

(2015) 02 JH CK 0167
In the Jharkhand High Court
Case No : Criminal M.P. No. 1302 of 2002

Nargish Paul

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202
Medical Termination of Pregnancy Act, 1971 — Section 3
Penal Code, 1860 (IPC) — Section 304-A, 312, 318

Citation : (2015) 2 JLJR 295

Hon'ble Judges : Rongon Mukhopadhyay, J

Bench : Single Bench

Advocate : S. Thakur, for the Appellant

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J.—Heard learned counsel for the petitioner and learned counsel for the State. No one has appeared on behalf of O.P. No. 2. In this application, the petitioner has prayed for quashing the entire criminal proceeding in connection with C.P. Case No. 190 of 2002, including the order dated 21.8.2002, passed by Shri R. Kumar, learned Judicial Magistrate, 1st Class, Bokaro, whereby and whereunder cognizance has been taken for the offence under Sections 312/318 of the Indian Penal Code.

2. The prosecution story as would appear from the complaint petition is that the complainant had approached Dr. Reeta Mishra in connection with the treatment of his wife, who was pregnant. It has been stated that after examination, she was referred to St. Paul Clinic, which belongs to the petitioner. It has been alleged that the wife of the complainant was admitted in the clinic on 26.2.2002 and on 27.2.2002 at about 12 P.M. she was operated upon without taking consent of the complainant. It has been stated thereafter that the signature of the complainant was forcibly taken and the doctors had told him that the new born male baby had died, as he was born prematurely. Thereafter, it has been

alleged that on 27.2.2002, the complainant came to know that the baby is still alive and on persuasion by his family members, they forcibly took the newly born baby to Bokaro General Hospital for treatment, where he died. The complainant has lastly alleged that no discharge slip was given to him and ultimately on creating a political pressure on 7.3.2002, the discharge slip was given to him.

3. Thereafter enquiry was conducted under Section 202 Cr.P.C. by examining the complainant on solemn affirmation and his witnesses and cognizance was taken for the offence under Sections 312 and 318 of the Indian Penal Code.

4. Learned counsel for the petitioner has assailed the order taking cognizance by submitting that the learned Judicial Magistrate, Bokaro did not apply his judicial mind and had taken cognizance in a mechanical manner. He has further submitted that the complaint case was instituted after almost three months from the date of the alleged offence and no explanation has been given by the complainant with respect to the delay in filing of the complaint petition. He has further submitted that an enquiry was conducted by the police on the written application and in the enquiry, the allegations levelled against the petitioner were found to be false and that the complainant had a due of Rs. 6,000/- to the Nursing Home of the petitioner. Learned counsel for the petitioner has drawn my attention to the report of the Medical Board, which was constituted with respect to death of the male child and the Medical Board had categorically stated that on account of pre-maturity, the male child had died. Continuing with his argument, learned counsel for the petitioner submitted that Sections 312 and 318 of the Indian Penal Code if considered in the back drop of the allegations levelled in the complaint petition would not be applicable so far as the petitioner is concerned. He has also submitted that Section 3 of the Medical Termination of Pregnancy Act, 1971 protects the petitioner, who is a member of the medical fraternity as the same envisages that a registered medical practitioner shall not be guilty of any offence under the Indian Penal Code or under any other law for the time being in force if any pregnancy is terminated by him in accordance with the provisions of the Act and indiscriminate proceedings against doctors for medical negligence should not be permitted to continue.

5. With regard to protection of the medical community, learned counsel for the petitioner has referred to the case of *Martin F. D'Souza Vs. Mohd. Ishfaq*, (2009) ACJ 1695 : AIR 2009 SC 2049 : (2009) 2 CompLJ 417 : (2009) 2 JT 486 : (2009) 154 PLR 1 : (2009) 3 SCC 1 : (2009) 3 SCR 273 : (2009) 2 UJ 794 .

6. Learned counsel for the State, on the other hand, has submitted that a perusal of the complaint petition reveals criminal intent on the part of the petitioner as although the male child was alive but the complainant was informed that since the male child was born prematurely, as such he had died and, therefore, he submits that medical negligence leading to termination of pregnancy is palpable on the face of the allegations made in the complaint petition.

7. After hearing learned counsel for both sides and on going through the records, I find that an appropriate enquiry was conducted by the police as well as by the Medical Board with respect to aspersion made by the complainant against the petitioner, who is the owner of St. Pauls Clinic, where the alleged occurrence is said to have taken place. The enquiry by the police does not reveal any offence having been found against the petitioner rather it was the complainant who had not paid an amount of Rs. 6,000/- due to the clinic. The Medical Board constituted for determining the death of the male child had submitted a report in favour of the petitioner by stating therein that the death had occurred on account of premature birth of the baby.

8. Section 312 of the Indian Penal Code reads as follows:--

"312. Causing miscarriage.--Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

9. A perusal of Section 312 of the Indian Penal Code reveals that a person may be punished for causing miscarriage if the same is not caused in good faith for the purpose of saving the life of the woman. The complaint petition although contains certain allegations against the petitioner but if the same is, considered in the backdrop of the enquiry report submitted by the police as well as the report by the Medical Board, it would automatically lead to the conclusion that Section 312 of the Indian Penal Code is not made out as against the petitioner.

10. With respect to Section 318 of the Indian Penal Code, the same deals with concealment of birth by a secret disposal of dead body and the same reads as under:--

"318. Concealment of birth by secret disposal of dead body.--Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Section 318 of the Indian Penal Code would not be applicable as against the petitioner as even assuming if the allegations are taken to be true, the complainant himself had disclosed that on persuasion, the male child was handed over to him and it was taken to Bokaro General Hospital for treatment, where he subsequently died. The factum of concealment of birth by secret disposal of the dead body is apparently absent and as such Section 318 of the Indian Penal Code would also not be applicable as against the petitioner.

11. In the case of Martin F.D'Souza (supra), the Hon'ble Supreme Court while

considering the fastening of liability in a criminal proceeding upon a member of the medical practitioner has held as follows:--

"49. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

50. To fasten liability in criminal proceedings e.g. under Section 304-A, IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus, for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness."

12. The recklessness, which had been indicated by the Hon"ble Supreme Court in the aforesaid judgment so as to attract the criminal prosecution is wholly absent from a perusal of the complaint petition as well as the circumstances surrounding the genuineness of the case. In such view of the matter also, the complaint case does not have any legs to stand in order to continue with the prosecution.

13. In view of what has been discussed above, continuation of the present proceeding as against the petitioner would be an abuse of the process of the court. Accordingly, the entire criminal proceedings in connection with C.P. Case No. 190 of 2002, including the order dated 21.8.2002, passed by Shri R. Kumar, Judicial Magistrate, 1st Class, Bokaro, whereby and whereunder cognizance has been taken for the offence under Sections 312/318 of the Indian Penal Code, is hereby quashed. This application is, thus, allowed.