
(1992) 06 GUJ CK 0009
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Dr. Maltiben Valjibhai Shah

RESPONDENT

Date of Decision : 18-06-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 304A

Citation : (1994) ACJ 375 : (1993) 2 GLR 1600

Hon'ble Judges : S.M. Soni, J

Bench : Single Bench

Judgement

S.M. Soni, J.—Criminal Appeal No. 1071 of 1981 is filed by the State of Gujarat for enhancement of sentence imposed by the learned Judicial Magistrate, First Class, Mundra on accused No. 2 in Criminal Case No. 94 of 1980. Criminal Appeal No. 1188 of 1981 is transferred from the Court of Sessions to This Court in view of the enhancement appeal filed by the State being the appeal filed by the accused-respondent against the order of conviction of simple imprisonment for seven days and a fine of Rs. 1000 and in default simple imprisonment for one month on she being found guilty u/s 304A of Indian Penal Code.

2. Heard learned A.P.P. Shri S.P. Dave for the State and Learned Counsel Mr. A.D. Shah for the respondent accused No. 2. Before adverting to diverse contentions raised by the parties in this appeal challenging the conviction and asking for enhancement, it will be relevant to refer to the facts of the case. The case has arisen from an unfortunate incident which took place in village Mundra, District Kutch in the morning at about 8-00 to 9-30 a.m. on 25-9-1979. Respondent accused No. 2 is a qualified Doctor practicing at Mundra. Deceased Ranjanbala went to the clinic for treatment of her child. In the course of the treatment of her child, she also complained that she has also a complaint of sinusitis and hypertension. The respondent treated her. In the course of treatment Ranjanbala (deceased) was first given S.P. test dose and then she was given injection Bistrepen half gram i.m. After the injection being given, she immediately

complained of giddiness, pain in chest, perspiration, her pulses were fast and she was found feeble. Respondent realising that she had reaction of the injection given immediately started with anti-reaction treatment and to control the reaction she was given coronary injection Isophin 1 amp. i.m., injection, Coromine 1 amp. i.m. injection, Dexona 2 cc i.m. injection. She was inhaled oxygen, cardiac massage was also carried and injection Avil 2 cc was given, injection Cal.gln. 10 cc 10% I/V was given, injection Mephennine 2 cc was also given. But unfortunately, it appears that she succumbed to the reaction and expired at about 8-55 a.m. Because of the demise of Ranjanbala in the course of treatment by the Doctor, complaint was filed before the Police Sub-Inspector Mundra, who in his turn registered the offence against the respondent as accused No. 2 and her husband who had also joined in treatment of the deceased as accused No. 1. On completion of the investigation both were charge-sheeted and they stood the trial and the learned Judicial Magistrate, First Class acquitted accused No. 1, the husband of respondent and held the respondent No. 2 guilty of an offence punishable u/s 304A of Indian Penal Code and awarded simple imprisonment for seven days and a fine of Rs. 1,000 in default simple imprisonment for one month. This order of conviction and sentence is under challenge in this appeal.

3. Learned Counsel Mr. A.D. Shah for the respondent accused (accused No. 2) has challenged the conviction on the ground that even the facts as stated in the complaint if taken on its face value do not constitute any offence u/s 304A of Indian Penal Code. Mr. Shah contended that by no stretch of imagination the act of respondent can be said to be rash and negligent much less be criminal. Mr. Shah also contended that whatever precautions were required to be taken by Doctor were taken in the instant case and under no circumstances, respondent could be said to have committed any offence much less u/s 304A of I.P.C. Mr. Dave learned A.P.P. who appeared for the appellant-State has supported the judgment of the learned Judicial Magistrate, First Class. He further contended that the sentence imposed by the learned Magistrate is not in proportion to the offence alleged to have been committed by the respondent and therefore this is a fit case where the sentence should be enhanced.

4. Section 304A of Indian Penal Code reads as under:

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

To constitute an offence u/s 304A, it is necessary for the prosecution to establish that the act of the accused is rash or negligent and by such act the death has occurred and that act does not amount to culpable homicide. The question therefore is whether in the facts and circumstances as on record, act of respondent can be said to be rash or negligent.

5. A rash act is primarily an overhasty act, and is thus opposed to a deliberate

act, but it also includes an act which, though it may be said to be deliberate, is yet done without due care and caution. Illegal omission is act under this section and may constitute an offence if it is negligent. Criminal rashness is hazarding a dangerous or wanton act with the knowledge mat it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances" out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Culpable rashness is acting with the consciousness mat the mischievous and illegal consequences may follow, but with the hope mat they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. It is clear, however, that if the words not amounting to culpable homicide are a part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death. In order to amount to Criminal rashness or Criminal negligence one must find that the rashness has been of such a degree as to amount to taking hazard knowing that the hazard was of such a degree that injury was most likely to be occasioned thereby. The Criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences.

6. It is in evidence of Dr. H.M. Parikh, Exh. 37 that injection Bistrepren contains Procaine Penicillin and before administering the same, certain precautions arc required to be taken and those precautions are-

- (1) It should be enquired from the patient as to whether he has taken pencillin injection in past and if taken whether there was reaction or not;
- (2) Whether the patient suffers from Asthama or Bronchitis;
- (3) Whether the patient has anywhere on his body disease like Exima and lastly;
- (4) Whether medicine other than pencillin was taken and whether there was any reaction for the same.

7. So far as query No. 1 is concerned, it may be a precaution in case of a person who has already taken a pencillin injection but any of the queries do not suggest that a person cannot for the first time be given an injection of drug which

contains pencillin. Case papers Exh. 34 specifically reveal that S.P. Test is done. This suggest that before giving an usual normal dose of Bistrepen, test dose is given. After that test dose one and half gram injection i.m. of Bistrepen is given. This very fact, that after giving a test dose, the regular dose is given suggests that there was no reaction when the test dose was given. As no reaction was noted after test dose, regular dose was given. After regular dose being given, the patient had immediately shown the symptoms of reaction. When a test dose is given and no reaction is noted, how can it be said that the Doctor was rash or negligent at the relevant time. After the test dose, when regular injection was given and when the reaction was noted, the respondent has started immediately anti-reaction treatment and number of injections as mentioned in case paper Exh. 34 were given. Therefore, when test dose is given before administering an injection which contains pencillin, and the deceased did not react to it, it cannot be said that the act of the Doctor was rash and after giving a regular dose when reaction was noted and immediate treatment for anti-reaction appears to have been seriously taken suggest that the Doctor was not negligent also. Dr. H.M. Parikh Exh. 37 has admitted in the cross-examination that the injections which were given for anti-reaction were proper injections for the purpose. This suggests that there was no negligence on the part of the Doctor.

8. Dr. Kirtikant Exh. 29 who has performed the Post-mortem has mentioned in the P.M. Notes that the cause of death is cardiac arrest due to shock, due to reaction to the injection. In the cross-examination, he has admitted that he cannot positively say that the death is caused due to reaction caused due to injection. He has further admitted that Bistrepen is a drug manufactured by Alembic Company. This drug is used in daily use. It is also used for ailments like severe cold etc. He has further admitted that in the P.M. Notes, he has mentioned the cause of death because of the reaction of the injection on the basis of the history of the patient. However, in the course of Post-mortem, he did not find anything on which he can arrive at such opinion. Now, when the injection of drug Bistrepen is given which is a normal routine drug it cannot be said that the act of the user of the same was a rash one. Dictionary meaning of rash. The Concise Oxford Dictionary page 994) is reckless, impetuous, hasty; acting or done without due consideration. The respondent has given a test dose. It appears that she must have waited for the reasonable time to note whether the said dose reacts or not. Giving of a regular dose after a test dose cannot be said to be reckless or an impetuous act. It also cannot be said to an act done without due consideration. Dictionary meaning of negligence (The Concise Oxford Dictionary page 794) is lack of proper care and attention; carelessness. In the instant case after the test dose, regular dose is given. After that regular dose when the reaction is noticed immediately necessary treatment is given. Not only respondent gave the treatment but she also called her husband to join her in giving the treatment. This act on the part of the respondent under no circumstances can be said to be lack of proper care and attention. Thus, the act of respondent cannot be said to be rash or negligent. To attract application of

Section 304A of Indian Penal Code, the prosecution must establish that the death is caused by doing any rash or negligent act which in my opinion is absent in the instant case.

9. Learned Magistrate appears to have some wrong notion about the purpose of reading the statement u/s 313 of the Criminal Procedure Code. Under the provisions of Evidence Act, burden of proving the fact especially within the knowledge is on the person who knows the same. But this principle u/s 106 of the Evidence Act does not apply to the criminal trials. Learned Magistrate has ignored this aspect and therefore has observed that it was within the special knowledge of the accused No. 2 that it was within her special knowledge as to care she took and she should have led necessary evidence for the same. In a criminal trial it is for the prosecution to establish the facts to constitute an offence charged against the accused. Simply because the accused did not enter the box cannot be led to infer that she was rash and negligent. Observation by the learned Magistrate to this effect is not warranted by any law much less by Evidence Act and more particularly by appreciation of evidence in Criminal Law. Thus, in my opinion, the conclusion arrived at by the learned Magistrate that respondent was rash and negligent is not based on proper appreciation of evidence and is not warranted by the evidence as it stands on record.

10. Under the circumstances, the appeal filed by the State for enhancement does not survive. In the result Criminal Appeal No. 1071 of 1981 for enhancement fails and is dismissed. Criminal Appeal No. 1188 of 1981 is allowed. The judgment and order of conviction u/s 304A of Indian Penal Code in Criminal Case No. 94 of 1980 passed against the respondent-Dr. Maltiben Valjibhai Shah is set aside. Bail bond cancelled. Fine if paid be refunded. Order accordingly.