

(2008) 02 KL CK 0031

In the High Court Of Kerala

Case No : Criminal M.C. No. 9049 of 2001

Sosamma Kurian (Dr.) and Another

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 304A, 34

Citation : (2008) 3 KLJ 298 : (2008) 4 KLT 472 : (2009) 5 RCR(Civil) 238

Hon'ble Judges : A.K. Basheer, J

Bench : Single Bench

Advocate : Bechu Kurian Thomas, for the Appellant; Amjeth Ali, PP, for the Respondent

Final Decision : Allowed

Judgement

A.K. Basheer, J.—Petitioners, a Gynecologist and Cardiologist respectively, who have been hauled up before the Chief Judicial Magistrate's court, Kottayam to face trial on a charge u/s 304-A read with Section 34 IPC, have preferred this petition u/s 482 of the Code of Criminal Procedure seeking up quash the above proceedings pending against them.

2. The court below has issued process to the petitioners at the instance of respondent No. 2 herein who, in Annexure A1 complaint alleged that his wife had died because of the rashness and negligence shown by the petitioners while treating her at Mandiram Hospital, Kottayam.

3. It is contended by Sri. Bechu Kurian Thomas, learned Counsel for the petitioners that the learned Magistrate had issued process to the petitioners and directed them to face prosecution without any application of the judicial mind at all. According to the learned Counsel, Annexure A1 complaint does not contain any specific averment or allegation sufficient enough to incriminate the petitioners, who as professionals had bestowed utmost care and attention while

treating the patient. There was absolutely no rashness or negligence as alleged in the complaint. The mere fact that the patient developed some complications after she delivered twin babies did not necessarily mean that they were due to any rashness or negligence on the part of the petitioners.

4. Are the above contentions legally and factually tenable?

5. The averments in Annexure A1 complaint may be briefly noticed.

6. Smt. Disha Raghavan, wife of the complainant was in advanced stage of pregnancy. The expected date of her delivery was April, 2004. According to the complainant, his wife had gone to her relatives' house at Manganam on March 31, 2001, she developed some pain in the morning on that day. Therefore, her mother took her to Mandiram Hospital nearby, where the petitioners were working. It is averred in the complaint that Disha was administered some I.V. fluids after her admission. At about 8.15 p.m. Smt. Disha delivered a baby. Shortly thereafter the other baby was also delivered applying vacuum apparatus. According to the complainant, when he and some others went to the hospital at about 10 p.m. they were informed that Smt. Disha had developed bleeding. Therefore, they were requested to arrange blood bleeding. Therefore, they were requested to arrange blood immediately. The complainant and his relatives had specifically told the hospital authorities that they were prepared to take the patient to the Medical College Hospital, if there was any problem, to which the doctors responded saying "there was no problem at all". The complainant further alleged that his near relatives, were not allowed to see the patient. In fact the patient told the complainant's sister that she was not being treated properly. Her blood pressure had gone up and one of her legs had become numb. The complainant came to know that the petitioner had brought Dr. Babu Chacko of Modern Diagnostic Centre to examine the patient without the knowledge of the complainant and his relatives. But still the petitioners did not allow the complainant to shift the patient to the Medical College Hospital to provide better treatment. Therefore, on the next day, viz. April 1, 2001 the complainant took an ambulance and went to the hospital at about 7.30 p.m. in order to take the patient to the Medical College Hospital since in the evening, he had seen the petitioners and duty nurses trying to remove blood from the patient's mouth and nose. But when the complainant came to the hospital with the ambulance, he found that his wife had passed away.

7. It is pointed out by the learned Counsel that there is no specific averment or allegation attributing rashness or negligence. In paragraph 6 of Annexure A1 complaint, it is seen alleged that the petitioners had refused to discharge Smt. Disha from the Hospital so that she could be taken to the Medical College Hospital for better treatment. The allegation is that "some serious complication", had developed in the course of some surgical procedure carried out by the petitioners.

8. In this context, it may be noticed that the learned Magistrate had taken

cognizance on the basis of the sworn statement of the complainant alone. No other witnesses are seen to have been examined before issuing process. The complainant had produced only some bills for payment of the hospital charges. It is rue that the complainant had filed a list containing the names of witnesses, one of whom was Dr. Manoj Babu. The complainant had not produced any of the witnesses, nor did the Magistrate issue any direction to the complainant to produce any.

9. Reference had been made to the above aspect only to indicate that there is considerable force in the contention raised by the learned Counsel for the petitioners that the learned Magistrate had apparently proceeded to issue process in a casual manner without a proper application of the judicial mind in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, it was observed by their lordships thus:

Summoning of an accused in a criminal case is a serious matter. Criminal Law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in brining charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court u/s 482 of the Code of Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.

10. The above observations by their Lordships would be more relevant and apposite in the case of professional like the petitioners who are, as mentioned earlier, considered to be highly skilled and proficient in their respective fields of speciality. In Jacob Mathew Vs. State of Punjab and Another, , their lordships had elaborately dealt with various aspects of medical negligence and culpability of medical practitioners who were dragged before criminal courts attributing rashness and negligence, if the patient died in the course of treatment. It was held that

The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily

understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

11. Their lordships further went on to observe that the subject of medical profession necessarily calls for treatment with a different. The court laid down certain guidelines for prosecuting medical professionals. The following observations of their lordships are, in my view, apposite:

As we have noticed hereinabove the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supported to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law u/s 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

12. It is true that the petitioners have now sought interference of this Court by invoking the inherent power u/s 482 of the Code even before the complainant has been afforded an opportunity to adduce evidence by examining witnesses and/or producing documents. But as has been noticed already, there is no specific averment at all in the complaint with regard to any negligent or rash act on the part of the petitioners while treating the patient. There is only a vague, bald or facile allegation that "some complication" had developed in the course of "some surgical procedure". The short question is whether the vague allegations made in the complaint would prima facie show or atleast even suggest that the accused had done any act which could be termed as rash or negligent. Even if it can be assumed that there were some lapses or any omission or commission on the part of the petitioners, can it be said that they are liable to be prosecuted?

13. As rightly observed by their Lordships in Jacob Mathew (supra) "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. It is recklessness that constitutes mens rea in criminal law as far as negligence is concerned. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm". For an act to amount to criminal negligence u/s 304A IPC, the degree of negligence should be much higher. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law, but it cannot form the basis for criminal

prosecution.

14. Having regard to the entire facts and circumstances of the case and having perused the complaint and other materials placed before me, I am satisfied that the proceedings pending against the petitioners are liable to be quashed. In my view, it may not be just or proper to ask the petitioners to face trial before the criminal court on the basis of the vague allegations made in the complaint. I hasten to add that the observations made above shall not stand in the way of the complainant or any of the relatives of the victim to pursue the remedy available to them under civil law.

15. The proceedings in C.C. 152/01 on the file of the Chief Judicial Magistrate's Court, Kottayam are quashed. Criminal M.C. is allowed.