

(2008) 08 BOM CK 0022

In the Bombay High Court

Case No : Criminal W.P. No. 623 of 2006

Hitesh Kishorechand Raithatha and Others

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216, 228, 228(1)

Penal Code, 1860 (IPC) — Section 279, 302, 304A, 328, 337

Transplantation of Human Organs and Tissues Act, 1994 — Section 18, 18(1)

Citation : (2009) CriLJ 439 : (2009) 1 RCR(Criminal) 699

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : P.M. Shah for P.S. Shendurnikar, for the Appellant; B.J. Sonwane, Assistant Public Prosecutor and M.P. Kale, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—By this petition, petitioners impugn correctness, propriety and legality of charge framed against them in Sessions Case No. 86/2003 pending on file of learned 4th ad hoc Additional Sessions Judge, Jalna. They also challenge order rendered by learned ad hoc Additional Sessions Judge below their application (Exh-66) seeking discharge. By the impugned order dated 29th September, 2006, their application (Exh-66) for the discharge to the extent of offence punishable u/s 18 of the Transplantation of Human Organs Act, 1994 and u/s 328 read with Section 34 of the I.P. Code, came to be dismissed.

2. Admittedly, the petitioners are Medical Practitioners. It is not necessary to elaborately set out the allegations made by the complainant (deceased Pandit Kulthe). Suffice it to say that on 21st April, 2000, wife of deceased complainant, namely, Smt. Shantabai was admitted in the hospital of the petitioner Nos. 1 and 4, which is styled as "Jaishree Hospital". She was found pregnant and was advised to visit the hospital at interval of a fortnight. There is no dispute about the fact that she was being medically treated by the petitioner No. 4 Smt. Ila.

Since it was noticed that opening of her uterus was dilated, a minor surgery was carried out on Smt. Shantabai on 4th June, 2000 in the hospital and the track at opening was sutured. She was thereafter discharged from the hospital. The stitching was removed in due course in November, 2000. In the evening of 28th November, 2000, Smt. Shantabai complained of delivery pains and, therefore, was shifted to the hospital of petitioner Nos. 1 and 4. At about midnight, she was rushed to operation theatre.

3. The complainant alleged that till about 1.30 a.m., the petitioners were making frantic efforts, but he was not informed about anything. His wife was operated. He noticed that blood was oozing from her private part when he, was allowed to see her in the wee hours. In the early morning, he was asked to collect blood bottles as she needed supply of blood of her blood group. So also. Dr. Mozes was called to see her. On 29th November. 2000, up till 2 p.m., operation was conducted and he was informed that caesarian was performed. He was informed that Smt. Shantabai delivered a stillborn female child. On 16th December, 2000,. Smt. Shantabai was discharged. As per allegations in the complaint, the petitioners prepared certain fabricated documents to show that Smt. Shantabai gave her consent for the operation. Allegedly, she has become disabled due to impairment of lower extremity as a result of incorrect diagnosis and improper medical treatment and the operation which was negligently carried out by the petitioners. It is alleged that during course of the operation, her uterus was removed without her consent.

4. The charge-sheet is filed against the petitioners for offences punishable under Sections 304-A, 328, 468 read with Section 34 of the I.P. Code and Section 18 of the Transplantation of Human Organs Act, 1994.

5. There is no dispute about the fact that before framing of the charge, an application was given by the petitioners to discharge them to the extent of offence punishable u/s 18 of the Transplantation of Human Organs Act, 1994 and u/s 328 read with Section 34 of the I.P. Code. That application was, however, not pressed into service. The learned Ad hoc Additional Sessions Judge framed a charge at Exh-21. Thereafter, another application (Exh-66) was moved by the petitioners claiming discharge from the said offences. The learned Ad hoc Additional Sessions Judge rejected the application.

6. Heard learned advocates for the parties and learned A.P.P.

7. At this juncture, it is impermissible to analyze the evidence on record. It is, however, amply clear that the learned Ad hoc Additional Sessions Judge did not follow appropriate procedure as required u/s 228 of the Criminal Procedure Code before framing of the charge. It is necessary for the Sessions Court to consider the record of the case and hear both the sides before framing of the charge. It is significant to note that Section 228(1) of the Criminal Procedure Code contemplates consideration of the record and hearing of submissions of the accused and the prosecution. So, unless hearing is given to both sides, the

charge cannot be framed. The Sessions Judge is required to form an opinion to the effect that there is ground for presuming that the accused has committed an offence which is exclusively triable by the Court of Session. It is only after formation of such an opinion that he may proceed to frame a charge. There appears no such exercise carried out by the learned Ad hoc Additional Sessions Judge in the present case. The framing of charge is not an empty formality. It requires consideration of the material on record notwithstanding any request for discharge by the accused. For example, if an accused is said to have given a slap on person of deceased and the death as per the report of post mortem examination is on account of some disease, though the accused will not claim any discharge, yet, on the face of record, charge for offence u/s 302 of the I.P. Code cannot be framed because there may not be ground for presuming that the accused has committed an offence which is exclusively triable by the Court of Session. Needless to say, it is not on say of the accused or say of the prosecution that the onerous duty to be performed is required to be discharged by the Court of Session. It is for the Court of Session to take a preview of the material on record before preparing of the charge. The Court of Session cannot blindly frame the charge without adhering to the nature of allegations.

8. In the face of it, though there is material on record to proceed against the petitioners for offences punishable under Sections 468 and 304-A read with Section 34 of the I.P. Code, yet, there is hardly any material to proceed against them for offence u/s 328 read with Section 34 of the I.P. Code. The necessary ingredients of offence u/s 328 of the I.P. Code require intention to cause hurt by means of poison or any other stupefying, intoxicating, or unwholesome drug, or any other thing with which such a person knows it to be likely to cause the hurt. By no stretch of imagination, it can be said that the petitioners could not have any intention, whatsoever, even in their wildest dreams, to cause hurt to the patient or the child in the womb. They were making frantic efforts to avoid the evil. It may be found after full dressed trial that there was improper treatment given to the patient or that the death of the infant was due to some medical negligence. The petitioners have not challenged the correctness of the charge to the extent of offence under Sections 304-A and 460 or 420 read with Section 34 of the I.P. Code.

9. Mr. Kale M.P., would submit that once the charge is framed, the subsequent application was untenable. He would submit that the learned Sessions Judge was not empowered to discharge the petitioners after framing of the charge. He seeks to rely on *Pramod Narayan Bandekar and Anr. v. State of Maharashtra* 2008 (4) Mh LJ 347 : 2008 (2) Bom R 799. The judgment rendered by a Single Bench of this Court deals with the question of discharge in the context of criminal revision application which was subject matter of that decision. The revisional jurisdiction is limited and, therefore, this Court may not have interfered with the order of learned Sessions Judge. In the exercise of writ jurisdiction, a patent error can be rectified. One cannot be oblivious of the provision u/s 216 of the Criminal Procedure Code. It gives power to the Court to alter or add any charge

at any time before the judgment is pronounced. Obviously, once the charge is framed, it cannot be said that the same cannot be subjected to any kind of further alterations. The same Court itself can, in any appropriate case, alter or add the charge in the exercise of power u/s 216 of the Criminal Procedure Code before the judgment is delivered.

10. Mr. Kale, would point out that there is material to show that hysterectomy was carried out during course of treatment of Smt. Shantabai. He would submit that removal of the uterus without her consent would come within ambit of Section 18 of the Transplantation of Human Organs Act, 1994. He would submit that Sub-clause (1) of Section 18 is in two (2) parts, one related to removal of human organ for the purpose of transplantation and other pertaining to removal of human organ without authority. The relevant provision may be reproduced for ready reference as follows.

18. Punishment for removal of human organ without authority:

(1) Any person who renders his services to or at any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.

A plain reading of the above provision would make it manifest that the removal of human organ may be punishable u/s 18 in case it is so done for purpose of transplantation and that too without authority. The provisions contained in the Transplantation of Human Organs Act, 1994, basically are aimed at arresting the evil of trading in human organs for transplantation. The Preamble thereof declares the aims and objects of the Act. There is no need of mincing words to ferret out correct meaning of the expressions used in Section 18(1) if the same is considered conjointly with the aims and objects of the Act. It follows, therefore, that removal of human organ during course of medical treatment or the operation without any kind of nexus with misuse of the same for transplantation will not come within ambit of Section 18. There is absolutely nothing on record to show that the removal of uterus was done with a view to misuse it commercially for transplantation. It is nobody's case that the petitioners are dealing in any kind of racket of human organs, for misuse to gain monetary benefits.

11. There is no doubt in my mind that the acts complained of in the FIR do not come within ambit of Section 18 of the Transplantation of Human Organs Act, 1994 and, therefore, charge could not have been framed against the petitioners for the said offences, nor the charge could have been framed for offence punishable u/s 328 read with Section 34 of the I.P. Code. The material on record, even if taken as it is, would not crystallize any ingredient of the said offences. The petitioner's request for discharge could have been considered as a request for alteration of the charge. They were not asking for full-fledged discharge from all the offences and in the entirety. Considering these aspects of the matter, this

is a fit case in which a part of the impugned charge must be pruned to the extent of one u/s 328 read with Section 34 of the I.P. Code and Section 18 of the Transplantation of Human Organs Act, 1994.

12. In the result, the petition is allowed. The learned Sessions Judge shall delete the charges referred to above by alteration of the same and may add charge for offence u/s 279 and/or 337 of the I.P. Code. The remaining part of the charge, however, is kept intact and the trial may proceed to the extent of such remaining part of the charge, along with added charges.