
(2000) 06 KL CK 0056

In the High Court Of Kerala

Case No : Criminal M.C. No. 6275 of 1999

Dr. Gopinatha Pillai T.M.

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 20-06-2000

Acts Referred:

Penal Code, 1860 (IPC) — Section 154(1), 336, 337, 338, 87

Citation : (2000) 2 ALT(Cri) 326 : (2000) CriLJ 3682 : (2000) 3 ILR (Ker) 421 : (2000) 3 RCR(Criminal) 741

Hon'ble Judges : D. Sreedevi, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas and Prakash Puthiadam, for the Appellant; V.K. Mohanan, Public Prosecutor (for No. 1) and M.J. Thomas, (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

D. Sreedevi, J.—This CrI. M.C. is filed against C.C. No. 389 of 1999 on the file of the Judicial First Class Magistrate Court-II, Kanjirappally.

2. Petitioner, who is working as Civil Surgeon at the Taluk Headquarters Hospital, Kanjirapally has filed this CrI. M.C. to quash all proceedings initiated against him in C.C. No. 389 of 1999 on the file of the Judicial First Class Magistrate Court-II, Kanjirappally. C.C. No. 389 of 1999 has been initiated on a private complaint filed by the second respondent, Girijakumari. The allegation against the petitioner is that on 12-10-1998 her minor daughter was admitted to the Taluk Headquarters Hospital, Kanjirappally due to severe stomachache. Petitioner examined the girl and decided to remove the appendix and accordingly, she was subjected to surgery "appendectomy" on 17-10-1998. It" is also alleged in the complaint that due to the " negligence of the Doctor the right ovary of the complainant"s daughter was lost and the loss of right ovary was never informed to her or her daughter. It is also alleged that when her condition became serious, she was taken to the Medical College Hospital. Then only she realised that her daughter"s

right ovary has been lost because of the negligence of the accused. Annexure-A1 is the complaint. Petitioner was accused for offences under Sections 336 and 338, IPC. According to the petitioner, the complaint does not disclose a prima facie case. He would contend that the daughter of the complainant came with acute stomachache and on investigation it was diagnosed that the patient had acute appendicitis and after obtaining consent appendectomy was done on 16-10-1999. During the course of surgery, it was found that there developed a cyst in the right ovary. Therefore, he brought the service of the gynecologist, who had diagnosed that the right ovary of the patient had been covered by a cystic mass. The same was informed to the complainant. After getting her consent in her own handwriting, surgery of removal of right ovary was done. The surgery for removal of ovary was done by the gynecologist of the hospital. As the ovarian cyst was huge in size (8 x 6 cm) and the right ovary could not be separately palpable, if the cyst was not removed, it would lead to extremely serious consequences. Annexure A2 is the case sheet kept in the hospital. This would go to show that the entire ovary was degenerated. After surgery, she was referred to the Medical College Hospital, Kottayam, as the Taluk Headquarters Hospital did not have the facility for blood transfusion. The histopathological report is Annexure-A3. Annexure A-3 goes to show that both the organs appendix and ovary were diseased organs requiring removal. The complainant has alleged that the surgery was done rashly and dangerously and hence her daughter had to suffer the loss of ovary. The above allegations are denied by the petitioner. He has stated that the above proceedings initiated against him are malafide. Annexure A4 is the consent given by the complaint for removal of the cyst and also for removal of the ovary. The factum of consent was suppressed by the complainant when she gave the complaint Annexure-A1. Therefore, it is submitted, that the complaint is liable to be quashed, as it does not make out a prima facie case of negligence on the part of the petitioner.

3. Where a criminal proceeding has been instituted by a complainant, the complaint can be quashed where the allegation made thereon on its face constituted an offence or where the allegations made are so absurd and inherently impossible that on the basis thereof no prudent person can reach a just conclusion that there is sufficient ground for proceeding against the accused. The Supreme Court in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, held, that (paras 31 and 32) -

The condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence. It is therefore manifestly clear that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Section 154(1) the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say to register a case on the basis of such information.

Whether the complaint makes out a prima facie case is the question to be looked

into in this case. Annexures-A4 (1) and (2) are the consent given by the complainant respectively for the removal of appendix and also for removal of ovary. The factum of consent by the complainant for performing the operation has been suppressed in the complaint. Petitioner has filed the case-sheet kept by him in the Taluk Headquarters Hospital, Kanjirapally, where he is working as Civil Surgeon. This goes to show that the complainant's daughter Santhakumari was admitted to the hospital and "appendicectomy" was done and on examination it was detected that there is a cystic ovarian mass (8 x 6 cms.) on the right side. The right ovary could not be separately palpable. So, Dr. Rajan, Gynecologist, was called for as the entire ovary was degenerated. The complainant's consent was obtained for removal of ovary by surgery. It is stated that after surgery, as there was no facility for transfusion of blood in the Hospital, she was referred to the Medical College Hospital. Annexure A-3 is the histopathological report issued by the Medical College Hospital, which goes to show that both the organs appendix and ovary, required removal. Therefore, surgery was done for the safety of the complainant's daughter.

4. In order to attract Section 336, IPC, there must be an act done by the petitioner to endanger human life. After surgery, the girl recovered from her illness and is now living without any stomach pain. So, it cannot be said that the petitioner had done any act to endanger the life of the girl. Section 337, IPC is attracted only when the petitioner causes hurt to the girl by doing any act so rashly and negligently so as to endanger life. This is also lacking in this case. Section 338, IPC is attracted only when the petitioner causes any grievous hurt to the girl by doing any act so rashly and negligently. From Annexures-4(1) and (2) and also from Annexures 2 and 3, it can be seen that the petitioner has not committed any offence as alleged by the complainant.

5. It is submitted for the petitioner that even if it is assumed that no consent has been obtained by the Doctor, before performing the operation, even then the Doctor's action comes under Sections 87, 88 and 89, IPC. Even if the surgery was done without the consent of the patient or his/her guardian; if it is for the benefit of the patient he is not liable. Section 98 deals with harm caused with the consent of the person injured or someone competent under law to give such consent on his behalf, excludes causing of such harm from the category of offence. Here the complainant has given her consent. Section 88, IPC provides that harm done for the benefit of the person injured and with his consent will not make the person causing harm liable for criminal offence. The illustration to Section 88, IPC is the following :

A surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent, A has committed no offence.

So even if harm is caused, if it is for the benefit of the person, it will not come under "offence". From Annexures 2 to 4 it is seen that even if the consent

alleged (Annexure A4(1);

(2) are not genuine, the petitioner is entitled to protection under Sections 87 - 89 IPC.

6. Mr. Bechu Kurien Thomas submitted that the Government have issued certain guidelines in order to protect the Doctors from unnecessary and frivolous criminal prosecution. He has produced for my perusal the Circular issued by the Government. By Memo No. 49882/SSA2/84/Home dated 20-8-1984, Government had issued guidelines to police officers in regard to investigation of complaints against Doctors in Government Service for acts of commission or omission in the medical care of a patient in Government Hospitals and Dispensaries. Government issued the following further instructions in the matter:

1. After registration of any case against a doctor for criminal negligence, the investigating Deputy Superintendent of Police will place the case before the Superintendent of Police and District Medical Officers. He will continue further investigation in the light to decision jointly taken by the Superintendent of Police and the District Medical Officer on further action in the case.

2. If the views of the Superintendent of Police are different from those of the District Medical Officer, the Superintendent of Police and District Medical Officer will refer the issue for the opinion of the appropriate specialist Doctor and further action will be on the basis of advice of such specialist.

This circular only relates to the investigation by police. Here, the Magistrate has already taken cognizance of the offence. Prima facie the allegations in the complaint appear to be baseless and no prudent man can reach a just conclusion that there is sufficient ground for proceeding against the petitioner. Therefore, the complaint is liable to be quashed.

In the result, the Cr. MC is allowed and all proceedings initiated against the petitioner in CC No. 389 of 1997 on the file of the Judicial First Class Magistrate Court-II, Kanjirappally are quashed.