

(2022) 10 OHC CK 0012
In the Orissa High Court
Case No : CRLMC No.322 Of 2022

Gupteswar Meher

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision : 10-10-2022

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 304, 304A

Citation : (2022) 10 OHC CK 0012

Hon'ble Judges : B. P. Routray, J

Bench : Single Bench

Advocate : B.P.B.Bahali, K.K.Das, G.C.Sahu

Final Decision : Allowed

Judgement

B. P. Routray, J

1. The Petitioner, who is serving as Pharmacist, has prayed for quashing of criminal proceeding in G.R.Case No.237 of 2021 arising out of Birmaharajapur P.S.Case No.116 of 2021 pending on the file of the learned S.D.J.M., Birmaharajpur.

2. It is alleged that the Petitioner gave one injection to the minor son (aged about 5 years) of the informant and then he turned convulsion and died. As per the prosecution case, on 3rd June, 2021 the deceased was suffering from skin infection and the Petitioner being the Pharmacist of local hospital, i.e. the Primary Health Centre, Kotsamalai was called for treatment. The Petitioner injected some medicine to the deceased. After some time froth came out from the mouth of the deceased and he became unconscious. The deceased was then shifted to District Headquarters Hospital, Subarnapur and died there. Upon completion of investigation, charge-sheet was submitted and based on the same, learned S.D.J.M, took cognizance of offences under Sections 419/304 of the I.P.C.

3. As per the submissions made on behalf of the Petitioner, he was serving in the

PHC for last 21 years and not a single allegation of negligence or unauthorized statement has been made against him except the present one. In Kotsamalai PHC, doctors were not there on many occasions and the patients coming there were given first hand treatment by the Petitioner in absence of the doctor. On 3rd June, 2021 it was a COVID infected period and many persons of the locality were infected. The Petitioner was busy in treatment of such Covid patients, when the parents of the deceased approached him regarding illness of their son. He was suffering from skin infection and limping. So the Petitioner being a Pharmacist gave Ceftriaxone Injection 250 to the deceased, which is a known medicine for skin infection. It is therefore submitted that the action of the Petitioner was with bona fide belief for treatment and being a Pharmacist, he is authorized to treat patients in absence of doctor as per the Health Department Circular No.6129534/H dated 23.9.2003 and Circular No.12524/H dated 21.5.2008 of Government of Odisha. It is thus submitted that none of the ingredients of either offence is attracted and therefore, the proceeding should be quashed.

4. From the certified copy of the charge-sheet as well as the averments made in the petition, it reveals that administration of injection by the Petitioner to the deceased on 3rd June, 2021 is not disputed. The status of the Petitioner as a Pharmacist and suffering of the deceased with skin infection is also not disputed. Admittedly, the Petitioner gave treatment to the minor child (deceased) as a Pharmacist on the request of the parents. Administration of injection to the deceased by the Petitioner as a responsive treatment given to him on the request of the parents is admitted. The informant has filed an affidavit before this Court stating that as their son (deceased) was badly suffering from skin infection, they requested the Petitioner to come to their house as many of Covid patients were being treated at the hospital.

5. The Medical Officer of Ulunda CHC enquired into the matter and submitted his report dated 30th November, 2021 to the C.D.M.O., Subarnapur under Annexure-4. As per the said report, the Petitioner used injection Ceftriaxone, injection Dexamethason and injection Pheniramine for treatment and said injections given to the deceased by the Petitioner was taken from Niramaya, the Government supplied medicine shop, with Batch No.CF119030, Exp.7/2021. The injection Dexamethasone and injection Pheniramine were brought from a medicine shop. The report further speaks that no regular medical officer has been posted in Kotasmalai PHC for a long time.

6. The statement of different witnesses recorded in course of investigation reveals that the Petitioner was serving as a Pharmacist of Katasmalai PHC and in that capacity, he used to give medical treatment to different person at different points of time. The medical register of the said CHC also reveals that the deceased on other earlier occasions was also treated by the Petitioner.

7. From the above narration of facts, it reveals that the action of the Petitioner in giving him treatment is admittedly in the capacity of Pharmacist of local health

center. Therefore it appears to be a case of medical negligence at best and not a case of 'culpable homicide not amounting to murder' as presented by the prosecution. When the admitted case of the prosecution is that the Petitioner gave treatment to the deceased as a Pharmacist and no material could be collected in course of investigation to opine otherwise, the action of the Petitioner giving treatment to the deceased can never be said anything more than medical negligence and therefore, the ingredients of offence of 'culpable homicide not amounting to murder' are never attracted. Therefore the offence under Section 304 of the I.P.C. which is meant for 'culpable homicide not amounting to murder' on either part, is found grossly illegal and without material ingredient.

8. Next, if the action of the Petitioner is treated as medical negligence, then the offence under Section 304-A is attracted. The main ingredient for satisfaction of the offence under Section 304-A is rash and negligent act not amounting to culpable homicide. As stated earlier, the facts and materials collected in course of investigation do not qualify the case of culpable homicide. For medical negligence, the Supreme Court in the case of *Jacob Mathew vrs. State of Punjab and another*, (2005) 6 SCC 1, has concluded as follows:

"Conclusions summed up

48. We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", 'breach' and "resulting damage".

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for

judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case, WLR at p.586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304-A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304-A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

9. Further, in the case of Kusum Sharma and others vrs. Batra Hospital and Medical Research Centre and other, AIR 2010 SC 1050, the Supreme Court held as follows:

"94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. 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. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they

can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners. XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.”

10. Coming back to facts of the instant case, first, it needs to be examined that, whether the Petitioner as a Pharmacist is authorized to medically treat the deceased?

11. In this regard, Circulars of Health Department, Government of Odisha dated 23rd September, 2013 and 21st May, 2008 are important. In those Circulars, it is stated that Government after careful consideration have been pleased to decide that the Pharmacists are entrusted with such kinds of ailments and drugs as per the list enclosed with the Circulars, for treatment in absence of the doctor. The list enclosed to the Circular dated 23rd September, 2003 (Annexure-6 series) includes skin diseases. The Circular dated 21st May, 2008 of Health Department authorizes the Pharmacist to administer injection and conduct dressing to surgical patients independently and further authorizes the Pharmacists to undertake minor ailments and prescribe drugs for treatment in absence of doctors. It is therefore clear from the above two circulars that the Petitioner being a Pharmacist is authorized to medically treat a patient of skin disease.

12. The gravity of situation on 3rd June, 2021 due to prevalence of Covid infection has been well said by all such witnesses as per the police investigation report. The enquiry report of the medical officer on the incident as submitted to the Chief District Medical Officer under Annexure-4 is clear to the extent that there was no Medical Officer posted in Kotasamali PHC for a long time and therefore on most occasions patients were managed by the Petitioner as Pharmacist. It is further clear from the said inquiry report that in case of emergency, the petitioner being called by the villagers used to visit their houses for primary treatment. On the date of occurrence the Petitioner, who was busy in treatment of Covid patients, was called by the parents of the deceased for treatment of the deceased. In other words, the Petitioner was invited by the parents to give treatment to the deceased as per the affidavit furnished by the informant before this Court, for the sufferings of the deceased due to skin infection. So it is not the case that the Petitioner has either induced or deceived the parents of the deceased for treatment of the deceased or he was unauthorized to give treatment to a patient of skin disease. Accordingly, the offence of cheating is not attracted against the petitioner.

13. In Bhajan Lal’s case i.e., State of Haryana v. Bhajan Lal, AIR 1992 SC 604,

the Supreme Court while categorizing the nature of cases to exercise inherent powers of the High Court under Section 482, either to prevent abuse of process or otherwise to secure the ends of justice, has laid down the guidelines. Those seven principles laid down in Bhajan Lal's case include a case where uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out case against the accused. Further, as explained in the case of Jacob Mathew (supra), if the definition of 'gross' with the expression of 'rash and negligent act' occurring in Section 304-A IPC is applied to the facts of the instant case, the medical negligence on the part of the Petitioner in the death of deceased in the alleged incident for the offence under Section 304-A IPC is completely ruled out.

14. In view of the discussions made above, it can safely be concluded that none of the offences alleged against the Petitioner is made out and thus, the criminal proceeding initiated against the Petitioner is quashed to secure ends of justice.

15. In the result, the petition is allowed and the criminal proceeding stated above initiated against the petitioner is quashed.

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