint filed on 10.07.2018 was not

accompanied by any opinion of the doctor and therefore, there was no occasion or no reason for the investigating officer to have registered the

offence and that too one under Section 304A IPC, against these applicants so hastily. If the offence was registered against these applicants hurriedly,

the investigating officer, before starting investigation, should have at least taken care to obtain opinion of the expert working in the same field. In the

present case, it appears that before registration of the offence on 10.07.2018, one report had been obtained by the Investigating Officer from the Civil

Surgeon of the District and this report dated 28.06.2018 has been relied upon by both the respondents. However, this report does not say anything

about negligence much less gross negligence, on the part of the applicants while treating deceased Sagar. It does not indicate that it holds the

applicants as responsible even remotely for causing death of deceased Sagar. Therefore, there was no way that the Investigating Officer could have registered offence against these applicants on the basis of the report dated 28.06.2018. The reliance placed on this report by both the respondents, we would say, is misplaced.

13. At this stage, we find it necessary to also make our comment in respect of the averments taken in the reply filed by the Investigating Officer, Shri

M. H. Sarkate, API, Police Station Dattapur, District Amravati. In paragraph No.8 of the reply, API Sarkate has stated that in the report given by the

Committee headed by the District Civil Surgeon, Amravati dated 28.06.2018, both the applicants were indicted in clear terms and, therefore, the report

dated 11.07.2018 of the same Committee, exonerating the applicants should be ignored. We have already found that the report dated 28.06.2018 does

not implicate the applicants in any manner, much less "clear terms", as mentioned emphatically in the reply of the API. It is clear that the

statement so made in the reply filed by the API is false and appears to be intentionally made to mislead this Court. However, it's a different

matter that this Court was not misled. On this backdrop, we would only request the office of the Public Prosecutor to be careful in future while

drafting and filing reply on behalf of the prosecution. Courts require assistance of parties to do justice and not to sponsor cause or agenda of one of

the parties. This would apply even with greater force to prosecution which takes up cudgels on behalf of society and not any self-serving individual

spited by malice and vengeance.

14. Thus, the report on which reliance has been placed for registration of the offences was favouring the applicants. There is also second report of the

same Committee of the date 11.07.2018. This second report clearly favours the applicants when it says that there was no negligence on the part of

any of the applicants in treating deceased Sagar. We have already seen the first report speaks of no negligence. Thus, the position is that both the

reports indicate no negligence on the part of the applicants in treating deceased Sagar. So, any possibility of registering offence punishable under

Section 304A IPC, the crime of gross negligence, was ruled out. But, the police ignored it and went ahead in registering a crime for even more grave

offence, the one of culpable homicide not amounting to murder punishable under

Section 304 IPC. Police ignored the fact that essential requirement of this offence is of causing death with intention or knowledge and both these ingredients were absent here, nor was it anybody's case that the applicants did some act with intention to cause death or such bodily injury as is likely to cause death or with knowledge that the applicants are likely by such act to cause death. Even then, the applicants were arrested on 10.07.2018, remanded to police custody for three days and were made to remain under M.C.R. till 19.07.2018. They were released on bail on 19.07.2018. All this was done by violating the directions of the Hon'ble Apex Court given in the case of Jacob Mathew (Supra) by the Investigating Officer.

15. Learned counsel for the respondent No.2/complainant submits that the applicants are habitual offenders, in the sense, that they have formed habit of negligently treating patients. While arguing the point, the learned counsel for the respondent No.2 refrained from saying anything further against the applicants. In support, he invites our attention to the averments made in the reply of the respondent No.2 in paragraph No.8 which suggests that a similar crime of medical negligence has been registered against both the applicants vide Crime No.261/2017 for causing death of one patient, Ku. Nidhi. Just because another similar crime has been registered against the applicants, it cannot be said that the present crime registered against the applicants discloses prima facie commission of the offence registered. Quashing of a crime would depend upon the nature of the allegations made against the accused, material available on record and the necessary inference which is required to be drawn from those allegations while accepting those allegations to be true. The allegations made in the present crime against the applicants, taken at their face value, do not show anything more than the case of negligence as pleaded by complainant himself.

But even for that case, the Expert Committee Reports do not extend any helping hand and that the allegations of negligence have also been made with much delay, delay of more than one year which has not been explained in any manner by the complainant. All these facts clearly show that the allegations taken at their face value and accepting them entirely, do not make out any prima facie case against the applicants for the offence punishable under Section 304 of the Indian Penal Code. It would then follow that in this case, the antecedents of the applicants for the present purpose

would be irrelevant. Previous conduct of an accused is relevant in such matters as the grant of bail or in implementing the sentencing in policy. The argument, therefore, is rejected.

16. In the result, we are inclined to allow the application. Accordingly, the application is allowed in terms of prayer clause (a).

17. Remuneration of Rs.3,000/- (Rs. Three Thousand only) be paid to the learned appointed counsel appearing for respondent No.2.