
(1986) 10 MP CK 0036
In the Madhya Pradesh High Court

Dr. R.P. Dhanda

APPELLANT

Vs

Bhurelal and Another

RESPONDENT

Date of Decision : 20-10-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 203, 204, 320, 398

Evidence Act, 1872 — Section 105

Penal Code, 1860 (IPC) — Section 338, 420, 88

Citation : (1987) CriLJ 1316 : (1987) JLJ 458 : (1987) 32 MPLJ 27

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Judgement

K.L. Shrivastava, J.

This revision petition is directed against the order dated 13-4-1983 passed by the 3rd Addition Sessions Judge, Indore, in Criminal Revision No. 298 of 1982 whereby setting aside the trial Magistrate's order dismissing the complaint u/s 203 of the Code of Criminal Procedure 1973 (for short "the Code") a direction has been issued to register a case under Sections 338 and 420, IPC against the petitioner.

Circumstances giving rise to the petition are these. The non-applicant No. 1 Bhurelal suffered from trouble, in his right eye. The petitioner operated upon him in the T. Choithram Hospital, Indore for cataract. After a few months of the said operation, the non-applicant No. 1 suffered from retinal detachment of the same eye and was again operated upon in the said hospital on 22-4-81.

The non-applicant Bhurelal not being satisfied with the operations in which according to him the petitioner was involved, served him with a lawyer's notice dated 23-2-82 (vide Ex. P/1). In para 6 thereof, it has been stated as under:

My client's vision of the eye stands completely vitiated. The eye sight is totally lost. It is said to be permanently damaged. The fault in the operations is the proximate cause for such occurrence. The negligence is writ large. How is that

the small trouble labelled as "cataract" could not be cured by operation and soon enough caused "retinal detachment" which on second operation usurped the sight in its entirety? The left eye too is partially damaged as a consequence and is now being diagnosed as "myopic". The loss is seemingly irreparable. And this should occasion at the hands of a medical practitioner of your standing and repute is certainly an issue causing grave concern. The grievous hurt to the eye is caused by the operation. The operation is obviously a rash and negligent act endangering human limb and eye and thus its safety so ruthlessly.

Paras 9 and 10 read as under:

(9) My client thus demands from you the following amount as compensation:

Rs. 20,000.00 towards expenses incurred so far. Rs. 20,000.00 towards special damages. Rs. 60,000.00 towards general damages.
_____ Total Rs. 1,00,000.00 (one Lakh only) _____

(10) My client also desires you to express sorrow as atonement in order to obviate initiation of criminal proceedings against you.

In his reply dated 6-4-82 (vide Ex. P/ 3) the petitioner took the stand that in respect of the retinal detachment he was not the operating surgeon. It may however, be pointed out that in the bill (vide Ex. P/9) issued by the hospital to the non-applicant No. 1 it has been mentioned that Rs. 450/- were paid to the petitioner as operating surgeon for the operation.

In due course, the non-applicant filed a criminal complaint in question against the petitioner with the result already stated.

learned Counsel for the petitioner contends that his client's case comes within the coverage of Section 88 of the Indian Penal Code. According to him, though the petitioner has contended that he was not the operating surgeon, this stand taken by him does not come in the way of his claiming protection under the provision aforesaid.

The contention of the learned Counsel for the non-applicant No. 1 is that there was sufficient ground for proceeding against the petitioner and the dismissal of the complaint u/s 203 of the Code by the learned Magistrate was clearly erroneous and was rightly interfered with in revision. In this connection he has invited my attention to the decision in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, . According to the learned Counsel the false stand taken by the petitioner as to the person operating for retinal detachment is a circumstance which cannot be lightly brushed aside.

The contention of the learned Counsel for the petitioner further is that the non-applicant Bhurelal did not seek information from the petitioner as to the name of the doctor who had performed the operation in respect of the retinal detachment. He also did not take care to get produced the original documents from the hospital from which the name of the operating surgeon could be ascertained.

The contention of the petitioner's learned Counsel is also that it has to be remembered that in the notice the non-applicant No. 1 had laid a claim for damages. He did not however file any suit for enforcing his claim and is seeking to move the machinery of the criminal Court to enforce a claim which, at best, may be said to be of a civil nature.

The petitioner's learned Counsel has also urged that the learned Additional Sessions Judge could not have ordered registration of the case in respect of the offences in question in view of the provision in Section 398 of the Code which provides only for further inquiry into any complaint so dismissed.

The point for consideration is whether the revision petition deserves to be allowed.

It may be stated at the outset that it is well-settled that the prosecution must succeed on the strength of its own case and cannot rely on the weakness or falsity of the defence version. The falsity of defence version is no guarantee of the truth of the prosecution case.

It is true that according to Section 105 of the Evidence Act, the burden of proving that the case of the accused comes under any of the exceptions is on him but this burden is certainly not as onerous as the burden cast by law on the prosecution of proving its case beyond reasonable doubt. This burden cast on the accused may, in a given case, be held discharged even at the stage u/s 203 of the Code and it is not necessary that the matter must be left to be raised by the accused at the trial for determination.

A perusal of Section 203 of the Code shows that the Magistrate has to dismiss the complaint if from the material on record he is of opinion that there is no sufficient ground for proceeding. Section 204 *ibid* provides that if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding he shall order issue of process as therein provided.

Now as to the crimes complained of. Negligence is always relative to some circumstances of time, place or person. It is a negative term which indicates want of care. It is failure to exercise that degree of care which circumstances demand. It is necessary to distinguish between the standard of care ordinarily required in a particular case and the degree of care actually exercised. The standard of care, unless that is specifically laid down by law, could be such care and circumspection as would ordinarily be observed by a prudent and reasonable man in a particular set of circumstances. A perusal of Section 338 of the IPC shows that the criminal liability thereunder arises only when the offender does the act so rashly or negligently as to endanger human life or the personal safety of others and thereby grievous injury is caused. Rashness and negligence for the purposes of the section must be of such a degree as to sustain a finding of criminal liability as distinguished from civil liability. Criminal negligence may be shown in the performance of a duty which a person undertakes for another. But in this, as in the other cases, the degree of care required is only reasonable and

such as is customary for I the people undertaking similar duties. An oculist performing surgical operation by primitive means would certainly render himself liable for prosecution.

It may be pointed out that an intentional act is not a rash and negligent act and, therefore, for the offence u/s 338, IPC it is not necessary that there must be an intention to cause grievous hurt. For the applicability of this section it is necessary that grievous hurt as defined in Section 320 of the Code is the direct result of the rash and negligent act and not a remote result of the same.

At this stage reference may be made to Section 88 of the IPC which reads thus:

Act not intended to cause death, done by consent in good faith for person's benefit Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

When an operation of cataract is performed by a duly qualified doctor in the recognized Indian method of treatment with the consent of patient and in good faith for his benefit but the operation is unsuccessful and the patient loses sight, it is not permissible to hold that the accused is guilty under this section. From the mere fact that the operation has been unsuccessful, it cannot be held that there was rashness or negligence so as to give rise to criminal liability.

In the instant case, the non-applicant Bhurelal in addition to himself, has examined Suresh (P. W. 2) an agriculturist and Virendra Singh (P. W. 3) who is engaged in soap business. Their evidence shows that the non-applicant No. 1 had consulted the petitioner and was operated upon by him. No expert has been examined to show that during the alleged operations, the petitioner did not exercise the standard of care required of him. As already pointed out the fact that the operation has been unsuccessful does not ipso facto disclose that there was any negligence attracting criminal liability.

As regards the offence u/s 420, IPC also I find that the material on record does not furnish any sufficient ground for proceeding. According to the non-applicant's own case, the petitioner is an eye surgeon of repute and it cannot be held that it was as a result of any deception practised on the former that he parted with the money towards the fees charged by the latter.

From the foregoing discussion, it is clear that the order passed by the learned Magistrate dismissing the complaint was the proper one and the impugned order passed by the learned Additional Sessions Judge, setting it aside is improper and deserves to be set aside. The attention of the learned Additional Sessions Judge is specifically drawn to the provision in Section 398 of the Code as to the order that can be passed in the case of a complaint dismissed u/s 203 ibid.

In the ultimate analysis, the revision petition succeeds and is allowed. The

impugned order is set aside and the one assed by the learned Magistrate is restored.