

A

MAHADEV PRASAD KAUSHIK

v.

STATE OF U.P. & ANR.

(Criminal Appeal No. 1625 of 2008)

B

OCTOBER 17, 2008

[C.K. THAKKER AND D.K. JAIN, JJ.]

Penal Code, 1860:

C

ss. 304A, 304, 504 and 506 – Medical negligence – Complaint that medical practitioner gave injections to patient and within half an hour he died – Threat by accused-medical practitioner to kill complainant if case not withdrawn – Summons issued u/ss.304, 504 and 506 by Magistrate – Upheld by High Court – Interference with – Held: Proceedings u/ss.504 and

D

506 liable to be quashed as there was no reference to any threat by accused to complainant in the Order by Magistrate as also by High Court – Act of accused of giving injections to deceased would not fall within mischief of s.304, hence process issued u/s. 304 also quashed – It was act of negligence

E

covered u/s.304A as there was nothing to show that accused before administering injections took reasonable care – Thus, proceedings could only be issued u/s. 304A – Code of Criminal Procedure, 1973 – s. 204.

F

s. 304 – Applicability of – Discussed.

s. 304A – Application of – Determination – Held: There should neither be intention nor knowledge to cause death – Death should be caused by rash or negligent act.

G

Words and Phrases – Negligence – Meaning of.

Respondent no. 2-complainant's case was that his father-BR had pain in his body and he took him to the clinic of the appellant-medical practitioner for treatment. The appellant administered three injections to BR and

H

within half an hour, BR died in the clinic. The respondent no 2 went to the Police Station to lodge a complaint against the appellant but the police refused to register the complaint. Respondent no 2 then filed complaint before the Magistrate that his father died because of the negligence on part of the appellant; and that the appellant threatened to kill the complainant unless he withdrew the complaint. The Magistrate directed the Police Authorities to carry out the investigation. The Police Authorities carried out the investigation and submitted the report in favour of the appellant that BR was suffering from heart ailment and before he could reach the clinic of the appellant, he died in the transit. Thereafter, the complainant filed Protest Petition. The Magistrate observed that the allegations of the complainant was supported by eye-witnesses and issued summons to the appellant for commission of offences punishable under sections 304, 504 and 506 IPC. High Court upheld the order. Hence the appeal.

The question which arose for consideration in this appeal was whether the courts below were justified in issuing summons to the appellant- medical practitioner for commission of offences punishable under sections 304, 504 and 506 IPC.

Partly allowing the appeal, the Court

HELD: 1. The issuance of process for offences punishable under Sections 504 and 506, IPC is liable to be quashed and is hereby quashed. Likewise, process for an offence punishable under Section 304, IPC is ill-conceived on the facts of the case and the process could only be issued by the Magistrate to the appellant-accused for an offence punishable under Section 304A, IPC. [Para 47] [678-G-H; 679-A]

2. It is clear that in the order dated 09.01.2007 passed by the Magistrate, there was no whisper about the threat alleged to have been given by the appellant to the complainant nor the Magistrate recorded even a *prima facie*

A finding as to such threat. The High Court also in the impugned order does not refer to such intimidation. On the contrary, the High Court observed that the allegations were sufficient to summon the appellant for causing death of BR under section 304, IPC. Therefore, the submission that no summons could have been issued to the appellant-accused for commission of offences punishable under Sections 504 and 506 is upheld. The proceedings initiated against the appellant for offences punishable u/ss. 504 and 506 IPC are quashed. [Paras 20 and 21] [670-B-E]

C 3.1 The plain reading of the section 304 makes it clear that it is in two parts. The first part of the section is generally referred to as "Section 304, Part I", whereas the second part as "Section 304, Part II". Before Section 304 can be invoked, the following ingredients must be satisfied; D the death of the person must have been caused; such death must have been caused by the act of the accused by causing bodily injury; there must be an *intention* on the part of the accused (a) to cause death; or (b) to cause such bodily injury which is likely to cause death; (Part I) E or (iv) there must be *knowledge* on the part of the accused that the bodily injury is such that it is likely to cause death (Part II). [Paras 23 and 26] [671-B; 672-B-D]

F 3.2 Section 304 A deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Sections 299 and 300, IPC and covers those cases where death has been caused without '*intention*' or '*knowledge*'. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section G seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are *rash* or *negligent* and are directly the cause of H death of another person. Thus, there is distinction between Section 304 and Section 304A. Section 304A carves

out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300, IPC. In other words, Section 304A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the 'motivating force' of the act complained of, Section 304A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death. [Paras 28 and 29] [672-G-H; 673-A-D]

Empress v. Idu Beg (1881) ILR 3 All 776 – referred to.

3.3 Though the term 'negligence' has not been defined in the Penal Code, it may be stated that 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 reasonable and prudent man would not do. [Para 31] [673-H; 674-A]

3.4 The submission that it cannot be said that the appellant while administering injections to deceased BR had intention (*mens rea*) or knowledge that his act would result or likely to cause death of the patient, is well-taken and is accepted. Even if the averments made in the complaint are accepted in their entirety, the act in question of giving injections to deceased BR would not fall within the mischief of Section 304, IPC. Therefore, no process could have been issued against the appellant-accused for commission of an offence punishable under section 304 IPC. [Para 33] [674-C-D]

4.1 The court can issue summons u/s. 304 A IPC in certain circumstances, such as absence of possession

A of requisite skill or failure to exercise reasonable care by
 a professional. In the instant case, nothing has been stated
 by the appellant about his qualifications or of 'requisite
 skill' in the profession he was practising. There was also
 B nothing to show that before administering injections, [that
 he had undertaken reasonable care that ought to have
 been taken by a professional]. Trial court found *prima facie*
 case against the appellant. Though on the facts and
 in the circumstances of the case, no summons could have
 C been issued by the trial court against the appellant for an
 offence punishable under Section 304, IPC, summons for
 an offence under Section 304A, IPC ought to have been
 issued. [Paras 42 and 43] [677-F-G; 677-A; 677-E]

Jacob Mathew v. State of Punjab and Anr. 2005 (6) SCC
 1; *State of Punjab v. Shiv Ram and Ors.*, 2005 (7) SCC 1 –
 D referred to.

4.2 On the facts of the case, ailment of BR *prima facie*
 could not be said to be of such a serious nature which
 would result in death during his treatment. The allegation
 of the complainant which has been corroborated by state-
 E ments of other eye-witnesses is that immediately after
 administration of three injections, the colour of the body
 of BR turned into blue and within half an hour he died. If
 in the light of the above facts and circumstances, pro-
 ceedings have been initiated against the appellant for an
 F offence punishable under Section 304A, IPC (though not
 under Section 304, IPC), it cannot be said that no such
 action could be taken. [Para 46] [678-D-E]

*Khushaldas Pammandas (Dr.) v. State of Madhya
 Pradesh*, AIR 1960 MP 50 – referred to.

G CASE LAW REFERENCE

(1881) ILR 3 All 776	Referred to.	Para 30
2005 (6) SCC 1	Referred to.	Para 34
2005 (7) SCC 1	Referred to.	Para 41
H AIR 1960 MP 50	Referred to.	Para 44

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal A
No. 1625 of 2008

From the final Judgment and Order dated 9.2.2007 of the
High Court of Judicature at Allahabad in Criminal Revision No.
366 of 2007

Ratnakar Dash, Rakesh Taneja and K.L. Taneja for the
Appellant. B

K. Sarada Devi, Pramod Swarup, Mohd. Fuzail Khan and
Anuvrat Sharma for the Respondents. C

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is filed by the appellant herein-a
Medical Practitioner, being aggrieved and dissatisfied with the
order passed by the Additional Judicial Magistrate-IV, Mathura D
on January 09, 2007 in Case No. 28 of 2006 and confirmed by
the High Court of Judicature at Allahabad on February 09, 2007
in Criminal Revision No. 366 of 2007. By the said orders, the
courts below issued summons to the appellant for commission E
of offences punishable under Sections 304, 504 and 506, In-
dian Penal Code ('IPC' for short).

3. Briefly stated, the facts of the case are that the appel-
lant herein is a Medical Practitioner. It is the case of respondent
No. 2 - complainant, resident of village Amanullahpur, Police F
Station Surir, District Mathura that he is residing at the afore-
said place. That the father of the complainant had pain in his
body. On July 04, 2001 at about 6.00 p.m., therefore, the com-
plainant brought his father Buddha Ram to the clinic of the ap-
pellant herein for treatment. According to the complainant, treat- G
ment was given by the appellant who administered three injec-
tions to Buddha Ram. Within half an hour, Buddha Ram died.
The appellant asked the complainant to remove the dead-body
of Buddha Ram immediately and also threatened the complain-
ant not to take any action against the appellant. H

A 4. It is the case of the complainant that he immediately
went to Surir Police Station to lodge a report against the appel-
lant but the police refused to register any case. He, therefore,
filed a complaint in the Court of Additional Judicial Magistrate
III, Mathura on January 03, 2002. In the said complaint, the above
B facts had been stated by the complainant. A prayer was, there-
fore, made to take appropriate action against the appellant-
doctor for offences punishable under Sections 304, 504 and
506, IPC.

C 5. It was alleged that on July 04, 2001, the father of the
complainant died because of negligence on the part of the ap-
pellant. It was also stated in the complaint that the complainant
went to villege Khaira on August 20, 2001. In the morning at
about 8.00 a.m., the appellant-accused met the complainant
near Puran Tea stall and abused the complainant stating as to
D why he had filed a complaint against the appellant. According
to the complainant, the appellant also took out a revolver and
threatened the complainant to kill him unless he would withdraw
the complaint. It was stated by the complainant that since the
E police refused to lodge report against the appellant, he was
constrained to file the complaint. A prayer was, therefore, made
to the Court to direct Police Station, Surir to register a com-
plaint of the complainant, to take up investigation and take ap-
propriate legal steps against the appellant.

F 6. An order was passed by the learned Magistrate under
sub-section (3) of Section 156 of the Code of Criminal Proce-
dure, 1973 (hereinafter referred to as 'CrPC') and investiga-
tion was directed to be made by the Police Authorities. The
Police Authorities, as per the said direction made the inquiry
and submitted a final report under Section 169, CrPC on May
G 27, 2002 stating therein that no offence had been committed by
the appellant herein. In the report, it was *inter alia* observed that
Buddha Ram had suffered "*heart attack*" and he died during the
course of "*transit*" from villege Khaira before he was brought to
the clinic of Dr. Mahadev-appellant herein. It was also observed
H that it had not come on record that the deceased had taken any

†
treatment from Dr. Mahadev nor there was anything to show that Dr. Mahadev administered threat to the complainant. The investigation was, therefore, closed.

7. According to the complainant, since the final report submitted by the Police was biased, factually incorrect and had been prepared only with a view to favour the appellant herein, Protest Petition was filed by the complainant which was registered as Case No. 120 of 2007 by the Court. In the Protest Petition, it was asserted by the complainant that his father Buddha Ram had no heart trouble at all. Buddha Ram was taken to the clinic of the appellant. The appellant gave three injections to Buddha Ram and within half an hour, the colour of his body went blue and he died in the clinic of the appellant. The appellant also threatened the complainant ordering him to take away dead body of Buddha Ram immediately. It was, therefore, prayed that the final report submitted by the Police Authorities should not be accepted and the case may be decided in accordance with law.

8. The learned Magistrate heard the parties. After perusing the complaint and recording statements under Section 200 of the CrPC, the learned Magistrate observed that from the statements of the complainant Devendra Kumar as also PW 1 Har Dayal, PW 2 Gopal Prasad and PW 3 Shiv Devi, it was clear that on July 04, 2001, at about 6.00 p.m., the father of the complainant got indisposed and was taken to the clinic of appellant-Dr. Mahadev with the help of other village persons. Buddha Ram was given three injections and within a short time, body of Buddha Ram turned into blue colour and he died. According to the learned Magistrate, the allegation of the complainant was supported by eye-witnesses.

9. The Court also noted that newspaper reports revealed that the Chief Medical Officer and District Collector passed orders pursuant to which the clinic of Dr. Mahadev was closed. It was also alleged that Dr. Mahadev was stocking poisonous injections and illegal drugs in his clinic. The learned Magistrate,

A therefore, observed that there was sufficient evidence to call upon the accused as to what he had to say in the case.

B 10. Being aggrieved by the said order, the appellant preferred Revision Petition No. 368 of 2007, which was dismissed by the High Court by a brief order. The said order is challenged by the appellant in the present appeal.

C 11. Notice was issued by this Court and considering the nature of proceedings, the Registry was directed to place the matter for final hearing. That is how the matter has been placed before us.

12. We have heard the learned counsel for the parties.

D 13. The learned counsel for the appellant contended that no case has been made out against him and both the Courts were in error in issuing process against the appellant for offences punishable under Sections 304, 504 and 506, IPC. It was submitted that as per Police Report, Buddha Ram was suffering from heart ailment and died before he reached clinic of the appellant. The said report ought to have been accepted by the Court.

E 14. In the alternative, the learned counsel submitted that serious error of law has been committed by the Courts below in issuing process for commission of offences punishable under Sections 304, 504 and 506, IPC. It was submitted that so far as F Sections 504 and 506, IPC are concerned, even the learned Magistrate has not stated anything as to why process for the aforesaid two sections should be issued.

G 15. As to issuance of process under Section 304, IPC, the counsel submitted that even if it is assumed for the sake of argument that whatever is stated by the complainant is true, the appellant is a Doctor and it is well-established that in exercise of his professional conduct, no criminal liability can be imposed on him. The process under Section 304, therefore, deserves to be quashed. According to the learned counsel, at the most process could have been issued under Section 304A and not un-
H

der Section 304, IPC. There can neither be *intention* (mens rea) nor '*knowledge*' on the part of the appellant that his act would result or likely to cause death of the patient. Hence, even if all the allegations are treated to be true, it is an act of negligence covered by Section 304A, IPC. A

16. The learned counsel for the complainant, on the other hand, supported the order of the trial Court and confirmed by the High Court. It was submitted that the father of the complainant was admitted to the clinic of the appellant, the appellant gave injections and within half an hour, the patient lost his life. Section 304, IPC was, therefore, rightly invoked. Since the appellant had administered threat, the Court was right in issuing process for offences punishable under Sections 504 and 506, IPC as well. The High Court upheld the action. Hence, no interference with the orders of the Courts below is called for. B C

17. Having heard the learned counsel for the parties and having applied our mind to the material on record, in our opinion, the appeal deserves to be partly allowed. D

18. So far as threat said to have administered by the appellant herein, it may be noted that the learned Magistrate, in the order dated January 09, 2007 did not even refer to such threat. In the said order, the learned Magistrate, dealing with the incident, dated July 04, 2001, observed that the complainant took his father Buddha Ram to the clinic of the appellant and the appellant gave three injections to the patient. Within some time, Buddha Ram died. Over and above the complainant, three witnesses also stated about the said fact. The clinic of the appellant was also ordered to be closed. There was, therefore, '*sufficient evidence*' to issue process against the appellant in relation to the said allegation. E F G

19. But in the operative part of the order, the learned Magistrate said;

"Summons for the offence punishable under *Sections* 304, 504, 506 of *Indian Penal Code* are issued against the H

A accused Dr. Mahadev. Applicant is directed to file the process fee within 7 days. Summons be issued on filing the process fee. File be listed on 26.02.2007 for appearance”.

(emphasis supplied)

B 20. From what is stated hereinabove, it is clear that in the body of the order, there is no whisper about the threat alleged to have been given by the appellant to the complainant nor the learned Magistrate recorded even a *prima facie* finding as to such threat. The High Court also, in the impugned order, does not refer to such intimidation. On the contrary, the High Court observed that the allegations were sufficient to summon the appellant for causing death of Buddha Ram under Section 304, IPC.

D 21. In our considered opinion, therefore, the submission of the learned counsel for the appellant is well-founded that on the facts and in the circumstances of the case, no summons could have been issued to the appellant-accused for commission of offences punishable under Sections 504 and 506, IPC.
E We uphold the contention and quash proceedings initiated against the appellant herein for offences punishable under Sections 504 and 506, IPC.

F 22. The question then is as regards issuance of summons under Section 304, IPC. Section 304 reads thus;

304. Punishment for culpable homicide not amounting to murder

G Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

H

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

23. Plain reading of the above section makes it clear that it is in two parts. The first part of the section is generally referred to as "*Section 304, Part I*", whereas the second part as "*Section 304, Part II*". The first part applies where the accused causes bodily injury to the victim with *intention* to cause death; or with *intention* to cause such bodily injury as is likely to cause death. Part II, on the other hand, comes into play when death is caused by doing an act with *knowledge* that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

24. The Makers of the Code observed;

"The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed".

25. The Makers further stated;

"It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observation and experience enable us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain

A acts heedlessly or unintentionally and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion".

26. Before Section 304 can be invoked, the following ingredients must be satisfied;

- B
- (i) the death of the person must have been caused;
 - (ii) such death must have been caused by the act of the accused by causing bodily injury;
 - C (iii) there must be an *intention* on the part of the accused
 - (a) to cause death; or
 - (b) to cause such bodily injury which is likely to cause death; (Part I) or
 - D (iv) there must be *knowledge* on the part of the accused that the bodily injury is such that it is likely to cause death (Part II).

27. Section 304A was inserted by the Indian Penal Code (Amendment) Act, 1870 (Act XXVII of 1870) and reads thus;

E 304A. *Causing death by negligence*

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.

28. The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Sections 299 and 300, IPC and covers those cases where death has been caused without '*intention*' or '*knowledge*'. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done

H

will in all probability result into death. It applies to acts which are rash or negligent and are directly the cause of death of another person. A

29. There is thus distinction between Section 304 and Section 304A. Section 304A carves out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300, IPC. In other words, Section 304A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the 'motivating force' of the act complained of, Section 304A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death. B C D

30. In *Empress v. Idu Beg*, (1881) ILR 3 All 776, Straight, J. made the following pertinent observations which have been quoted with approval by various Courts including this Court; E

"Criminal rashness is hazarding a dangerous or wanton act with the knowledge that 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". F G

31. Though the term 'negligence' has not been defined in the Code, it may be stated that negligence is the omission to do something which a reasonable man, guided upon those con- H

A considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do.

B 32. The learned counsel for the appellant-accused submitted that by no stretch of imagination, it can be said that the appellant while administering injections to deceased Buddha Ram said to have committed an offence punishable under Section 304, IPC. It can never be said that the death of Buddha Ram had been caused by the appellant by doing the act of giving injections with *intention* to cause his death or to cause such
C bodily injury as is likely to cause death. Likewise, it is impossible to think that the purported act has been done by the appellant-accused with the *knowledge* that in all probability, it would result into the death of Buddha Ram.

D 33. In our opinion, the submission of the learned counsel for the appellant-accused is well-taken and deserves acceptance. Even if the averments made in the complaint are accepted in their entirety, the act in question of giving injections to deceased Buddha Ram would not fall within the mischief of Section 304, IPC. In our opinion, therefore, no process could have
E been issued against the appellant-accused for commission of an offence punishable under the said section. To that extent, therefore, the plea raised on behalf of the appellant must be upheld.

F 34. The next question relates to applicability of Section 304A, IPC. The learned counsel for the appellant submitted that the law on the point is settled by various pronouncements of this Court, the latest in the line is a three-Judge Bench decision in *Jacob Mathew v. State of Punjab & Anr.*, (2005) 6 SCC 1. In
G that case, one Jiwan Lal Sharma, father of the complainant was admitted as a patient in a hospital. Jiwan Lal felt difficulty in breathing. The complainant's elder brother approached the duty Nurse who tried to contact a doctor, but no doctor was available for about half an hour. The appellant then reached to the room
H of the patient. Oxygen cylinder was brought and an attempt was

made to ensure that breathing problem of the patient does not aggravate. The oxygen cylinder, however, was not working. Another cylinder was brought. But by the time it could be made active, the patient died. An offence was registered under Section 304A, IPC against the doctor which was challenged by him under Section 482, CrPC and prayer was made for quashing of criminal proceedings. The High Court dismissed the petition. The aggrieved appellant approached this Court.

35. Considering the relevant provisions of CrPC as also negligence by professionals, this Court held that in every mishap or death during medical treatment, a medical man cannot be proceeded against in a criminal Court. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing disservice to the community at large. If the Courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. It would also lead to shaking the mutual confidence between the doctor and patient. Every failure or misfortune in the hospital or in a clinic of a doctor cannot be termed as act of negligence so as to try him of an offence punishable under Section 304A of the Code.

36. The Court observed that a physician would not assure the patient of full recovery in each and every case. He cannot and does not guarantee that the result of his treatment would invariably be beneficial much less to the extent of 100% for the person treated by him. The only guarantee which a professional can give or can be understood to have given by necessary implication is that he is possessed of requisite skill in that branch or profession which he is practising and while undertaking performance of the task entrusted to him, he would be exercising his skill with reasonable competence.

37. In the light of the above test, the Court stated;

“Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not

A 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”.

B 38. The standard to be applied for judging whether a person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession.

C 39. It was further observed that mere deviation from normal professional practices is not *necessarily* evidence of negligence. An error of judgment on the part of the professional is also not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. Medical profession is often called upon to adopt a procedure which involves higher element of risk, but which a doctor honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow would depend on facts and circumstances of a given case.

40. It was, therefore, held that the prosecution of the doctor was ill-founded and accordingly, it was quashed.

F 41. Strongly relying on the above decision in *Jacob Mathew* reiterated in *State of Punjab v. Shiv Ram & Ors.*, (2005) 7 SCC 1, the learned counsel submitted that in the case on hand, criminal prosecution of the appellant-accused was not well-founded. At the most, it was a case of ‘*error of judgment*’ on the part of the appellant. Even if it were so, no complaint could have been filed by the complainant nor the appellant could be summoned by a Court under Section 304A, IPC. The criminal prosecution, therefore, deserves to be quashed.

H 42. In our opinion, however, the learned counsel for the

respondent-complainant is right in submitting that the trial Court found *prima facie* case against the appellant. We have already noted in the earlier part of the judgment that the complaint of Buddha Ram was only as regards pain in body. It is no doubt true that in the final report submitted by the Police under Section 169, CrPC, it was stated that the deceased was suffering from heart ailment and before he could reach the clinic of the appellant herein, he died in transit. The case of the complainant, on the other hand, was that the said report was not only incorrect but was biased and had been prepared only with a view to oblige and favour the appellant. It was also asserted that immediately, the complainant went to the Police Station to lodge a complaint against the appellant but the police refused to lodge such complaint. It was because of the order passed by the Court that the Police Authorities had to carry out the investigation. One sided investigation then had been made by the Police Authorities and the report was submitted favouring the appellant which compelled the complainant to file Protest Petition which was heard by the learned Magistrate and on the basis of statements recorded under Section 200, CrPC that the summons was issued against the appellant.

43. In the circumstances, in our opinion, though on the facts and in the circumstances of the case, no summons could have been issued by the trial Court against the appellant for an offence punishable under Section 304, IPC, summons for an offence under Section 304A, IPC ought to have been issued. The decisions on which strong reliance has been placed by the learned counsel for the appellant expressly allows such a step in certain circumstances, such as absence of possession of requisite skill or failure to exercise reasonable care by a professional. Nothing has been stated by the appellant about his qualifications or of 'requisite skill' in the profession he was practising. There was also nothing to show that before administering injections, he had undertaken reasonable care ought to have been taken by a professional.

44. In this connection, we may refer to a decision of the

A High Court of Madhya Pradesh in *Khushaldas Pammandas (Dr.) v. State of Madhya Pradesh*, AIR 1960 MP 50. In that case, the appellant, *Hakim* examined *M*, who was 'tired' and 'exhausted'. The *Hakim* found that *M* had no temperature. The *Hakim*, however, advised *M* to take a Procaine Penicillin injection. Injection was then given to *M*, who perspired profusely, started vomiting and died. The *Hakim* was prosecuted for commission of an offence punishable under Section 304A, IPC and was convicted.

45. Upholding the conviction, the High Court observed that a person totally ignorant of science of medicine or practice of surgery cannot undertake a treatment or perform operation. If he does so, it is a material circumstance to show his gross rashness and negligence in undertaking the treatment so as to attract Section 304A, IPC.

46. On the facts of the case, ailment of Buddha Ram *prima facie* could not be said to be of such a serious nature which would result in death during his treatment. The allegation of the complainant which has been corroborated by statements of other eye-witnesses is that immediately after administration of three injections, the colour of the body of Buddha Ram turned into blue and within half an hour he died. If in the light of the above facts and circumstances, proceedings have been initiated against the appellant for an offence punishable under Section 304A, IPC (though not under Section 304, IPC), it cannot be said that no such action could be taken. We are, therefore, of the view that submission on behalf of the learned counsel for the complainant deserves to be accepted to the above extent.

47. For the foregoing reasons, in our judgment, the appeal deserves to be partly allowed. So far as issuance of process for offences punishable under Sections 504 and 506, IPC is concerned, it is liable to be quashed and is hereby quashed. Likewise, process for an offence punishable under Section 304, IPC is ill-conceived on the facts of the case and the process could only be issued by the learned Magistrate to the appellant-

MAHADEV PRASAD KAUSHIK v. STATE OF U.P. 679
& ANR.

accused for an offence punishable under Section 304A, IPC. A
The appeal is accordingly allowed to the extent indicated above.

48. Before parting with the matter, we may clarify that we
have not entered into merits of the matter or allegations and
counter allegations by the parties and we may not be under- B
stood to have expressed any opinion one way or the other. All
observations made by us hereinabove have been made only
for the limited purpose of deciding the issue before us. As and
when the matter will come before the Court, it will be consid-
ered on its own merits without being inhibited or influenced by C
the observations made by the trial Court, by the High Court or
by us in the present order.

49. Ordered accordingly.

N.J.

Appeal partly allowed.