
(1997) 04 BOM CK 0013

In the Bombay High Court

Case No : Criminal Application No. 3348 of 1993

Dr. Kandarpat Dholkia and Another

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 28-04-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 201
Penal Code, 1860 (IPC) — Section 201, 202, 203, 304A

Citation : (1997) 99 BOMLR 319

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—Both these petitions arise out of the same order passed by the Metropolitan Magistrate 14th Court Girgaon, Bombay, on 11/08/1993 issuing the process against the accused Nos. 1 to 4 for the offences u/s 304A, 201, 202 and 203 of the Indian Penal Code.

2. Cr. Writ Petition No 465/94 is filed by Dr.G.S. Ambardekar and Dr. J.J. Merchant who are accused Nos. 1 and 2 in the original criminal case filed by S.A. Chaturvedi, and Cr. Application No. 3348/93 is filed by Dr. Kandarpa T. Dholakia and Dr.H.R. Jhunjhunwala who are accused Nos. 3 and 4 in the original complaint.

3. The complaint was the cause of issue of process against all the petitioners accused, was filed by Respondent S.A. Chaturvedi who was the father of Anand Chaturvedi (deceased) who at the age of 21 had returned from U.S.A. in June, 1992, to India after completing his studies in business management. Immediately thereafter, Anand complained of severe backache. He was examined by Dr. Jhunjhunwala and Dr. Dholakia. He was subjected to medical examination treatment by the Doctors at the hospital and Dr. Jhunjhunwala diagnosed his backache as being a result of slip disc and was recommended traction treatment and the same was done at the Breach Candy Hospital. Anand was" admitted as indoor patient hut did not respond to the treatment and thereafter Dr.

Jhunjhunwala and Dr. Dholakia advised surgery for rectifying the slip disc problem. Thereafter, Anand underwent all the operational test and he was certified as fit for surgery which was scheduled to be held on 4th August 1992, at the Breach Candy Hospital. On that day, in the morning, Anand was prepared for surgery. He was in sound health and proper mental state of mind. He was taken to the Operation Theatre at 10.15 a.m. Thereafter, according to the complainant, at about 12.15 p.m. staff nurse told complainant and his family members that some problem has occurred and Anand was being removed to the I.C.U. of the Hospital and his operation was postponed. While Anand was being wheeled out of the operating theatre in unconscious condition he underwent convulsions at fast rate. The complainant and his family members made enquiry regarding the events that had transpired in the operating theatre and learned that Anand had suffered Hypoxia or reduced oxygen supply to the brain, thereby causing acute brain damage and suffered anaesthesia related cardiac arrest during surgery, however, his heart was revived and he went in state of Coma. Thereafter, Anand was given extensive treatment from the Jaslok Hospital and the complainant arranged for experts from abroad for examination and treatment of Anand. However, Anand did not respond to any kind of treatment and was declared dead on 29.08.92 and the cause of death that was certified as per the Breach Candy Hospital was "Cerebral Hypoxia following cardiac arrest, leading to brain death and ultimately, multiple organ failure."

4. It is the case of the complainant that his son Anand suffered due to deprivation of oxygen to the brain due to slipping of H.T. Tube from his nose while Anand was being placed and positioned on the scoliosis frame of the operation table. The slipping of E.T. Tube was not detected well in time by the accused who were in the operation theatre, and as a result, Anand suffered extensive damage to his brain and then cardiac arrest occurred. According to the complainant, Anand was dead on 04.08.92, but his heart was kept working by artificial means by the Doctors and he was declared dead on 29.08.92. According to the complainant, all the accused Doctors were negligent in discharging their duties and therefore, he filed complaint against all the four accused petitioners before the Metropolitan Magistrate under the aforesaid sections.

5. The learned Magistrate ordered enquiry u/s 201 of the Cr.P.C. Accordingly, enquiry was made in which statements of 17 persons concerned with the Anand and connected with Breach Candy Hospital were recorded and on the basis of that record, the Metropolitan Magistrate, ordered issue of process against all the four accused petitioners. It is this order which is challenged by the petitioners by their respective petitions or applications.

6. I heard Mr. V.V. Vashi for the Petitioners Dr. Dholakia and Dr. Jhunjhunwala and Advocate Owalekar for the two accused at length. Both of them took me through the entire record and contended that no case under any of the sections of the I.P.C. was made out against the accused/petitioners and as such, the order of issue of process was liable to be quashed. It was also contended by them that

all the four petitioners were eminent Doctors having world-wide reputation in their field, their record being without any blemish and that all the Doctors were aged and were above 65 to 70 years old. They further contended that this was not a case of negligence of any kind and the Doctors have done everything possible within their means to save Anand.

7. Mr. Owalekar, the learned Counsel for the petitioners who were the anaesthetist contended that the death of Anand was an accident arising out of reaction of anaesthetic drug and cardiac arrest was the result of anaesthesia. It was also contended that Anand's death occurred 25 days after his suffering cardiac arrest during which time no efforts were spared to save Anand either by Breach Candy Hospital or by any of the Doctors. It was also argued that all the Doctors had acted in good faith, with good intention and had taken due care and as such, the order of issue of process was liable to be quashed. Lastly, it was argued that the order of issue of process was the result of non-application of mind by the learned Magistrate as the Magistrate did not consider entire material collected by the police.

8. On the other hand, Mr. Mahesh Jethmalani, the learned Counsel for the Respondents in both the petitions, contended that Anand's death was an act of rash and negligence and this was not a case of allergy to the anaesthetic drug "Collin" as contended by the Accused Doctors. Mr. Jethmalani submitted that though initially all the accused Doctors tried to tell to the complainant and to the others concerned with Anand, that Anand died of cardiac arrest, Dr. Dholakia in an interview given to the Press which was published in the News papers had admitted that E.T. Tube had slipped from Anand's nose while he was shifted or turned into supine position, but none of the Doctors were careful enough to note this slipping of the E.T. Tube and as a result of which, Anand who was under the influence of anaesthesia did not get supply of oxygen to his brain for considerable time, as a result of which he died in the operation theatre itself, but this fact of Anand's death due to negligence was suppressed by all the four Doctors from the complainant and his family members and Anand was kept in I.C.U. under artificial respiration till 29th August, 1992. He, therefore, contended that this was a clear case of rash and negligent act and the learned Magistrate was justified in issuing process against all the four accused Doctors. Mr. Jethmalani also contended that the Police during their investigation had collected sufficient material to support the case of the complainant.

9. Since the Petitioners have challenged the issue of process against them in this case, it has to be seen whether the complainant has succeeded in making out the case against the petitioner for the issue of process, and whether there was material before the Magistrate to justify passing of such an order.

10. In this regard, the statement recorded by the police during the enquiry throws light on the happenings of the events on the fateful day, i.e. on 4.8.92. The statement of Dr. Mangal Ratan C. Jain and Dr. Noshir Hormussji Wadia are important. Dr. Wadia in his statement at record page No. 39 has stated that "the

patient was immediately turned over and during this hurried manouvre, the E.T. Tube had slipped out, but was replaced at once." Dr. Tulsidas Ganpatrao Honnekeri has on record Page No. 45, admitted that the brain damage occur following the cardiac arrest or because of slipping of E.T. Tube. Similar admission is given by Dr. Chetan Jagjivan Unadkat on record Page No. 56 wherein he has stated that "I now say that slipping of E.T Tube from treachea of Anand and replacing it immediately at its position without waste of time, was for a short time."

11. There are many other statements of Doctors and other concerned with the Hospital in this regard and everyone has considered slipping of E.T. Tube from treachea. This clearly shows that E.T. Tube has slipped from the nose of the victim and the valuable time had elapsed before this fact was noticed by all the four accused who were in the Operation Theatre. The most important fact is that the medical papers prepared by all these four Doctors do not speak about the slipping of E.T. Tube. If at all the E.T. Tube had slipped from the nose of Anand, then, it was the first and foremost duty of all the four accused Doctors to make the note of the same in the medical papers, but, admittedly, the important fact was not revealed in the medical papers and therefore, this itself is sufficient and strong circumstance against the accused.

12. If it was a case that Anand died a natural death on account of cardiac arrest due to anaesthetic drugs, the slipping of the E.T. Tube from the nose of Anand would have been never referred to by all these Doctors whose statements were recorded by the police. If these were merely the allegations made by the complainant, then, those Doctors (whose statements were recorded during the enquiry) were not under any obligation to give admissions about slipping of E.T. Tube and were also not compelled to give any explanation in that regard, but, admission of slipping of E.T. Tube (irrespective of the period for which it was out of nose) is a grave circumstance against all the four Doctors because they were present in the Operation Theatre and the fate of Anand's life was in their hands at that time.

13. Prima-facie, therefore, this is a case where complainant can succeed in prosecuting the accused for negligence and for other offences under the Indian Penal Code because he has with him material to establish that his son Anand died not on account of cardiac arrest following anaesthetic drugs, but, on account of slipping of E.T. Tube. The learned Magistrate therefore was justified in issuing the process under the relevant sections of the I.P.C. against all the four accused Doctors.

14. It was argued by the learned Counsel for the Accused that Anand's death was an accident in which none of the Doctors were negligent. This argument cannot be accepted at this stage because slipping of E.T. Tube from the nose, is itself an incident revealing negligence. Second factor prima-facie proving negligence is Anand's brain death which was immediately followed by slipping of E.T. Tube. It is an admitted fact that Anand was under anaesthesia and was not

in his senses and he was not in a position to react violently when the supply of oxygen stopped on account of slipping of E.T. Tube. He was not in his consciousness and could not do anything to save himself. All the four Doctors i.e. the Accused were not watchful and alert enough right from the stage when the E.T. Tube was slipped from Anand's nose when the anaesthetic drug was administered to him. If the slipping of E.T. Tube had been noticed instantaneously Anand could not have died. It is an admitted fact that apart from slip disc problem Anand was fully healthy. He was a young man full of energy and had no other complications, but because of his condition due to anaesthetic drug, he was totally in the hands of the accused who prima facie did not act diligently as alleged by the complainant.

15. There are admissions of Dr. Tulshidas Ganpatrao Honnekeri that the record i.e. medical papers of Anand were inadequate and the statements of Dr. Ambardekar and of other Doctors that E.T. Tube had slipped, and that the Anand died immediately thereafter. It is the scientific truth that even if the brain dies, the heart can be kept functioning by artificial machines. Prima facie, it appears that Anand died in the Operation Theatre itself, but, his heart was kept working alive for 2/3 weeks thereafter, much at the cost of pain, sufferings and agony of his parents and relatives. The fact that Anand's death in Operation Theatre on account of slipping of E.T. Tube was prima-facie suppressed by the Accused and therefore, for all these reasons, no fault can be found with the order of issue of process against the accused.

16. In fact, from the thorough and probing enquiry made by the concerned Police Station in this matter, many things have come to light and there is, therefore, more than sufficient material on record to prosecute the accused and proceed with the trial. In fact, there is statement of Dr. Dholakia (accused) at Page Nbs. 96 and 97 wherein he has admitted that the E.T. Tube had slipped. He has stated "prior to this anesthetist noticed the slipping of E.T. Tube from its position, sooner when Anand was turned and placed on the trolley. The position of the E.T. Tube was immediately corrected without wasting any time. This admission firstly proves prima-facia that the E.T. Tube had slipped and secondly it involves all the accused Doctors because none of them have come forward to say as to for how much period has elapsed since the slipping of the E.T. Tube was noticed. In fact, as is known to everybody, the E.T. Tube is inserted in the nose and is fixed to the nose by sticking plaster to ensure that it does not slip out from the nose and remains intact in its position even if the body is moved from one position to another. The slipping of the tube creates many problems and questions which the accused only will have to answer. This is, therefore, the case where the complainant has succeeded in making out strong prima-facie case against all the four accused Doctors. Dr. Dholakia and Dr. Jhunhunwala cannot escape from their liability on the ground that they were surgeons only and were not concerned with pre operation care. They also cannot be allowed to throw the responsibility on Dr. Ambardekar and Dr. Merchant. All the four accused Doctors were in the Operation Theatre. They were incharge of Anand's life and body.

They were supposed to be alert and watchful every minute and every second and to look after Anand till the operation was successfully carried out.

17. It was therefore their joint and several responsibility and liability and, therefore, I do not find any fault or illegality in the order of issue of process. The petitions are therefore liable to be dismissed.

18. I therefore pass the following order.

Criminal Application No. 3348/93 and Criminal Writ Petition No. 465/94 are dismissed. Stay if any is vacated. Parties to appear before the concerned Magistrate on 20th June, 1997. The Metropolitan Magistrate is directed to decide the complaint within six months from 20th June, 1997. C.C. expedited.