

(2014) 12 KL CK 0115

High Court Of Kerala

Case No: Crl. Rev. Pet. No. 1903 of 2014

Ajith

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Dec. 3, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 227, 228, 228(1A), 319
- Penal Code, 1860 (IPC) - Section 299, 300, 304, 304A

Citation: (2015) 1 KHC 100

Hon'ble Judges: B. Kemal Pasha, J

Bench: Single Bench

Advocate: T.M. Chandran, P.R. Neelakandan Namboodiri, S. Sujith and V.A. Sasidharan,
Advocate for the Appellant; Jibu P. Thomas, Public Prosecutor and Suman Chakravarthy,
Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

B. Kemal Pasha, J.

This second round of revision has been preferred by the accused in Sessions Case No. 1675 of 2011 of the Additional Sessions Judge-V, Kollam, challenging order dated 24.10.2014 passed by the learned Additional Sessions Judge in Crl. M.P. No. 2387 of 2013.

2. The incident relates to the case had occurred on 14.12.2004, when a hapless young lady had taken the chance to have a medical consultation, that too casually, for her abdominal pain at the hospital in question. She walked in to the casualty for a consultation. The Doctor at the casualty had examined her and administered Cyclopam injection and Digene gel and she was asked to go home. Thereafter the twist occurred, when she was further advised to meet the Surgeon also. As advised, she met the Surgeon. The Surgeon could not find anything to intervene; but advised her to consult the Gynecologist also. Then the victim met the Gynecologist. The

Gynecologist suggested that there was some sort of urinary infection and she was administered with Ampicillin injection, allegedly after taking the test dose. Immediately after the injection, she developed respiratory difficulties. Noting down the complications, the first petitioner, Doctor administered Diazepam injection. Immediately, her condition worsened and she had to be connected to a ventilator. As there was no ventilator facility at the hospital, she was directed to be shifted to VSM Hospital, Mavelikkara where such a facility was available. By the time, she reached the hospital, it seems that she was almost dead. Her heart beat and pulse were not readable. Even though she was connected to the ventilator and medicines were administered, she could not be resuscitated. Soon after, her death was declared.

3. As in the case of normal death, her dead body was taken to her house and it was buried. In the mean time, the de facto complainant, who is the mother of the victim, could smell rat about the gross negligence from the part of the doctors who had administered medicines to her, she filed a complaint and the law was set in motion. The dead body was disinterred and autopsy was conducted. The matter was investigated by the local police at first. Dissatisfied with the snail pace of investigation by the local police, the de facto complainant approached this Court seeking a proper investigation, which has culminated in handing over the investigation to the Crime Branch.

4. The Crime Branch investigated the matter and filed a final report alleging an offence under Section 304 IPC. On committal to the Court of Session, the case was made over to the learned Additional Sessions Court. Petitioners filed the aforesaid Crl. M.P. seeking a discharge. The matter was heard under Section 227 of the Cr.P.C. The learned Additional Sessions Judge initially found that a charge under Section 304-A will alone lie and consequently by invoking the power under Section 228(1A) of Cr.P.C., the court below transferred the case to the Judicial First Class Magistrate's Court, Karunagappally. Dissatisfied with the findings entered by the court below in the said Crl. M.P., the petitioners preferred Crl. R.P. before this Court as Crl. R.P. 296/2014. This Court, after hearing both sides, passed an order on 28.08.2014 thereby allowing the criminal revision and by setting aside the order impugned in it, by giving the following directions.

"(a) The impugned order passed by the court below in Crl. M.P. No. 2387 of 2013 will stand set aside, and the application for discharge will stand restored to files.

(b) The learned trial judge will reconsider the application for discharge, hear both sides in detail, examine the whole prosecution records as meant under Section 227 Cr.P.C. and take decision afresh for one of the options available under Section 228 of Cr.P.C. and pass appropriate judicious order.

(c) Crl. M.A. No. 3677 of 2014 brought by the mother of the deceased will stand closed for the time being. In case, she makes an application for being heard in the

court below, it shall be considered by the trial court, and if felt necessary, or if found that she has legal right to be heard, or that she requires to be heard in the interest of justice, appropriate orders can be passed by the trial court.

(d) The trial court is hereby directed to take decision on the application for discharge, without any delay. Efforts shall be made for disposal within four months."

5. The learned Additional Sessions Judge again heard the matter and passed the impugned order by which the court below found that there are sufficient grounds to proceed for an offence under Section 304 IPC. Consequently, a charge under Section 304 IPC has been framed. It is the said order which is under challenge herein.

6. It seems that the charge has been read over to the petitioners, plea has been recorded and the matter has been scheduled for trial.

7. Heard the learned counsel for the petitioners, the learned counsel for the de facto complainant and the learned Public Prosecutor.

8. Initially, the learned counsel for the petitioners has objected that the de facto complainant has no right of audience in the matter and therefore, the learned counsel for the de facto complainant may not be permitted to argue the matter. I find little merit in the said argument. It seems that the law was set in motion in this case on a complaint preferred by the de facto complainant herein. In a criminal trial, it is trite that there cannot be any question of locus standi. In this particular case, it seems that the 4th accused had approached this Court through CrI. M.C. 3094/2013 for getting all the proceedings against him in this case quashed. The de facto complainant was impleaded in that matter. It seems that the proceedings against the 4th accused has been quashed with a finding that at the appropriate stage of the trial if it is found that he should also be impleaded, there is nothing wrong on the part of the trial court in invoking the power under Section 319 Cr.P.C. it was also found that in case the prosecution does not choose to examine the 4th accused as a prosecution witness, he should be examined as a court witness by the trial court.

9. It seems that all along the proceedings the de facto complainant has been actively participating. When the provision under Section 227 Cr.P.C. says that the prosecution has to be heard, in this particular case it cannot be said that the de facto complainant is not a part of the prosecution. Over and above all these, the victims in crimes and their relatives are no longer a forgotten mass in criminal justice dispensing system. They have also their own rights to be protected. They are not supposed to swallow all what are being done by the investigation or prosecution. They should never be treated as persons expected to be mute spectators in judicial process.

10. The learned counsel for the petitioners have invited the attention of this Court to the decision in *Ajay Kumar Parmar v. State of Rajasthan*[2012 (4) KLT SN 61 Case No. 49(SC)] wherein it was held that the court should not pass an order of acquittal by

resorting to a course of not taking cognizance, where prima facie case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings.

11. It is true that normally a victim is not participating in the discharge proceedings under Section 227 Cr.P.C. If in a case wherein the victim is not sufficiently represented by the prosecution and in cases where the interest of the victim is not being adequately protected, there is nothing wrong on the part of the victim in stepping in with a request for being heard, and in such cases, the cries of the victim should not remain unheard. From the aforesaid dictum laid down by the Apex Court it cannot be said that the victim has no right to be heard during the discharge proceedings.

12. The learned counsel for the petitioners is also relying on the decision in [R.S. Mishra Vs. State of Orissa and Others](#), wherein it was held:

"It is also to be noted that a discharge order is passed on an application by the accused on which the accused and the prosecution are heard. At the stage of discharging an accused or framing of the charge, the victim does not participate in the proceeding. While framing the charge, the rights of the victim are also to be taken care of as also that of the accused."

13. From the aforesaid dictum also it cannot be said that the victim can have no right of audience at all. The Apex Court has laid down the law that while passing order under Section 227 Cr.P.C. the interest of the victim should also be considered as in the case of the accused. The said dictum was laid down by considering that in normal cases, the victims do not participate in discharge proceedings. From all these, I do not find any merit in the argument forwarded by the learned counsel for the petitioners that the de facto complainant has no right of audience.

14. Coming to the next aspect, the question to be considered is whether the impugned order passed by the court below suffers from any illegality, irregularity or impropriety. On hearing either side, this Court is faced with a peculiar circumstance wherein this Court is called upon now to decide whether a charge under Section 304 IPC will lie in the matter or not. If a charge under Section 304 will lie in the matter, it cannot be said that the impugned order passed by the court below is illegal, irregular or improper. This Court is of the view that, the said question has to be considered only by having recourse to the contents of the documents available at present, i.e., documents produced by the prosecution along with the final report. What is envisaged under Section 227 Cr.P.C. is not a threadbare examination of the entire evidence in the matter as in the case of passing a judgment at the conclusion of the trial. The court is not expected to balance the evidence whereas the court need only decide whether there are sufficient grounds to proceed or not. In short, it is trite that what the court has to decide under Section 227 Cr.P.C. is whether there is a prima facie case or not. If it is shown that there is a prima facie case to proceed

on an offence under Section 304 IPC, it has to be considered that there are sufficient grounds to proceed within the meaning of Section 227 Cr.P.C.

15. The learned counsel for the petitioners has argued that in order to sustain a criminal liability in such matters of alleged medical negligence, the prosecution has to establish gross negligence on a higher standard for making out sufficient grounds for proceeding. According to the petitioners, especially when the deceased was working as a staff nurse in another hospital, she ought to have taken due care in revealing the fact that she was epileptic. At this juncture, the said argument is challenged by the learned counsel for the de facto complainant by arguing that the de facto complainant has no case that the victim had ever suffered epilepsy. According to him, the deceased was not suffering from epilepsy, and the so called "epilepsy" is an invention by some so called medical experts in order to aid the petitioners.

16. Let us assume that the victim in this case was suffering from epilepsy. Even in such a case, can it be said that the doctors who are administering the medicines by way of injection had no duty to enquire whether the victim had any such disability or not? If it is shown that the petitioners as doctors had no duty to enquire whether the victim was suffering from any disability or whether she was epileptic or not etc., then it could be said that there was no culpable negligence of the highest standard in not enquiring about the said aspect. At the same time, in medical jurisprudence, it is a basic duty cast upon a doctor to enquire the victim as to whether the victim was suffering from any such disability or disabilities, prior to administering such medicines.

17. Now the question is whether the negligence in not enquiring as to whether the victim was suffering from any such disability or not, is a gross negligence of high standard or not. In this particular case, it seems that Ampicillin injection was administered, may be or may not be after test dose, and the same is a matter to be proved. Even if it is administered after test dose, it seems that she had developed respiratory trouble. Cases are not unknown even in cases where test dose was administered, reactions had arisen even after the stipulated time. If, as a matter of fact, Ampicillin injection was administered after the test dose and after the expiry of the waiting period, it cannot be said that there was any sort of negligence on the part of the persons administering Ampicillin injection. The trouble in this case started after that. It seems that when she developed utter discomfort and respiratory problem, Diazepam injection was administered. At that time, the persons who were behind it, as medical professionals, had a basic duty to ascertain whether she had any disability like epilepsy, hyper tension, cardiac problems etc. In the state of such restlessness, the victim might not have exercised the caution to reveal her disabilities, even if such disabilities were there. That does not absolve the doctors from exercising the basic care in enquiring about any such disabilities, if at all exist.

18. This Court is not expressing any opinion as to the cause of death of the deceased. The question to be considered is whether there are basic materials to frame a charge under Section 304 IPC or not. The learned counsel for the petitioners has invited the attention of this Court to a catena of decisions. In [P. Vijayan Vs. State of Kerala and Another](#), it was held:

"The words "not sufficient ground for proceeding against the accused" clearly show that Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to fact of case in order to determine whether a case for trial has been made out by prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of S. 227 the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

19. It was clearly observed that the duty of the judge at the stage of Section 227 Cr.P.C. is merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused and a roving enquiry is not expected. In [State of Karnataka Vs. L. Muniswamy and Others](#), it was held:

"It is clear from S. 227 of the new Code that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded that there is no sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record its reasons is to enable the superior Court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is no sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case."

20. It was also held therein that,

"For the purpose of determining whether there is sufficient ground for proceeding against the accused the court possess comparatively wider discretion in the exercise of which it can determine the question whether the material on the record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible".

In cases wherein a possibility of conviction on a proper charge itself is a ground for reckoning the acts as one having sufficient ground to proceed.

21. My attention has been invited to the decision in [Sati Kanta Guha and Another Vs. State of West Bengal](#), wherein the Division Bench of the Calcutta High Court held that hearing under Section 227 Cr.P.C. is not an empty formality whereas it is a valuable right conferred on the accused to challenge that there are no sufficient grounds to proceed.

22. In [Dilawar Balu Kurane Vs. State of Maharashtra](#), it was held that in exercising the powers under Section 227 Cr.P.C. the Judge while considering the question of framing charge on a particular offence, has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

23. In [Mahadev Prasad Kaushik Vs. State of U.P. and Another](#), it was held:

"There is thus distinction between Section 304 and Section 304-A. Section 304-A 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 304-A 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 304-A 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."

24. My attention has been invited to a series of decisions by the learned counsel for the petitioners to point out that normally it cannot be expected from a doctor that he would be negligent in carrying out a surgical operation or in prescribing medicines. It is common sense that normally a doctor will not do like that as it would be an end of his career. At the same time, in a case wherein there is culpable negligence on the part of the medical practitioner in prescribing medicine without taking care of its adverse impact in a patient labouring under some disorder, and if it causes death, can it not be said that it will fall under the definition of culpable homicide within the meaning of Section 299 I.P.C.? If the prosecution is able to prove that such a death was caused with the knowledge that it would endanger the life of that person, definitely it will attract culpable homicide within the meaning of Section 299 IPC. Even if it is shown that such knowledge was there and culpable homicide was caused, definitely it would fall within the category under Section 304 Part II IPC. In such cases wherein doctors are involved, can they be left scot free with their white cot even when there is culpable negligence. It is a fact, that has to be established by the prosecution in trial as to whether there was culpable negligence or not. That question cannot be decided merely on the basis of documents produced by the prosecution at the time of hearing under Section 227 of the Cr.P.C. alone. The evidence in this case will not be mere documentary evidence alone. The

oral evidence has also to be considered. There is a disability on the part of the court in relying on oral evidence at the stage of hearing under Section 227 Cr.P.C. The court may, for the limited purpose, go through even the statements recorded under Section 161 Cr.P.C. At the same time, it is not at all safe on the part of a court dealing with a serious matter to have a threadbare examination of the matters contained in the statements recorded under Section 161 Cr.P.C. produced by the prosecution. There may be embellishments or exaggerations in such statements. The court should not be carried away by going through the said statement by making a threadbare examination.

25. For the limited purpose of satisfying whether there are sufficient grounds to proceed, what is expected is to consider whether there is a prima facie case or not. On considering the entire aspects relating to the matter in this particular case, I am unable to say that this is a case wherein there are no sufficient materials to proceed with. I do not find any illegality, irregularity or impropriety in the impugned order passed by the court below. It seems that the court below has rightly complied with the directions passed by this Court in the order passed in the earlier Criminal Revision. I cannot find fault with the court below in not making a detailed discussion in the matter. If such a detailed discussion is made, definitely, it will tend to reflect during the trial. What was expected from the court below was only to enter a finding as to whether there was a prima facie case or not. The court below has come to the conclusion that there is a prima facie case and all the other matters raised by the learned counsel for the accused were only questions that could be decided during trial. It seems that the court below has not transgressed illegally to any other area, apart from confining to the scope of consideration under Section 227 Cr.P.C.

26. The learned counsel for the de facto complainant has argued that the de facto complainant is aged above 80 and she wants to see the disposal of the case during her life time. It is also pointed out that she is a cancer patient. Let a decision be given, whether it be an acquittal or conviction; let the trial continue. The de facto complainant has got a specific case that the petitioners are eager in postponing a final decision in the matter and the present proceedings are a reflection of it. It has also been pointed out that the petitioners have preferred a transfer petition also before this Court for getting the matter transferred to some other court. As the said matter is not before me, I am not making any opinion on it. Whatever it is, it seems that there is a conscious attempt to postpone a final decision in the matter. I do not find any merit in the present Criminal Revision Petition, and the same is only to be dismissed, and I do so.

In the result, this Crl. R.P. is dismissed.