(2009) 07 MP CK 0025

Madhya Pradesh High Court (Gwalior Bench)

Case No: None

State of M.P.	APPELLANT
Vs	
Dr. Ramlakhan Singh and Others Dr. Mangal and Dr. Ramlakhan Singh Vs State of M.P.	RESPONDENT

Date of Decision: July 2, 2009

Acts Referred:

- Penal Code, 1860 (IPC) - Section 193, 304A

Citation: (2010) CriLJ 1574 : (2009) ILR (MP) 2455 : (2009) 3 JLJ 173 : (2009) 5 MPHT 332 : (2010) 5 RCR(Criminal) 187

Hon'ble Judges: Brij Mohan Gupta, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Brij Mohan Gupta, J.
All these three petitions are arising out of one common order, hence as agreed to by all the parties, they have been heard together and are being disposed of by this common order.

2. The facts of the case of prosecution, as per the FIR are, that during intervening night of 5th and 6th August, 2001 at about 01.00 a.m., Ramlal Kaul, CJM Vidisha (hereinafter referred as "the deceased") was admitted in District Hospital Vidisha. He was feeling severe pain in his chest. He was attended by his son Ravindra Kaul and Priyadarshan Sharma, JMFC. Accused Dr. Ramlakhan Singh was on duty, who attended the deceased. During treatment he put Oxygen mask on the face of the deceased. Immediately after putting the mask, deceased started feeling

restlessness, which was reported by Ravindra Kaul to the doctor, on which Dr. Ramlakhan Singh checked the gas cylinder and found the same as empty. Immediately he removed the mask from the face. During that time, another doctor Bansal came and after examining the deceased declared him as dead. During treatment this accused Dr. Ramlakhan Singh sent calls to call Medical Specialist Dr. Bagrecha. When he could not available, he sent further calls to accused Dr. R.S. Sharma and Dr. M.S. Rajput. It was reported from the house of Dr. Radheshyam Sharma that he is out of station. Despite efforts, Dr. Mangal Singh Rajput also could not be available and thus these two doctors did not reach the hospital for the treatment of the deceased. Upon reporting the matter, Crime No. 414/01 was registered at Police Station, Kotwali Vidisha for the offence punishable u/s 304-A, IPC against Dr. Ramlakhan Singh alongwith one more, whose name was not mentioned in FIR. After completing the investigation, the charge-sheet was filed against Dr. Ramlakhan Singh, Dr. Mangal Singh Rajput and Dr. Radheshyam Sharma for the offence punishable u/s 304-A of IPC.

3-A. Vide order dated 14th December, 2006, JMFC, Vidisha in Criminal Case No. 949/06, has framed charge under Sections 193 and 304-A of IPC against accused Ramlakhan Singh and Mangal Singh Rajput and u/s 304-A of IPC against accused Radheshyam Sharma. Feeling aggrieved, three Criminal Revisions bearing Cr.R. No. 70/07, Cr.R. No. 71/07 and Cr.R. No. 72/07 were filed by all these three accused persons, which have been disposed of vide one impugned order dated 12th March, 2008 passed by First Additional Sessions Judge, Vidisha. Vide impugned order, the charge framed against accused Ramlakhan Singh has been affirmed. Revision filed by accused Radheshyam Sharma has been allowed and he has been discharged from charge u/s 304-A of IPC. Accused Mangal Singh Rajput has been discharged u/s 304-A of IPC, however, his charge u/s 193, IPC has been affirmed.

3-B. Feeling aggrieved with the impugned order, State has preferred Criminal Revision No. 389/08 praying therein to affirm the order as a whole passed by learned Magistrate. M.Cr.C. No. 3704/08 has been filed by petitioner Mangal Singh Rajput, assailing the order affirming charge u/s 193 of IPC against him. M.Cr.C. No. 3883/08 has been filed by petitioner Ramlakhan Singh assailing the impugned order as a whole and seeking discharge from all the two charges.

4. Although, these three petitions have not been admitted for final hearing, yet as per the order dated 15th January, 2009, all these petitions have been listed for final hearing, hence the parties have been heard finally in all the three petitions.

5. Shri R.D. Agrawal for the State has drawn attention at the statement of Civil Surgeon Dr. Pankaj Shukla and has submitted that he has. also held the doctors responsible and also has mentioned that Dr. Mangal Singh Rajput was on duty and Dr. Radheshyam Sharma left the headquarters without permission. He has also drawn attention at the report dated 11th September, 2001 of Additional Collector, Vidisha, who has also observed the doctor''s negligence. With regard to accused

Ramlakhan Singh he has submitted that before putting a mask at the nose of the deceased, he was required to check as to whether the Oxygen is available in the cylinder or not.

6. Shri R.K. Sharma, learned Advocate for accused Radheshyam Sharma has submitted that neither he was on emergency duty nor he was required to be available on call and he was very much in town. He did not give any treatment to the deceased and he has further submitted that when JMFC Shri Priyadarshan Sharma returned from his house, he was informed by Dr. Bansal that Shri Kaul has died. While drawing attention at the judgments of the Apex Court in the cases of Ambalal D. Bhatt Vs. The State of Gujarat, , Rakesh Ranjan Gupta v. State of U.P. and Anr. 1999 SCC (Cri) 76 and Dr. Smt. Beena Yadu v. State of Madhya Pradesh 2004(5) M.P.H.T. 205 : 2004 (II) MPJR 63, he has submitted that the impugned order deserves to be affirmed with regard to him.

7. Shri Amit Lahoti, learned Counsel for the accused Dr. Ramlakhan Singh has referred Paras 27, 29, 30 and 51 to 54 of the judgment in the case of Jacob Mathew v. State of Punjab and Anr. 2005 (3) Crimes 63 (SC) : 2005(5) M.P.H.T. 462 (SC), and has submitted that in view of this judgment, even if this accused put the mask on the nose and face of the deceased, having no Oxygen, he cannot be held liable. In this case, there is no opinion of competent doctor that this petitioner was negligent. No post-mortem of the deceased was conducted. As stated by witness Rambharose, who was the compounder at the relevant time, and also as per Para 6 of the letter dated 12th November, 2001, written by Civil Surgeon Vidisha to In-charge Police Station Kotwali, Vidisha, it was not his duty to check the cylinder as to whether it is filled or empty. Deceased Shri Kaul died within a period of 10 minutes after admitting in the hospital. During that period best available attendance and treatment has been given by him to the deceased. In the last he has submitted that there is not an iota of evidence on record with regard to framing of the charge u/s 193 of IPC. He has drawn attention at the statement of Dr. Pankaj Shukla, Para 2, who has stated that on 6th August, 2001, he obtained the signatures of Dr. Mangal Singh Rajput on the register, in which his duty was assigned, as Dr. Bagrecha was on leave. In this regard, he has submitted that the incident had happened during the night of 5th and 6th August, 2001. Thus, his duty was not assigned before the incident by the Civil Surgeon.

8. Shri Y.S. Tomar, learned Counsel lor accused Mangal Singh Rajput, has submitted that Dr. Bagrecha was very much available in the town and he was not on leave. Only evidence against this accused is that despite efforts he could not wake up and came to the hospital. There is not an iota of evidence on record with regard to the charge u/s 193 of IPC.

9. In view of the facts and submissions mentioned as above, with regard to the charge u/s 304-A of IPC, it is alleged against accused Ramlakhan Singh that when he attended the deceased, required promptness was not shown and Oxygen mask put

on the face of the deceased was found without Oxygen in the cylinder. However, immediately after putting the mask the same was removed. With regard to accused Mangal Singh Rajput, it is alleged that his duty was to remain available on call. With regard to accused Radheshyam Sharma, he being a Government Doctor, was expected to available in emergency cases. But both these doctors on call could not be available during the fateful night. These allegations have been denied on behalf of all the three doctors.

10. During arguments on behalf of the State reliance has been placed at the statement of Civil Surgeon Dr. Pankaj Shukla. As per his statement, the deceased was admitted in the hospital at 1.40 a.m. on 6th August, 2001. This fact gets corroboration from another prosecution witness Rambharose Ahirwar, who was the Compounder in the hospital at the relevant lime. As observed by the learned Judge in Para 21, the deceased died before 1.55 a.m. in the same night. This fact also get support from the statement of Rambharose Ahirwar, who has mentioned in his statement that he came to know at about 1.55 or 2.00 a.m. that deceased has died. In view of this, it is apparent that even as per the evidence of the prosecution, within 15 minutes deceased died in the hospital. It is an admitted fact that no post-mortem was conducted. Hence cause of death is unknown. As per the statement of Civil Surgeon Dr. Pankaj Shukla, at the relevant time, one Dr. Bagrecha was posted as Medical Specialist, but he was on leave on oral request. On this oral request, he asked Dr. Mangal Singh Rajput to remain available on duty at his place, that was also an oral direction. It is also mentioned by this witness that next day on 6th August, 2001, an application was received from Dr. Bagrecha and that too was not in correct proforma. Thereafter, he put a note on the register and got it signed by Dr. Rajput on 6th August, 2001. It indicates that the duty of Dr. Rajput was assigned in writing after the incident. Dr. Radheshyam Sharma had left the headquarters to go to his sister''s home. He has also mentioned that during the fateful night, when both the doctors were called, they could not be available and when the person, who had gone to call Dr. Rajput, came back empty hand, the deceased had already died. In view of this, the argument on behalf of Dr. Rajput appears impressive, that had he been available, he could have no chance to give treatment to the deceased. In view of all, it is crystal clear that both these doctors did not treat the deceased. With regard to the fact that the Oxygen cylinder was found empty, vide afore-quoted letter dated 12th November, 2001, written by the Civil Surgeon to the In-charge Police Station, it appears that this was the responsibility of Ward in charge. He did not mention that for this act, the doctor was responsible. Similarly, witness Rambharose Ahirwar has mentioned that in emergency it is his duty to check the Oxygen cylinder as to whether the same is filled or empty. On 5th August, 2001, he checked the cylinder and found filled with Oxygen. This letter and the statement of this departmental witness indicates that prima faciely it was not the duty of Dr. Ramlakhan Singh to check the cylinder.

11. Apart from the above, if the case of the prosecution including the allegations mentioned against the doctors are taken as true for the sake of arguments, in view of the following judgment of the Apex Court, it is to be seen whether the doctors can be held responsible for criminal negligence in this case, which is required for framing the charge u/s 304-A of IPC. The landmark and the latest judgment of the Apex Court rendered by Hon''ble three Judges Bench is the judgment of Jacob Mathew (supra). For ready reference, the relevant parts of this case from Paras 1, 7, 8, 50, 51, 53 and 54, which includes the brief facts of that case also, are as under:

Brief facts of Dr. Jacob Mathew''s case are:

1 ...The gist of the information is that on 15-2-1995, the informant''s father, late Jiwan Lal Sharma was admitted as a patient in a private ward of CMC Hospital, Ludhiana. On 22-2-1995 at about 11 p.m., Jiwan Lal felt difficulty in breathing. The complainant''s elder brother, Vijay Sharma who was present in the room contacted the duty nurse, who in her turn called some doctor to attend to the patient. No doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew, the appellant before us and Dr. Allen Joseph came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in the bed. The oxygen cylinder was found to be empty. There was no other gas cylinder available in the room. Vijay Sharma went to the adjoining room and brought a gas cylinder therefrom. However, there was no arrangement to make the gas cylinder functional and in-between 5 to 7 minutes were wasted. By this time, another doctor came who declared that the patient was dead...

6. The matter came up for hearing before a Bench of two learned Judges of this Court. Reliance was placed by the appellant on a recent two-Judge Bench decision of this Court in Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another, . The Bench hearing this appeal doubted the correctness of the view taken in Dr. Suresh Gupta''s case and vide order dated 9-9- 2004 expressed the opinion that the matter called for consideration by a Bench of three Judges. This is how the case has come up for hearing before this Bench.

7. In Dr. Suresh Gupta''s case, the patient, a young man with no history of any heart ailment, was subjected to an operation performed by Dr. Suresh Gupta for nasal deformity. The operation was neither complicated nor serious. The patient died. On investigation, the cause of death was found to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". The Bench formed an opinion that this act attributed to the doctor, even if accepted to be true, could be described as an act of negligence as there was lack of due care and precaution. But, the Court categorically held for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill can not be described to be so reckless or grossly negligent as to make him criminally liable.

8. The referring Bench in its order dated 9-9-2004 has assigned two reasons for their disagreement with the view taken in Dr. Suresh Gupta''s case, which are as under:

Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another,

(1) Negligence or recklessness being ''gross'' is not a requirement of Section 304-A of IPC and if the view taken in Dr. Suresh Gupta''s case is to be followed then the word ''gross'' shall have to be read into Section 304-A, IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304-A. If by adducing evidence it is proved that there was no rashness or negligence involved, the Trial Court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

After discussion, Hon''ble Court observed as under:

50. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another, , and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta''s case.

51.... The Investigating Officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law u/s 304-A of IPC ...

53. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, 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 Bolam''s 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 investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case at hand

54. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be we express no opinion thereon) but the accused appellant cannot be proceeded against u/s 304-A, IPC on the parameters of Bolam''s test.

(Emphasis supplied)

12-A. Ultimately, Hon''ble Court allowed the appeal of Dr. Jacob Mathew in that case in the aforementioned facts mentioned in Para 1 of the case. As observed by the Apex Court in the aforementioned case, with regard to the alleged negligence of Dr. Ramlakhan Singh, it may be mentioned that the facts of the case of Dr. Jacob Mathew (supra), are more or less similar to the present case. In the aforementioned facts, the Hon''ble Apex Court has observed that no such negligence appears on the part of the doctor, for which he can be prosecuted for the aforesaid offence of Section 304-A of IPC. In absence of post-mortem of the deceased, the cause of death is still unknown. No certificate has been obtained by the Investigating Officer of an independent and Competent Medical Officer as it is required as per the observation of the Apex Court in Paragraph 53 of the case of Dr. Jacob Mathew (supra). In view of the observation of the Apex Court in the case of Dr. Jacob Mathew (supra), the facts being similar, the framing of charge against Dr. Ramlakhan Singh u/s 304-A, IPC does not appear justified.

12-B. With regard to the rest of the two doctors; namely Dr. Mangal Singh Rajput and Dr. Radheshyam Sharma, the allegation against them mainly is that on call they could not be available at the relevant time. It is a fact that they did not treat the deceased at all. On these facts of their non-availability, the cannot be held responsible for such criminal negligence, on which they can be prosecuted for the offence punishable u/s 304-A of IPC. As rightly submitted on behalf of these doctors, at the most they can be dealt with in accordance with their service rules, if any lapse appear on their part.

13. With regard to another charge u/s 193 of IPC, when it is argued on behalf of the doctors that there is no evidence on record, then despite putting specific question by the Court, no evidence oral or documentary has been shown on behalf of the State. On perusal of Para 6 of the impugned order, it appears that with regard to accused Ramlakhan Singh it is mentioned that in bed head tickets he put some overwriting and thus committed forgery. With regard to accused Mangal Singh Rajput it is mentioned that he caused false entries by subordinate employees of the hospital in call register. None of those documents or relevant oral evidence has been highlighted by the State during the course of arguments despite asking specifically with regard to it. In Criminal Revision No. 389/08 filed by the State, on perusal of order dated 18th November, 2008, it appears that a direction was given by the Court to file the documents, but thereafter till today no documents have been filed. It is informed that copies of charge-sheet have been filed in M.Cr.C. 3883/08 by the petitioner Ramlakhan Singh. Even from those documents, during arguments, nothing could be highlighted on behalf of the State with regard to this offence. Thus, the charge u/s 193 of IPC appears without evidence.

14. In view of the above, it appears that in the facts and circumstances of this case, in the light of the observation of the Apex Court, in the case of Dr. Jacob Mathew (supra), and as observed in Para 12 hereinabove, framing of charge against them u/s 304-A of IPC is baseless. With regard to charge u/s 193 of IPC, there is lack of evidence. As observed by the Apex Court in the case of R.P. Kapoor v. State of Punjab 1960 (3) SCR 338, in Para 6, the inherent power of this Court can be exercised for quashing the criminal proceedings where the allegation in the FIR at its face value and accepted in its entirety do not constitute the offence alleged and where the allegation constitutes an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge. Thereafter, in subsequent case of the R.S. Raghunath Vs. State of Karnataka and another, , in Para 102 (1) or (3), the Apex Court has observed that where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; or where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, the criminal proceeding can be quashed by this Court while invoking the inherent power to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

15. In view of all, M.Cr.C. No. 3704/08 and M.Cr.C. No. 3883/08 deserve to be allowed and Cr.Rev. No. 389/08 deserves to be dismissed.

16. Consequently, M.Cr.C. No. 3704/08 and M.Cr.C. No. 3883/08 are allowed and Dr. Ramlakhan Singh and Dr. Mangal Singh Rajput are discharged from the charge u/s 304-A along with Section 193 of IPC and Section 193 of IPC respectively and Cri.Rev. No. 389/08 is dismissed being devoid of merits.