(2010) 10 AHC CK 0323

Allahabad High Court

Case No: None

Dr. Mrs. Renu Jain		APPELLANT
	Vs	
Smt. Savitri Devi and Another		RESPONDENT

Date of Decision: Oct. 5, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 200, 202, 482
- Penal Code, 1860 (IPC) - Section 337, 420, 467, 471

Hon'ble Judges: Arvind K. Tripathi, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Arvind K. Tripathi, J.
Heard learned Counsel for the parties and perused the record.

2. The present application u/s 482 Cr.P.C. has been filed for quashing the proceeding of Case No. 818 of 1995 pending in the court of IInd Class Judicial Magistrate, Jhansi. On 20.5.1988, notice was issued and further proceeding was stayed. Counter affidavit on behalf of the opposite party No. 1 has already been filed.

3. Learned Counsel for the applicant submitted that the applicant being qualified Surgeon, conducted operation, by surgery of sterilisation of opposite party No. 1. The complaint was filed by opposite party No. 1 with the allegation that the applicant was consulted and the complainant opposite party No. 1 was operated upon for ligation. Further allegation was that the applicant assured the complainant and her husband that the latest techniques were available in her Nursing Home and she was Specialist of Surgery of sterilisation. The complainant was admitted who was operated upon and certificate was issued on 18.2.1988. There was decline in the health of the complainant and ultimately it was found that she was pregnant. After the statement of the complainant u/s 200 Cr.P.C. and the statement of witnesses u/s

202 Cr.P.C. the applicant was summoned under Sections 337, 420, 467, 471 I.P.C. taking cognizance on the complaint. The applicant was aggrieved by cognizance and proceeding pending before the Judicial Magistrate - IInd, Jhansi, hence the present application u/s 482 Cr.P.C. was filed. He further contended that even as per the allegation it is clear that the opposite party No. 1 was operated upon in the month of February, 1988 and after six years she became pregnant. Hence it is clear that though the applicant was leading a normal life along with her husband, however, she did not conceive for about six years. It might be a case of failure of the operation but since there was no material to show that there was any negligence on part of the doctor, in conducting the surgery for which the applicant was qualified, she cannot be blamed. No offence is made out against the applicant under the aforesaid sections because neither there was any ingredient of cheating nor there was any mens rea of cheating or giving any false assurance. He further submitted that it is well established as per expert opinion which was considered by the Apex Court that quite often pregnancy took place even after surgery of sterilisation. Extracts from the text books were placed by counsel for the applicant. Counter affidavit was filed on behalf of opposite party No. 1 and it was reiterated on her behalf that there was assurance by the applicant that there was latest techniques in her Nursing Home and she was well qualified in operation of sterilisation. Even then she became pregnant due to carelessness of the applicant, hence it is clear that the complainant was cheated deliberately to earn the black money from her. Counsel for applicant submitted that the applicant is a qualified doctor who passed P.G. Degree. She is also reputed and successful gynaecologist.
He relied upon the Judgment of the Apex Court reported in State of Haryana and Others Vs. Raj Rani, (Three Hon''ble Judges Bench) in which Judgment in the case of State of Punjab Vs. Shiv Ram and Others, was considered. He also relied the Judgment of the Apex Court reported in Martin F. D''Souza Vs. Mohd. Ishfaq, Martin F.D''Souza v. Mohd. Ishfaq.

4. From the text book of Gynaecology by Sir Norman Jeffcoate regarding reliability of sterilisation the opinion in that text book is quoted herein below:

The only sterilisation procedures in the female which both satisfactory and reliable are (1) resection or destruction of a portion of both fallopian tubes, and (2) hysterectomy. No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy. The explanation of these extremely rare cases is a persisting communication between the ovary or tube and the vaginal vault.

Even when tubal occlusion operation are competently, preformed and all technical precautions taken, intra-uterine pregnancy occurs subsequently in 0.3 per cent cases. This is because an ovum gains access to spermatozoa through a recanalised inner segment of the tube.

There is a clinical impression that tubal resection operations are more likely to fail when they are carried out at the time of caesarean section than at any other time. The fact that they occasional fail at any time has led many gynaecologists to replace the term ''sterilisation'' by tubal ligation'' or tubal resection in talking to the patient and in all records. This has real merit from the medico-legal standpoint and has been my practice for many years.

5. Failure rate of sterilisation according to Text Book of Gynaecology by D.C. Dutta is quoted herein below:

The overall failure rate in tubal sterilisation about 0.7% , the Pomeroy''s technique being the lower 0.1-0.3%. In contrast to the Madkner''s, being 1.5-3.0%. The failure rate is increased when it is done during hysterectomy or during Caesarean section. The failure rate is also increased when it is done through vaginal route rather than the abdominal approach.

6. According to Shaw''s Textbook of Operative Gynaecology revised by John Howkins and Christopher N. Hudsor:

The operation of sterilisation consists of employing a method whereby the patency of the Fallopian tubes on each sides is destroyed, and the destruction must be permanent. Although the procedure may seem to be relatively simple, the number of failures reported in the literature is remarkably high. There seems to be no doubt that certain married couples have a combined high fertility, so that fairly complicated procedures must be employed to ensure the permanent success of sterilisation. The cause of failure of a correctly performed operation is recanalisation of the divided Fallopian Tube.

7. In the present case though there is allegation that the applicant suggested the complainant that there was latest techniques in her Nursing Home and she was well qualified doctor. Hence she was cheated because inspite of the operation of sterilisation the complainant became pregnant but neither latest techniques was denied nor there is allegation that the applicant was not qualified gynaecologist surgeon. There was no evidence either regarding any negligence on the part of the applicant or that the applicant was not qualified so she might be responsible for failure of the operation. In the present case complainant did not conceive for the first six years inspite of the fact that she was leading a normal life along with her husband. It was held by the Apex Court in the case of State of Punjab v. Shiv Ram (supra) that merely because a woman having undergone a sterilisation operation became pregnant and delivered a child, the operating surgeon and his employer could not be held liable for compensation on account of unwanted pregnancy or unwanted child. It was further held that the claim in tort can be sustained only if there was negligence on the part of the surgeon in performing surgery. The proof of negligence should have satisfied though it was held in that Judgment that the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that

the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. It was further observed that ordinarily a surgeon does not offer such guarantee. In the aforesaid case vicarious liability in tort was considered by the Apex Court.

8. The difference between the criminal liability and civil liability was considered by the Apex Court in the case of Jacob Mathew Vs. State of Punjab and Another, which was considered and reiterated in subsequent Judgment by the Apex Court in case of Martin F. D''Souza Vs. Mohd. Ishfaq,

9. In the aforesaid Judgment the Apex Court considered the simple negligence which may result into in civil liability and gross negligence or reckless which may result in criminal liability. For civil liability only damages can be imposed by the Court. However, in the criminal liability doctor can also be sent to jail, apart from the damages imposed by the civil court or by Consumer Forum. In para 10 of the aforesaid Judgment negligence as tort and in para 12 the negligence as a tort and as a crime was considered. Para10, 12 and 19 are reproduced herein below:

Para 10: The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading Judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian Jurisprudential thought is well stated in the Law of Torts, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh). It is stated (at pp.441-42)

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something, which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property... the definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former''s conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

According to Charlesworth & Percy on Negligence (10th Edn. 2001), in current forensic speech, negligence has three meanings. They are (I) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (para1.01) The essential components of negligence, as recognised, are three: "duty" "breach" resulting damages", that is to say:

1. The existence of a duty to take care, which is owed by the defendant to the complainant.

2. The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

3. Damage, which is both casually connected with such breach and recognized by the law, has been suffered by the complainant.

If the claimant satisfied the court on the evidence that these ingredients are made out, the defendant should be held liable in negligence.

Para 12: "The term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of the damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In R.V. Lawrence Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in R.V. Caldwell and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said:
Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligence. It is only when this is so that the doer of the act is acting '' recklessly'' if, before doing the act, he either fails to give an thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

10. While considering basic principle relating to medical negligence the principle known as Bolam''s rule has been considered and accepted in several judgments.

Para 19 of Jacob Mathew case (supra):

An oftquoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in Bolam v. Friern Hospital Management Committee, WLR at page 586 in the following words:

Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular Article (Charlesworth & Percy ibid, Para 8.02)

11. Hence it is clear that the negligence differs in civil and criminal liability. If there is negligence the damages can be claimed but negligence may not be necessary for criminal liability. The ailment of mens rea or recklessness must exist for criminal liability which amounts to an offence. In para 52 of the aforesaid Judgment the guidelines were laid by the Apex Court which reads as follows:

1.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.

2. 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 Bolams test to the facts collected in the investigation.

3. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge have 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.

12. In case of State of Haryana v. Santra it was held that if a child is born after the sterilisation operation the surgeon will be liable for negligence.

13. In the case of State of Haryana and Others Vs. Raj Rani, it was held by Hon. Apex Court that if a child was born to a woman even after she had undergone a sterilisation operation by a surgeon, the doctor was not liable because there can not be 100% certainty that no child will born after sterilisation operation. The views of earlier Judgment in the case of State of Haryana and Others Vs. Smt. Santra, of two

Hon''ble Judges Bench was not followed by another three Hon. Judges Bench in State of Punjab Vs. Shiv Ram and Others, . It was held by the Hon''ble Apex Court in para 25 of the aforesaid Judgment that merely because a woman having undergone operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy and unwanted child. The claim in tort can be sustained only if there was negligence on the part of surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam''s test. It was further held that surgeon would not be held liable in contract, unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. It was further observed that ordinarily a surgeon does not offer such warranty.

14. There are several methods of female sterilisation, out of which some methods are popular and some are less popular. However, according to expert opinion, no method, is absolutely reliable, and pregnancy occurs subsequently in 0.3 to 7 per cent of cases. In spite of the operation performed successfully, without any negligence, the sterilised woman may become pregnant.

15. No doubt the standard in the profession have shown decline due to impact of commercialisation. There are complaints and reports against doctors, because black sheeps have entered in this noble profession. Whether there was negligence or gross negligence depends on facts and circumstances of each case.

16. However, in the present case there was no expert opinion by any other competent doctor to support the allegation in the complaint, Prima facie there was no evidence that there was gross negligence or recklessness and mens rea. In the circumstances no offence is made out and the doctor is not liable for prosecution. Since there is no evidence to fasten the criminal liability against the applicant, hence the complaint and proceeding of Complaint Case No. 818 of 1995 Savitri Devi v. Dr. Mrs. Renu Jain pending in the court of IInd Judicial Magistrate is hereby quashed. Interim order, if any, is hereby discharged.

17. Accordingly present application u/s 482 Cr.p.C. is allowed. No order as to cost.