

(2012) 09 JH CK 0024

In the Jharkhand High Court

Case No : Criminal Rev. No. 214 of 2004

Dr. Ashok Kumar Chourasia and Dr. Upendra Narayan Sinha	APPELLANT
Vs	
The State of Jharkhand and Sri Ram Yadav	RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 304A

Citation : (2013) 1 AJR 460

Hon'ble Judges : Harish Chandra Mishra, J

Bench : Single Bench

Advocate : Anoop Kumar Mehta, for the Appellant; Sanjay Prasad, Advocate, for the Opposite Party No. 2 and Mr. T.N. Verma, Assistant Public Prosecutor, for the State, for the Respondent

Final Decision : Allowed

Judgement

H.C. Mishra, J.—Heard learned counsel for the petitioners, learned counsel for the State, as also learned counsel for the complainant opposite party No. 2. The petitioners are aggrieved by the order dated 28.02.2004 passed by Sri S.S. Yadav, learned Judicial Magistrate, 1st Class, Dhanbad, in C.P. No. 06 of 2003, whereby the application filed by the petitioners for dropping the criminal proceedings against them for the offences u/ss. 304A and 201 of the Indian Penal Code, has been rejected by the Court below.

2. The facts of this case lie in a short compass. A complaint petition was filed by the complainant Sri Ram Yadav, alleging that the nephew of the informant, namely, Sailesh Kumar was suffering from Tonsillitis and the complainant accompanied with his nephew Sailesh Kumar went to Central Hospital, Dhanbad and consulted the E.N.T. Specialist, Dr. A.K. Chourasia, the petitioner No. 1, who advised a minor surgical operation of the Complainant's nephew. It is alleged in the complaint petition that the petitioner No. 1 demanded Rs. 2,000/- towards his fees, but he agreed for performing the operation for Rs. 500/- instead, even though the complainant's nephew was entitled to free treatment. It is alleged

that on 19.11.2002 the surgical operation was performed, but subsequently the complainant learnt that the patient had been shifted to I.C.U. of the hospital. The complainant rushed towards the I.C.U. where he overheard the conversation between the petitioner No. 1, Dr. Ashok Kumar Chourasia and petitioner No. 2, Dr. Upendra Narayan Sinha, wherein Dr. Ashok Kumar Chourasia was accusing Dr. Upendra Narayan Sinha for faulty administration of anesthesia, whereas Dr. Upendra Narayan Sinha was accusing Dr. Ashok Kumar Chourasia that there was gross carelessness during operation on the part of Dr. Ashok Kumar Chourasia. They however, became mum seeing the complainant and began telling that such situation happens after minor operations and the patient would be alright within 72 hours. The patient was unconscious till afternoon of 22.11.2002 and the complainant attempted to contact Dr. Ashok Kumar Chourasia and Dr. Upendra Narayan Sinha, but found both the petitioners missing from the hospital and as such, the Complainant contacted Dr. R.L. Prasad, C.M.S. Central Hospital, who informed the Complainant that the problem had developed at the operation table itself and there is not much that could be done except praying the God. Ultimately, the patient died on 23.11.2002 at about 10:30 p.m. and he was declared to be dead due to C.R. Failure.

3. Further alleging that the Complainant in order to collect the documents pertaining to the treatment of his nephew Sailesh Kumar went to Central Hospital on 26.11.2002, but he could know that the efforts had been made by the accused persons to remove the evidence against them, the complaint petition was filed against the petitioners for the offences u/ss. 304A and 201 of the Indian Penal Code on 03.01.2003 in the Court of the Chief Judicial Magistrate, Dhanbad, which was registered as C.P. No. 6/2003.

4. It appears that the statement of the complainant was recorded on solemn affirmation and the complainant also examined some witnesses during the enquiry stage. On the basis of the enquiry, prima-facie case was found against the petitioners and accordingly, the process was issued against the petitioners. Subsequently the petitioners filed the application for dropping the criminal prosecution against them which was rejected by the Court below by the impugned order, holding that upon enquiry it was found that both the accused doctors had taken active part in the operation of the deceased at the Central Hospital, Dhanbad, and there are positive averments in the complaint petition which have also been supported by the witnesses examined by the complainant on oath at the enquiry stage on the basis of which the prima-facie offence is made out u/ss. 304A and 201 of the Indian Penal Code.

5. Learned counsel for the petitioners has submitted that the impugned order passed by the Court below is absolutely illegal and the petitioners have been falsely and maliciously implicated in this case, in as much as, from the complaint petition itself it would be apparent that it relates to the occurrence during the period 18.11.2002 to 23.11.2002, whereas the complaint petition was filed after an inordinate delay on 03.01.2003. It has also been submitted that there was

nothing in the record to show that there was any gross negligence by the petitioners in treating the patient. In this case even post mortem was not held and nothing is available on record to show that there was any negligence on the part of the petitioners in performing the surgical operation of the patient which was the cause of the death.

6. Learned counsel has drawn the attention of this Court towards the second edition of the book on Otolaryngology, Volume-III, wherein there is a topic "Complications of Adenotonsillectomy" which reads as follows:-

Anesthesias. Among the most serious complications associated with adenotonsillectomy are those attributable to anesthesia (Boies, 1954; Hill, 1960: Alexander et. al., 1965). Even under closely monitored conditions, anesthesia may produce operative mortality secondary to respiratory compromise or cardiac arrest. Beecher and Todd (1954) found that the overall death rate from general anesthesia was approximately 1:1560, but 20 percent of the deaths occurred in children.

7. Learned counsel for the petitioners has placed reliance upon the decision of the Supreme Court of India in Jacob Mathew Vs. State of Punjab and Another, , and has pointed out that relying upon the previous decisions of the Supreme Court on the point, Supreme Court has discussed the negligence of medical practioners and has laid down the guidelines which are as follows:-

48. We sum up our conclusion as under:

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(3) A professional may be held liable for negligence on one of the 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. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam case, WLR at p. 586 holds good in its applicability in India.

(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".

8. Placing reliance upon this decision learned counsel for the petitioners has submitted that there is nothing to show that there was any gross negligence on the part of the petitioners and accordingly, the criminal prosecution against the petitioners cannot be continued and it is a fit case in which the prosecution against the petitioners be quashed.

9. Learned counsel for the State on the other hand has submitted that no reason had been assigned by the doctors for the death of the deceased which should have been done, which shows that proper precautions had not been taken by the doctors. Learned counsel for the State has further submitted that it is a case of gross negligence by the doctors and even the post mortem was not conducted on the deceased.

10. Learned counsel for the complainant opposite party No. 2 adopting the submission of the learned counsel for the State has further submitted that from the allegations made in the complaint petition it would appear that nobody looked after the patient while he was in the I.C.U. and the doctors were not found to be present. It has also been submitted that this is a case in which the accused petitioners did perform the surgical operation on the deceased and when the condition of the patient deteriorated the accused petitioners were not there to attend him in the I.C.U., and accordingly, there was gross negligence on part of the petitioners, against whom the offence is clearly made out and the application filed by the petitioners has been rightly rejected by the Court below.

11. So far as the delay in filing the complaint petition is concerned, it is submitted that it was due to collection of the evidence against the accused persons and the delay is not such, so as to disbelieve the allegations made in the complaint petition against the petitioners. Learned counsel accordingly, submitted that there is no case of interference in the criminal proceedings against the petitioners at this stage in the revisional jurisdiction.

12. In Kusum Sharma and Others Vs. Batra Hospital and Medical Research Centre and Others, , the Apex court has relied upon the case of Jacob Mathew (Supra) and upon considering the leading cases of medical negligence both in our country and other countries, has laid down the law as follows:-

89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,

II. 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

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of

the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

90. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

13. In the present case, except the statement of the witnesses that due to the negligent treatment the patient died, there is nothing to show as to actually what "gross negligence" was committed by the petitioners in the treatment of the nephew of the complainant. Even the post mortem report of the deceased is not there to show that the deceased actually died due to any "gross negligence" by the petitioners in performing the surgical operation upon the deceased. As such, in view of the law settled by the Apex Court in Jacob Mathew's case (Supra), followed in Kusum Sharma's case (supra), I am of the considered view that no offence can be said to be made out against the petitioners and compelling the petitioners to face the criminal prosecution shall amount to misuse of the process of Court. In view of the aforementioned discussions, the impugned order dated 28.02.2004 passed by Sri S.S. Yadav, learned Judicial Magistrate, 1st Class, Dhanbad, in C.P. No. 06 of 2003, is hereby, set aside. Consequently, the petitioners stand discharged. This application is accordingly, allowed.