
(1915) 02 BOM CK 0011

In the Bombay High Court

Case No : Criminal Application for Revision No. 450 of 1914

Emperor

APPELLANT

Vs

Gulam Hyder Panjabi

RESPONDENT

Date of Decision : 16-02-1915

Acts Referred:

Penal Code, 1860 (IPC) — Section 337, 338, 88

Citation : (1915) 17 BOMLR 384

Hon'ble Judges : Shah, J;Heaton, J

Bench : Division Bench

Judgement

Shah, J.—The applicant in this case has been convicted of causing grievous hurt by a rash and negligent act u/s 338, Indian Penal Code.

2. It is urged on his behalf that his act was neither rash nor negligent as alleged by the prosecution, that he is protected by Section 88 of the Indian Penal Code, as the complainant consented to suffer the harm caused to her, and that the hurt caused is not proved to be grievous hurt. As regards the first contention, the facts which are either proved or admitted are these. The accused, who is a Hakim, performed an operation, on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. As the Magistrate correctly finds : the most ordinary precautions, such as, using proper instruments for the operation as well as for protecting the eye-ball, disinfecting and sterilizing the instruments and using antiseptics, were entirely neglected. The medical evidence shows that the operation was needless and performed in a primitive way. It is not shown that it was in accordance with any recognized Indian method. Dr. Prabhakar, who has been examined on behalf of the defence, says that he has not seen lid operations performed by Hakims, though he has seen cataract operations performed by them. On these facts, it was quite open to the learned Magistrate to find that the accused acted so rashly and negligently as to

endanger human life or the personal safety of others. For where, as here, a Hakim gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law. This case has been very fully argued before us; but we have heard nothing to induce us to think that the finding of the lower Court is not proper. The fact of the accused having treated a large number of cases and, according to him, success fully, was relied Upon by Mr. Godinho. Quite apart from the infirmity of the evidence bearing on this point, which has been mentioned by the Magistrate, it appears that in many cases the diseases treated and the operations performed by the accused were quite different. And there is not a single case in which it is shown that the disease and the circumstances connected with the operation were the same as in this case. This renders the evidence relating to these several cases practically useless, if not irrelevant. The point in the case is not whether the petitioner is at liberty to use such skill as he may possess in performing such operations, but whether, in doing so, he has acted rashly or negligently. It matters not, for this purpose, whether a practitioner is trained or not; he is bound by law to avoid such rashness or negligence as would endanger human life or the personal safety of others, if he undertakes an operation. In our opinion, the petitioner has been properly found to have acted rashly and negligently.

3. As regards the argument based on Section 88 of the Indian Penal Code, it is rather difficult to accept the learned Magistrate's finding that the accused acted without the complainant's consent and against her wish. If he did so, he would be guilty of causing hurt, simple or grievous, whichever it may be, quite independently of the consideration whether he acted rashly or negligently. This apparently is not the prosecution case, and that is not the charge against him. The gravamen of the charge against him is that he acted rashly and negligently. On the evidence, what appears to have happened is this. When the complainant was taken to the accused the latter persuaded her to accept his treatment, and her companion, Sayad Hassanally, who had taken her to the accused and who apparently had faith in the skill of the accused as a Hakim, wanted her to submit to his treatment. The complainant had neither time nor opportunity to realise what it was that she was asked to submit to; but on the persuasion of both she submitted to the operation. In that sense she consented to the operation. But she hardly realised the harm or the risk of the harm, which the operation involved, and did not consent expressly or impliedly to the harm or the risk of the harm as required by Section 88 of the Indian Penal Code. It is not suggested—certainly not proved—in this case that the complainant had anything like a real opportunity to realise the nature of the accused's act, and the harm and the risk incidental to that act, so as to be a consenting party to the operation in whatever manner it might be performed. It is clear, therefore, that the accused is not protected by Section 88 of the Indian Penal Code, even if we assume that the other conditions necessary to invite the application of that section are fulfilled.

4. Lastly, it is urged that the hurt caused is not proved to be grievous. The medical evidence on this point is that as a result of the operation performed by the accused, complainant's eye-sight would be permanently damaged to a certain extent. This is not sufficient to establish that there has been a permanent privation of the sight of either eye in consequence of the operation. It is not suggested in this case that the hurt is otherwise grievous as defined by Section 320 of the Indian Penal Code. This contention appears to be good, and must be allowed.

5. As regards the sentence, having regard to all the circumstances a substantial fine would meet the justice of the case and no sentence of imprisonment is necessary.

6. The result, therefore, is that the conviction u/s 338 is set aside and the petitioner is convicted of causing hurt u/s 337, Indian Penal Code. The sentence of imprisonment is set aside and that of fine confirmed. The order as to compensation must, of course, stand.