
(2018) 03 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : 561A--225 OF 2013

DR. VIJAY GUPTA AND ANOTHER	Vs	APPELLANT
STATE OF JAMMU & KASHMIR AND ANOTHER		RESPONDENT

Date of Decision : 06-03-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 174, 561, 561(3)
Ranbir Penal Code 1989 — Section 80, 88, 304A

Citation : (2018) 03 J&K CK 0002

Hon'ble Judges : TASHI RABSTAN

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. The instant petition has been filed under Section 561_A Cr. P.C. for quashing the FIR No. 297 of 2013, registered against the petitioners for

commission of offence punishable under Section 304-A RPC along with the proceedings/ investigation being conducted against them in the said FIR.

2. Briefly stated the material facts are as under:-

3. The petitioners are serving in the Directorate of Health Services as Consultant ENT Specialist (Surgeon) and Consultant "Anesthetist

respectively and are presently posted at District Hospital, Rajouri. Both of them have at their credit 23 long years of service in the Directorate of

Health Services and throughout their service career, the petitioners have always treated the patients with utmost care and sincerity and has never

given any chance of complaint. It is also stated that during their whole service career they performed numerous surgical operations and there has been

no complaint of any sort either against the petitioners or against their performance.

4. It is stated that one person namely, Sh. Shariq Shadab, S/o Mohd. Shabir, R/o Village Tralla/ Panjnara, Tehsil Kotranka was diagnosed to be

suffering from Deflected Nasal Septum (DNS) and was advised surgery of his nose. He reached District Hospital, Rajouri at around 8.00 a.m. on

01.05.2013, accompanied with one person, namely, Yasir, who is stated to be his cousin, for getting himself operated upon for DNS. Even his

cousin's signatures are also appended on the consent form for the aforesaid operation. It is also mentioned that prior to the surgery of the nose of

the deceased, he was advised different routine tests, which were required for the said procedure, were also got conducted by the petitioners and

reports obtained thereto, the findings of which were duly recorded on the InPatient General Case Sheet. Thereafter, the patient was admitted as

Surgical Case under MRD No. 1830 in the District Hospital, Rajouri, where he was given pre-medication by Mr. Parvaiz Ahmed, Nursing Orderly and

thereafter he was taken to operation theatre for surgery. Copies of the In-Patient General Case Sheet and the consent form signed by his cousin are

enclosed.

5. It is submitted that inside the operation theatre after removal of packing from the nose of the another patient, the deceased was called to the

operation theatre. Petitioner No. 2, being an Anesthetist administered general anesthesia to the patient and surgery was initiated by the petitioner No.

1, but unfortunately, during the course of surgery, the patient died due to cardiac arrest, may be because of reaction of anesthesia drugs.

6. Learned counsel for the petitioners further contended that after the death of the deceased, his relatives without getting the post-mortem of the

deceased done, forcibly took away the corpse and buried and thereafter tried to project the case of the death as alleged negligence of doctors.

Thereafter on the orders of District Magistrate, Rajouri vide order dated 02.05.2013, an enquiry was ordered to be conducted with regard to the death

of the alleged allegations. For this purpose, the Additional District Magistrate, Rajouri was appointed as an Enquiry Officer, who after holding a

detailed enquiry into the matter returned the findings, which are as under:-

Conclusion:-

The doctors have accepted that in most probability the patient died of medicine/ drugs administered during anesthesia and it can be either by reaction

of drugs, over dose or mere suppression of heart movement because of anesthesia. However, there is a possibility that the patient died of aspiration (lack of breath), which is caused by anesthesia drugs with food present in the stomach.â??

Besides, the above conclusions, general assessment/ feed back about the functioning of the District Hospital Rajouri an recommendations have also been given in the said enquiry report.Â

7. Learned counsel for the petitioners further contended that simultaneously the Director, Health Services Jammu also constituted an Enquiry

Committee, consisting of five senior doctors for holding an enquiry into the death case of Mr. Shariq Shadab vide his officer order No. DHS/J/Gen-

Enquiry-81/897-0900 dated 01.05.2013. The Enquiry Committee so constituted after scrutinizing each and every detail, including all the records of the

hospital, statements of the staff and inspection of Operation Theatre returned the following findings, which are as under:-

â?? The Committee after perusal of all record of the hospital, statement of staff and inspection of OT is convinced that all requisite steps were taken

in this case. The patient has been properly examined adequate investigations were done. PAC and per operative Anesthesia were found to be within

normal limits, CPR was also as per standard guidelines.

The committee had noted with concern that the recording of findings and record keepings are extremely poor and need to be addressed the

Committee is also of the view that had autopsy been conducted it could have been useful to corroborate with the treatment/ drugs given to the

patient.Â

Conclusion:- to conclude, Committee is of the opinion that the doctors have provided adequate standard treatment and managed the patient as per

recommended protocols and no lapse on the part of any staff member could be found.â??

8. It is pertinent to mention here that a Special Investigating Team was also conducted, which too started carrying out investigation into the matter

with regard to death of the deceased during the course of his surgery.

9. Learned counsel for the petitioners further contended that subsequent to the aforesaid two enquiries, the father of the deceased approached the

Court of learned Judicial Magistrate, Rajouri by filing an application under Section

156(3) of the Code of Criminal Procedure, seeking directions to the SSP Rajouri to register an FIR against the doctors of District Hospital, Rajouri including the petitioners herein. On receipt of the said complaint, learned Judicial Magistrate, 1st Class, Rajouri directed the Chief Prosecuting Officer to ascertain the facts from the concerned quarters in the backdrop of the allegations levelled against the accused, who after some time appeared before the learned Judicial Magistrate alongwith Dy. S.P (DAR) and SHO, Police Station, Rajouri and informed the Court that inquest proceedings under Section 174 Cr. P.C. have already been initiated in the matter pursuant to enquiry of District Magistrate, Rajouri and SSP, Rajouri in terms of the order passed by the District Magistrate, Rajouri and a SIT was constituted,Â headed by Dy. S. P. (DAR) and SHO, Police Station, Rajouri as one of its members.Â

10. Upon receiving the aforementioned information, learned Judicial Magistrate (T), Rajouri vide order dated 20.05.2013 disposed of the application filed by the father of the deceased under Section 156(3) with the observations that law enforcing agencies are on the job sincerely and are looking into all the aspects of the case, therefore, the circumstances do not warrant invoking of Section 156(3) of the Code of Criminal Procedure.Â The SIT was also directed to submit the progress report of enquiry beforeÂ the Court after every four days. Copy of the aforementioned order is also enclosed.

11. It is further contended that the SIT so constituted in the case after carrying out the investigation into the matter on the pressure and influence exerted by the family of the deceased and without taking into consideration the two enquiry reports submitted in the mater by Additional District Magistrate, Rajouri and Enquiry Committee of senior doctors constituted by the Director, Health Services submitted its report dated 10.06.2013 to the Police Station, Rajouri upon which the respondent No. 2 has registered an FIR No. 297 of 2013 dated 10.06.2013 under Section 304-A RPC against the petitioners. According to the report submitted by the SIT to the Police Station Rajouri, the petitioners have allegedly been committed offence under Section 304-A RPC. Copy of the impugned FIR is enclosed herewith as Annuxure-E.

12. The petitioners challenge the impugned FIR No. 297/2013 on the following grounds:-

a) That the findings returned by the SIT in its report, which has been made basis for registration of FIR are totally perverse, as the members of the SIT constituted by the SSP, Rajouri for enquiring into the death of deceased were not the experts in the medical profession. The enquiry conducted by the experts in the medical profession have already given their enquiry report, in which they have not pointed out any act of omission or commission on the part of the petitioners or any other doctor while treating the deceased. The findings returned by the SIT run contrary to the findings and observations made by the Enquiry Committee consisting of senior doctors, therefore, the report of SIT should not have been believed by the respondent No. 2, who by succumbing to the pressure and influence of the friends and relatives of the deceased has registered the impugned FIR.

b) That even in the magisterial enquiry, which was conducted by the Additional District Magistrate, no lapse on the part of the petitioners or any other staff has been found while treating or operating the deceased. Hence, the findings returned by the SIT, which led to the registration of FIR against the petitioners are totally vitiated.

c) That the act of the petitioners while treating and operating the deceased cannot under law be termed as negligent act not amounting to culpable homicide punishable under Section 304-A RPC. The petitioners as the doctors have acted with utmost professional ethics and has taken all the necessary precautions while operating upon the deceased.

d) That a doctor cannot be held criminally responsible for patient's death unless it is shown that she/he was negligent or incompetent with such disregard for the life and safety of his patient that it amount to a crime against the State. Section 80 and 88 of the Ranbir Penal Code contain defences for doctors accused of criminal liability. Sections 80 & 88 of the Ranbir Penal Code reads as under:-

80. Accident in doing a lawful act. "Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. Illustration A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

88. 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. Illustration A, 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.

13. Learned counsel for the petitioners has placed reliance upon the decision of the Apex Court in case titled "Poonam Verma V/s Ashwin Patel"

AIR 1996 SC 550, wherein the Division Bench has categorically distinguished between negligence, rashness and recklessness. According to the

judgment a negligent person is one who inadvertently commits an act of commission and violates a positive duty. A person who is rash knows the

consequences but foolishly thinks that they will not occur as a result of her/his act. A reckless person knows the consequences but does not care

whether or not they result from her/his act. Any conduct falling short of recklessness and deliberate wrong doing should not be the subject of criminal

liability.

14. In case titled "Dr. Suresh Gupta Vs Govt. of NCT of Delhi and another", reported in 2004(6) SCC 422, the Apex Court considered that the

standard of negligence required to be proved for fixing the criminal liability on a medical man or surgeon. Relevant paragraphs of the aforesaid

judgment is reproduced hereunder, for facility of reference:-

"21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as

'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his

patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of

judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might

create civil liability but would not suffice to hold him criminally liable.

23.Â For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment.

Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large

because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried

about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and

patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable

negligence.

25.Â Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness

and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness

and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct.â??

15. Heard learned counsel for the parties.

16. The allegations against the petitioners as per the report submitted by SIT is that before giving anesthesia deceased was not got conducted prature

evaluation, cardio renal test respiration, neither physical examination/ verification nor anybody profile tests were conducted having empty stomach and

without recording the same, they started the operation and all these aforementioned factors became the cause of death of the deceased.Â The SIT

constituted by the respondents comprised of Dy. SP. (DAR) and SHO, Police Station, Rajouri and further it is admitted that no medical expert has

been associated with the SIT.Â

17. Sections 80 & 88 of the Ranbir Penal Code, even otherwise protected the doctors performing the surgery along with the assisting medical staff,

according to which the petitioners being a doctor and while operating the patient, due to misfortune, the patient expired, cannot be held criminally liable

for the simple reason that there was no criminal intention of the petitioners in causing death of the patient.

18. It is not a case of the respondents that the petitioners are not the doctors

qualified to undertake surgery for the ailment suffered by the deceased or that they adopted a procedure hitherto unknown to medical profession or deviated from the conventional method of treatment endangering the life of patient, mere lack of care or error of judgment on the part of the petitioners, would not render them liable for punishment for medical negligence. It is apt to refer to the two enquiry committees being appointed by the District Administration and by the Director, Health Services, which committee consisted of five medical experts, which concluded that the petitioner have provided adequate standard treatment and managed the treatment as per recommended protocols and no lapse on the part of any staff member could be found. The report of enquiry committee does not admit of any ambiguity. They does not hold the petitioners even remotely liable for the complication that arose out of the procedure adopted by the petitioners, while treating the deceased. It is not disputed that the petitioners are expert in the field. There is no material to indicate that the bonafides on the part of petitioners in conducting the surgery for the benefit of the patient were lacking. No post-mortem was being conducted.

19. The Honâ??ble Apex Court while dealing with the concept of â??medical negligenceâ?? in case titled â??Jacob Mathew Vs State of Punjab and anotherâ?? (2005)6 SCC 1, in paragraph 26 held as under:-

â??26. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se.

Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. 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. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given

procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.â??

20. I am of the opinion that the material assembled during the investigation being conducted by SIT, without evaluating the probative value of the expert opinion, does not disclose a prima facie case for commission of offence under Section 304-A R.P.C. against the petitioners, therefore, the impugned FIR No. 297/2013, registered with Police Station, Rajouri along with all proceedings/ investigation are hereby quashed.

21. Disposed of accordingly along with connected MP.