

(2013) 03 GUJ CK 0055

Gujarat High Court

Case No: Misc. Criminal Application No. 13690 of 2008 in Cri. Appeal No. 2724 of 2008

State of Gujarat

APPELLANT

Vs

Rajendrasinh @ Raju @ Mahavir
Gautam Kishorsinh Chauhan and
Others

RESPONDENT

Date of Decision: March 22, 2013

Citation: (2014) 1 CCR 181 : (2013) CriLJ 4383 : (2013) 3 GLR 1889 : (2013) 4 RCR(Criminal) 821

Hon'ble Judges: Abhilasha Kumari, J

Bench: Single Bench

Advocate: K.L. Pandya, Addl. P.P, for the Appellant;

Judgement

Abhilasha Kumari, J.

This application has been preferred by the applicant-State of Gujarat seeking leave to appeal against the judgment

and order 21-4-2007, passed by the learned Chief Judicial Magistrate, Nadiad, in Criminal Case No. 5202 of 2002, whereby the respondents-

original accused have been acquitted of the charges levelled against them for the offences punishable under Secs. 465, 419 and 114 of the Indian

Penal Code and under Sec. 19 of the Transplantation of Human Organs Act, 1994. The case of the prosecution, in brief, is that one N.

Bhaskaran, General Manager (Administration), Muljibhai Patel Urological Centre, Nadiad, filed a complaint dated 23-6-2002, which was

registered as II-C.R. No. 118 of 2002 with the Nadiad Town Police Station, to the effect that the hospital where he is working, specialises in

treatment of kidney diseases and in performing kidney transplant operations, where several patients come for treatment. Kidney transplant

operations can be performed by donation of a kidney by a relative of the patient, which would constitute the relatable category but if a kidney of a

close relative is not available, then a stranger can donate a kidney which is known as the non-relatable category. For both the categories,

permission from the Department of Health, Government of Gujarat is necessary. After carrying out the necessary laboratory tests upon the donor

and recipient, kidney transplant operations are performed on the patient. The complaint goes on to state that a patient by the name of Virajbhai

Ramnikbhai Velani was admitted in the hospital for a kidney transplant operation, which was performed. He had first contacted the Social

Department of the hospital, which fixed the date for the operation. The donor of the kidney to Virajbhai was Kavtaben Shah (respondent No. 5),

who was stated to be his sister. After performing the Tissue Typing Tests and other necessary procedure, it was found that both the kidneys

matched and the kidney transplant could be performed. The necessary permission by the Health Department of the Government of Gujarat was

granted and a kidney transplant operation was performed on Virajbhai Ramnikbhai Velani. During the period that Virajbhai Ramnikbhai Velani

was admitted in the hospital, one Doctor Shishir Gang, while going on his rounds in the hospital, suspected that Kavtaben Shah was not the real

sister of Virajbhai Ramnikbhai Velani, as nobody used to sit near her or attend to her. Dr. Shishir Gang, therefore, made inquiries from

Ramnikbhai, father of Virajbhai, who told him that Kavtaben Shah and Virajbhai Velani are not real siblings and Kavtaben is not his daughter. Dr.

Shishir Gang, therefore, informed a Senior Doctor of the hospital, Dr. Mohan Rajapurkar, regarding the information given to him by Ramnikbhai

that Kavtaben Shah had donated her kidney to Virajbhai by posing as his sister, but she was not actually his sister. It is further stated in the

complaint that Ramnikbhai informed Dr. Gang that nobody in his family was in a position to donate a kidney, therefore, he made inquiries regarding

a possible donor. An agent, by the name of Girishbhai Soni (respondent No. 3) arranged for Kavtaben to donate a kidney to Virajbhai by posing

as his sister. As per the case of the prosecution, Ramnikbhai further informed Dr. Shishir Gang that another patient by the name of Nileshbhai

Manilawala had also undergone a kidney transplant operation and the donor of the kidney had posed to be his brother. His name was Sunilbhai

Manilawala, but he was not his real brother. According to the prosecution, upon inquiries being made from Nileshbhai Manilawala, he confessed

that the donor of the kidney was not his real brother but was a person who had been arranged by an agent named Girishbhai Soni. Ramnikbhai is

further stated to have disclosed that another patient by the name of Ashok Gautam was about to undergo a kidney transplant surgery and the

proposed donor was not his brother, but had been set up by the same agent, Girishbhai Soni. It is stated in the complaint that these three instances

of kidney transplant operations involving persons who are not related to the patients but are posing as such, have shown that a middleman is

arranging for donation of human organs for monetary considerations, which is an offence under the Transplantation of Human Organs Act, 1994

(hereinafter referred to as "the Act").

2. After investigation, a charge-sheet against the respondents was filed before the learned Chief Judicial Magistrate, Nadiad, and the charges were

read over and explained to them. Evidence was led by the prosecution. The respondents denied the charges against them and claimed to be tried.

The case was, therefore, put to trial.

3. After appreciating the oral and documentary evidence on record, the trial Court acquitted the respondents of the charges against them.

4. Mr. K.L. Pandya, learned Additional Public Prosecutor, submitted that the trial Court has erred in holding that the prosecution has failed to

establish its case beyond reasonable doubt. That there was sufficient evidence on record to show that the accused persons were involved in the

offences for monetary considerations. That, respondent Nos. 4 and 5 have falsely posed as brother and sister of Nileshbhai and Virajbhai,

respectively, and have donated their kidneys to those patients for financial benefits. The entire racket is being run by respondent No. 3, who has

arranged for donation of the kidneys from donors, posing as relatives of the recipients, when in fact, they are not at all related to them. This is being

done for monetary considerations which is an offence.

5. Learned Additional Public Prosecutor has heavily relied upon the deposition of P.W. 2, Dr. Shishir Gang, to whom Ramnikbhai, father of

Virajbhai, had confessed that the donor of the kidney to his son was not his daughter. Learned Additional Public Prosecutor has also relied upon

the deposition of P.W. 1, N. Bhaskaran, who is the complainant, by submitting that P.W. 1 has stated that the kidney donation to Virajbhai was

arranged by an agent Girishbhai Soni, for monetary consideration. It is further stated that under the circumstances, and looking to the evidence on

record, this is a fit case where the Court may grant leave to appeal.

6. This Court has heard learned Additional Public Prosecutor and perused the record made available by him.

7. Before discussing the evidence on record, it may be fruitful to advert to the relevant provisions of the Transplantation of Human Organs Act,

1994 (hereinafter referred to as "the Act"), in order to appreciate the evidence, in proper perspective.

8. Section 19 of the Act deals with the punishment for commercial dealings in human organs and reads as thus:

19. Punishment for commercial dealings in human organs:--Whoever-

(a) makes or receives any payment for the supply of, or for an offer to supply, any human organ;

(b) seeks to find a person willing to supply for payment any human organ;

(c) offers to supply any human organ for payment;

(d) initiates or negotiates any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ;

(e) takes part in the management or control of a body of persons, whether a society, firm or company, whose activities consist of or include the

initiation or negotiation of any arrangement referred to in clause (d); or

(f) publishes or distributes or causes to be published or distributed any advertisement,-

(a) inviting persons to supply for payment of any human organ;

(b) offering to supply any human organ for payment; or

(c) indicating that the advertiser is willing to initiate or negotiate any arrangement referred to in clause (d), shall be punishable with imprisonment for

a term which shall not be less than two years but which may extend to seven years and shall be liable to fine which shall not be less than ten

thousand rupees but may extend to twenty thousand Rupees:

Provided that the Court may for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term

of less than two years and a fine less than ten thousand Rupees.

9. Section 22 of the Act is regarding cognizance of offence and reads thus:

22. Cognizance of offence:--(1) No Court shall take cognizance of an offence under this Act except on a complaint made by -

(a) The Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government or, as the

case may be the Appropriate Authority; or

(b) a person who has given notice of not less than sixty days, in such manner as may be prescribed, to the Appropriate Authority concerned, of the

alleged offence and of his intention to make a complaint to the Court.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-sec. (1), the Court may, on demand by such person, direct the Appropriate

Authority to make available copies of the relevant records in its possession to such person.

10. From a perusal of the above provisions of law, it is evident that no commercial dealings in human organs is permissible and in the event that any

offence under the Act has been committed, no Court can take cognizance of such offence, except on a complaint made by the Appropriate

Authority, any officer authorised by the Central Government, the State Government or the Appropriate Authority or by a person who has given

prior notice of sixty days as prescribed to the Appropriate Authority, of the alleged offences and his intention to make a complaint to the Court. It

is also provided that no Court, except the Court of Metropolitan Magistrate or Judicial Magistrate of the First Class, shall try any offence under

this Act.

11. Keeping in view the above legal provisions, the salient features of the evidence may now be noticed.

12. P.W. 1, N. Bhaskaran, who is the complainant, is the General Manager (Administration) of the concerned hospital. He narrates in detail, the

procedure that is to be followed by patients desirous of having any type of kidney transplant operation performed, of the relatable and non-

relatable categories, and the tests to be performed before the operation can take place. He further states that he was informed by Dr. Shishir

Gang, that as per the information given to him by Ramnikbhai, Kavitaaben Shah and Virajbhai Velani are not real siblings and Kavitaaben is not his

daughter.

13. He further states that as per the information given by Ramnikbhai, another patient by the name of Nileshbhai was the recipient of the kidney

from a person who was posing as his brother but was not actually related to him. Another patient, by the name of Ashok Gautam, was scheduled

to have a kidney transplant operation and the donor in that case is also not related to him, though he is posing as such.

14. On all these aspects, the deposition of P.W. 1 is more or less a repetition of the complaint. From the cross-examination of this witness, it

emerges that he does not have any role to play in the procedure for kidney transplant operations and nor does he personally know or recognize the

donors or the recipients of the kidneys, in the present case.

15. P.W. 2 is Dr. Shishir Gang, who is a Consultant Pathologist, and has been examined at Exh. 86. He states that while he was on his rounds, he

got suspicious that Kavitaaben Shah, donor of the kidney to Virajbhai Velani, is not actually the sister of Virajbhai, as nobody was attending to her

or sitting near her. He states that he made inquiries from Ramnikbhai, father of Virajbhai, who confessed that Kavitaaben Shah is not his daughter

and Virajbhai and Kavita are not real brother and sister, and that the kidney donation has been arranged by Girishbhai Soni, who is an agent. P.W.

2 Ramnikbhai also disclosed that another patient by the name of Nileshbhai was the recipient of a kidney from one Sunilbhai Manilawala, who had

posed as his brother when, in fact, he was not related to him. This witness further deposes that Ramnikbhai disclosed another incident regarding a proposed kidney transplant operation in which a kidney was to be donated to Mr. Ashok Gautam by a person who was posing as his brother but was not actually related to him. Upon receiving such information, P.W. 2 informed his Senior Doctor Rajapurkar. Apart from the above, his deposition describes the procedure for the Tissue Typing Test to be performed on the recipient and the donor in order to ensure that the kidneys match and other procedure to be followed before a kidney transplant operation can be performed. At no stage in the deposition of P.W. 2, does it emerge that he has any suspicion, knowledge or information that the accused persons are involved in monetary transactions for the donation of kidneys to the recipients.

16. P.W. 3 is Dr. Mohan Manohar Rajapurkar, who is a Medical Director in the hospital and has been examined at Exh. 112. In his deposition, he describes the procedure adopted for kidney transplant operations, and Tissue Typing Tests that are to be performed before such operations. In his deposition, he has stated that in the present case, he is not aware of any monetary transactions regarding the kidney transplant on Virajbhai and Nileshbhai. However, he has stated that Kavitaaben Shah and Sunilbhai are not related to Virajbhai and Nileshbhai. From the entire deposition, it does not emerge that he has any personal knowledge regarding any monetary transaction that has taken place for the donation of kidneys. In his cross-examination, this witness has categorically admitted that he has not taken permission to file a complaint regarding impersonation by the accused persons. The deposition of this witness does not throw any light upon the aspect that the agent Girishbhai Soni has arranged the donation of the kidneys by impersonation of the donors as siblings of the recipients for monetary considerations.

17. P.W. 4-Dr. Sunita Mohan Rajapurkar, has been examined at Exh. 153, Apart from describing the procedure and narrating the version of the complainant regarding impersonation of the donors as relatives of the recipients, this witness has identified the signature of respondent No. 7 who has identified the donors of the kidneys.

18. The Notary, Mr. Kanubhai Hirabhai Shah, is P.W. 5 and has been examined at Exh. 172. He states that he has notarized the affidavits made

by Kavtaben Shah and Sunilbhai Manilawala, stating that they are the sister and brother of the recipients Virajbhai Velani and Nilesbhai

Manilawala respectively, and intend to donate one of their kidneys to these patients to save their lives.

19. P.W. 12 is Elizabeth Denialbhai Solanki, a Laboratory Technician, who has been examined at Exh. 250. She has performed the Tissue Typing

Tests on the donors and recipients of the kidneys, which tests show that the kidneys of the donors matched those of the recipients.

20. Dr. Binaka Thakkar has signed upon the Report of the Tissue Typing Test. However, she has not been examined or arraigned as an accused

person. Though Anilbhai Vaghela has been arraigned as respondent No. 8 and Arunbhai Dabhi as respondent No. 7, significantly, Elizabeth

Denialbhai Solanki has not been arraigned as an accused.

21. The above is the evidence of the salient and relevant witnesses on behalf of the prosecution. The State Government has granted sanction for

prosecuting the accused persons under Sec. 420 of the Indian Penal Code and Sec. 19 of the Act vide Exh. 118.

22. It is significant to note that though the State Government has sanctioned the prosecution under Sec. 420 of the Indian Penal Code, in the

present case, the complaint has not been filed for offences under that Section, but has only been filed under Sec. 19 of the Act.

23. After appreciating the evidence as above, the trial Court has found that the sanction of the State Government to file a complaint is in the name

of the complainant N. Bhaskaran, who has never sought permission for sanction to prosecute under the Act. It was Dr. Mohan Manohar

Rajapurkar, Medical Director of the hospital who had sought permission, therefore, the permission having been granted to a person who has not

sought it, is not in consonance with the provisions of Sec. 22 of the Act.

24. As per Sec. 22(b) of the Act, a person who has given notice of not less than sixty days in the prescribed manner to the Appropriate Authority

can make a complaint, upon sanction being granted in his favour. However, Mr. N. Bhaskaran has neither given prior notice of sixty days nor

sought permission from the Appropriate Authority or the State Government. He is, therefore, not authorised to make the complaint. The findings of the trial Court in this regard are in consonance with the provisions of the Act and, in the view of this Court, cannot be faulted.

25. It is noteworthy that the complaint was made on 23-6-2002 and the authorisation from the State Government is dated 5-8-2002; meaning thereby that the complaint has been made even before the authorisation was received. The complainant, therefore, was not authorised to make the complaint on the date it was made. It is also significant to note that though the case of the prosecution is based upon the information received by Dr. Shishir Gang from Ramnikbhai Velani, who is stated to have confessed that the donor of the kidney to his son, is not his daughter but is posing as such, Ramnikbhai has not been examined. Rather, it has been noticed by the trial Court that he ought to have been arraigned as an accused, but has not been so arraigned. This person could have been the main person who was in a position to disclose regarding any monetary transaction that may have taken place for the kidney transplant operation of his son. Though it is stated that Ramnikbhai has confessed that the kidneys were arranged by Girishbhai Soni, he does not utter a word regarding any financial transaction or payment made to Girishbhai to arrange a donor for his son. The entire basis of the offence under Sec. 19 of the Act is giving or receiving any payment for the supply of a human organ or seeking a person supplying human organs, for payment. The very substratum of the case of the prosecution falls to the ground as the giving and receiving of money for supply of a kidney or seeking to find a person willing to supply a kidney for monetary considerations, has not been proved at all.

26. Section 2(k) of the Act defines payment as payment in money or moneys worth. Not only has the prosecution failed to establish payment in money for the kidneys donated to the recipients but it has also been unsuccessful in establishing the payment for moneys worth, or in kind, to either the donees or the purported agent who is stated to have arranged for such donations.

27. Another aspect is that before the kidney transplant operation on Virajbhai Velani and Nileshbhai was performed, a Tissue Typing Test was

conducted on the donors and the recipients, which showed that the organs matched each other and that the transplant could be performed. P.W.

12 Elizabeth Denialbhai Solanki, Laboratory Technician, who performed the Tissue Typing Test and Dr. Binaka Thakkar, who has signed on the

Report, have not been arraigned as accused. On the other hand, respondent No. 7-Arunbhai Dabhi and respondent No. 8-Anilbhai Vaghela, who

are employees of the hospital, have been arraigned as accused though there is no material on record to establish their roles in the entire episode.

28. It is noteworthy that the prosecution has not tried to establish its case by examining any other independent witnesses. If the authorities of the

concerned hospital were inclined to unearth the alleged racket of kidney transplants by donors posing as close relatives, an effort to examine

independent and trustworthy witnesses could have been a step in the right direction.

29. The evidence, as it stands, does not reveal that any monetary transaction has taken place in respect of the donation of kidneys by respondent

Nos. 4 and 5 to Nileshbhai and Virajbhai Velani, respectively, or that respondent No. 3, Girishbhai Soni, has played the role of an agent for

arranging such donations by impersonation and for monetary considerations. Insofar as the impersonation by respondent Nos. 4 and 5 as brother

and sister of Nileshbhai and Virajbhai Velani is concerned, though the State Government has granted sanction for prosecution for the offence under

Sec. 420 of the Indian Penal Code, in the present case, the charges against the respondents are only under Sec. 19 of the Act. As the giving and

receipt of payment for transplant of kidneys has not been established, no offence under Sec. 19 of the Act has been made out against the accused.

This Court, therefore, concurs with the findings of the trial Court in this regard.

30. For the aforestated reasons, this Court does not find any error or infirmity in the judgment rendered by the trial Court. On re-appreciation of

the evidence on record, this Court finds itself in agreement with the findings recorded by the trial Court that the prosecution has failed to prove the

offence against the respondents beyond reasonable doubt. In this view of the matter, no other verdict, except that of acquittal, could have been

recorded by the trial Court.

31. It is a settled position of law that where there is a possibility of two views, the one favourable to the accused should be adopted. In the present case, the view adopted by the trial Court is possible and probable on the basis of the evidence on record.

32. As this Court is in agreement with the findings of acquittal recorded by the trial Court, there is no justifiable reason to grant leave to appeal against the judgment and order of the trial Court. For the aforesaid reasons, leave to appeal is declined, and the application is rejected.