

A.S.V. NARAYANAN RAO
v.
RATNAMALA & ANOTHER
(Criminal Appeal No. 1433 of 2013)

SEPTEMBER 13, 2013

[H.L. GOKHALE AND J. CHELAMESWAR, JJ.]

Code of Criminal Procedure, 1973 – s. 482 – Criminal proceedings u/s. 304A IPC for medical negligence – Quashing of – Denied by courts below – Held: The proceedings are liable to be quashed – Though doctors are not immune from criminal proceedings for their professional negligence, but in the interest of the society they are required to be protected from frivolous and unjust prosecution – In the facts of the case, case u/s. 304A not made out against the accused doctor – Penal Code, 1860 – s.304A.

Criminal proceedings were initiated against the appellant (a medical practitioner) u/s. 304A IPC at the behest of respondent No.1, who was the wife of appellant's patient who lost his life during treatment. Though the police after its investigation of the case, submitted its report stating that it was a case of no evidence, but the Magistrate took cognizance of the offence. The appellant approached the High Court seeking quashing of the proceedings, but the High Court declined to quash the proceedings. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the

A society, it is necessary to protect doctors from frivolous and unjust prosecution. [Para 11] [122-A-B]

2. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the State Medical Council and also the Medical Council of India which opined that the “doctors seem to have made an attempt to do their best as per records”. However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthetist before conducting an angioplasty. According to the High Court, both the above-mentioned ‘lapses’ on the part of the appellant “clearly show the negligence” of the appellant. The High Court reached such conclusion on the basis of evidence of a doctor, given before the State Consumer Redressal Commission in the consumer dispute initiated by the respondent-wife of the deceased against the appellant and others. But the High Court failed to take into account another part of the same statement whereby the doctor stated that the time gap between the angioplasty failure and the surgery was not the factor for the death of the patient and that the time gap may or may not be a factor for the enhancement of the risk. This is most crucial in the context of criminal prosecution of the appellant. Therefore, the prosecution of the appellant is uncalled for. [Paras 12 to 16] [123-A-E; 124-B-D]

Jacob Mathew vs. State of Punjab and Anr. (2005) 6 SCC 1: 2005 (2) Suppl. SCR 307 – relied on.

Case Law Reference:

2005 (2) Suppl. SCR 307 relied on **Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1433 of 2013.

From the Judgment & Order dated 28.10.2010 of the High
Court of Andhra Pradesh at Hyderabad in Criminal Petition No.
6506 of 2007.

P.S. Narasimha, M. Srinivas R. Rao, Sudha Gupta for the
Appellant.

Mahabir Singh, Nikhil Jain, C.S.N. Mohan Rao, G.N.
Reddy, Debojit, M. Bala Shivudu, D. Mahesh Babu for the
Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. This appeal arises out of an order dated 28th October
2010 in Criminal Petition No.6506 of 2007 of the High Court
of Andhra Pradesh.

3. The aforementioned criminal petition was filed praying
that the proceedings initiated against the appellant herein in
C.C. No.600 of 2006 on the file of the XIV Additional Chief
Metropolitan Magistrate, Hyderabad for the offence punishable
under section 304A IPC be quashed. The said petition along
with another similar petition by one of the co-accused was
heard and disposed of by a common order (order in appeal).

4. While the petition filed by the appellant herein was
dismissed by the High Court, the other petition of the co-
accused was allowed.

5. The appellant is a cardiologist. The husband of the first
respondent (one Divakar) approached the appellant herein,
complaining of a pain in the chest on 22.04.2002. Divakar was
admitted in the hospital where the appellant was working and

A kept in the Intensive Care Unit (ICU). Thereafter, the appellant informed the first respondent that Divakar had suffered a mild heart attack. On 23.04.2002, an angiogram was conducted which showed three blocks in the vessels carrying blood to the heart. On 25.04.2002 at 9.30 a.m., the appellant unsuccessfully attempted to perform an angioplasty on Divakar. Around 1.30 in the afternoon, the appellant informed the first respondent that the angioplasty failed as the blocks were calcified. Same day at around 3.30 p.m., by-pass surgery was conducted on Divakar in the same hospital. Subsequently, various complications developed and eventually Divakar died on 09.05.2002.

6. On 14.05.2002, the first respondent lodged a complaint against the appellant and others under section 304A IPC which came to be registered as FIR No.416 of 2002.

D 7. The police on investigation submitted a final report on 02.02.2005 treating the case to be one of lack of evidence. The respondent filed objections before the Metropolitan Magistrate to the final report and prayed the Magistrate to take cognizance of the offence. The learned Magistrate by his order dated 11.12.2006 came to the *prima facie* conclusion that there exists material to try the accused for the offence punishable under section 304A IPC. Challenging the said order the appellant approached the High Court by way of Criminal Petition No.6506 of 2007.

F 8. By judgment under appeal, the High Court opined that the material on record "clearly shows negligence on the part of A1"¹ and declined to quash the proceedings.

G 1. The sworn statement of Dr. P.V.N. Rao also discloses that A1 without consulting the Anestheist and without a surgical stand conducted Angioplasty, which should be done by the Surgeon, as the surgeon was out of station which fact he came to know through the Anesthetist. The operation was delayed by 5 hours due to want of surgeon who has to come from New Delhi, which clearly shows the negligence on the part of A1. Further as the patient was a chronic smoker he should be prepared before undertaking Angioplasty and the Cardiac Anesthesian should be consulted for fitness of the patient before conducting the same.

9. Mr. P.S. Narasimha, learned senior counsel appearing for the appellant submitted that the High Court clearly erred in dismissing the petition of the appellant herein. Learned senior counsel argued that the law laid down by this Court in *Jacob Mathew Vs. State of Punjab & Anr.* (2005) 6 SCC 1 has completely been ignored by both the learned Magistrate and the High Court in deciding to proceed with the case against the appellant herein. On the other hand, learned counsel for the first respondent submitted that the conduct of the appellant in undertaking the angioplasty without having a standby surgical unit is clearly in violation of the established practice of the medical profession and therefore a clear case of negligence warranting punishment of the appellant.

10. This Court in the case of *Jacob Mathew* (supra) considered exhaustively the various aspects of negligence on the part of a doctor and laid down inter alia;

"48.(5) 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. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to

The entire record adduced does not indicate as to whether A1 assessed the condition of the patient on consultation of the cardio Anasthesian and obtained the fitness certificate for going Angioplasty on the patient.

A *be read as qualified by the word "grossly".*

B 11. This Court further opined that though doctors are not
immune from legal proceedings in the event of their negligence
in discharging their professional duties, in the interest of the
C society, it is necessary to protect doctors from frivolous and
unjust prosecution. It was further pointed out the need to frame
either statutory rules or administrative instructions incorporating
D guidelines for prosecuting doctors on charges of criminal
negligence. This Court therefore, ordered that until such
E guidelines are laid down, the following procedure is required
to be followed:-

D *"52. ...we propose to lay down certain guidelines for the
future which should govern the prosecution of doctors for
offences of which criminal rashness or criminal
negligence is an ingredient. A private complaint may not
be entertained unless the complainant has produced
prima facie evidence before the court in the form of a
credible opinion given by another competent doctor to
support the charge of rashness or negligence on the part
of the accused doctor. The investigating officer should,
before proceeding against the doctor accused of rash or
negligent act or omission, obtain an independent and
competent medical opinion preferably from a doctor in
government service, qualified in that branch of medical
practice who can normally be expected to give an
impartial and unbiased opinion applying the Bolam test
to the facts collected in the investigation. A doctor
accused of rashness or negligence, may not be arrested
in a routine manner (simply because a charge has been
levelled against him). Unless his arrest is necessary for
furthering the investigation or for collecting evidence or
unless the investigating officer feels satisfied that the
doctor proceeded against would not make himself
available to face the prosecution unless arrested, the
arrest may be withheld."*

H

12. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the “doctors seem to have made an attempt to do their best as per records”.

13. However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthesian before conducting an angioplasty. According to the High Court, both the above-mentioned ‘lapses’ on the part of the appellant “clearly show the negligence” of the appellant.

14. The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr. Surajit Dan given before the A.P. State Consumer Redressal Commission in C.D. No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the above-mentioned Dr. Dan’s evidence was recorded wherein Dr. Dan in his cross-examination stated as follows:-

“...Whenever Cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case....”

He further stated;

“...The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In

A *a planned coronary surgery, the risk is less than in an emergency surgery....”*

However, the same doctor also stated;

B *“....The time gap between the angioplasty failure and the surgery is not THE FACTOR for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk.”*

C 15. Unfortunately, the last of the above extracted statements of Dr. Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

D 16. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in *Jacob Mathew case* (supra) that the negligence, if any, on the part of the appellant cannot be said to be “gross”. We, therefore, set aside the judgment under appeal and also the proceedings of the trial court dated 11.12.2006.

E 17. The appeal is allowed, however, there shall be no order as to costs.

K.K.T.

Appeal allowed.