
(2011) 05 MP CK 0042

Madhya Pradesh High Court (Gwalior Bench)

Case No: Criminal Revision No. 1000/10

Dr. Ramesh Gupta

APPELLANT

Vs

State of Madhya
Pradesh

RESPONDENT

Date of Decision: May 13, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397, 401
- Drugs and Cosmetics Rules, 1945 - Rule 2
- Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaaye (Registrikaran Tatha Anugyapan) Adhiniyam, 1973 - Section 2A
- Penal Code, 1860 (IPC) - Section 228, 304A

Hon'ble Judges: Giriraj Das Saxena, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

G.D. Saxena, J.

This revision-petition preferred u/s 397/401 of Cr.P.C., is directed against the order dated 24th September, 2010 passed in Sessions Case No. 212/09, by the Second Additional Sessions Judge (Fast Track) Ganj Basoda District Vidisha (M.P.), whereby the learned trial Judge framed the charge against the Petitioner for commission of an offence punishable u/s 304-A of I.P.C. and transferred the case for trial to the court of Judicial Magistrate First Class, Ganj Basoda for trial, in the light of the provisions of Section 228 of I.P.C. Code of Criminal Procedure 1973.

2. The facts in short relevant for the disposal of the case are that 02nd September, 09, Shyam, s/o Kalu Ram Malviya went to the clinic of Dr. Ramesh Gupta at Gandhi Squire, Ganj Basoda for treatment of fever. After examining the patient, Dr. Ramesh Gupta (Petitioner herein) administered the drug "Benzyl Penicillin " in the form of injection on

his right glutei region. After receiving injuction, the patient was said to have suffering from pain in that portion coupled with swelling. On complaint, he was treated by Dr. Darshana Jain, in Government clink in Ganj Basoda. As he did not get relief, he was referred to the District Hospital Vidisha, where he died at 8.05 AM on 3rd September, 09. On report from the hospital, a Marg was registered. Post-mortem of the deceased was conducted. The viscera were preserved and were sent to examination by the State Forensic Laboratory Sagar. According to the report of Examiner, in Article A/3, i.e., skin and tissues, the presence of drug anti-biotic drug "Bezyl Penicillin" was detected. It also appeared that the physician Dr. Ramesh Gupta was having the certificate from "Bhartiya Chikitsa Padhhati" and was having the decree "Ayurvedacharya", Bachelor of Medicine and Surgery" from the Board of Indian Medicine, Uttar Pradesh, but he administered the allopathic medicine. Consequently, an FIR was registered against the Petitioner for committing the alleged offence. After investigation, the charge-sheet was filed and the case was committed to the court of Sessions.

3. The contentions of the learned Counsel representing the Petitioner are that the learned trial court, without considering the procedural law and the evidence collected during investigation framed the charge for offence u/s 304-A I.P.C., and committed thereby serious error of law and facts. As per post-mortem report of the deceased Shyam, no definite opinion was given about cause of death of the deceased. There is no conclusive evidence that due to administering the alleged drug "Benzyl Penicillin" after injecting the same in the body of deceased Shyam, it has resulted into his death. The Petitioner is a qualified Physician in recognized Ayurvedic system and he is having the degree of "Ayurvedacharya" Bachelor of Medicine and Surgery from the Board of Indian Medicine U.P. and same is also registered in the State of Madhya Pradesh. As per Notification issued by the State of Madhya Pradesh, the Petitioner is authorized to for providing the Allopathic Medicine. It is contended that the Investigating Officer, during investigation, did not make an Endeavour to verify from the Specialists of the Medical Board whether the Petitioner was grossly negligent in administering the drug as alleged. Therefore, no case of medical negligence against Petitioner is made out. It is requested that the impugned order passed by the trial judge be set aside and the Petitioner be acquitted from the charges as framed u/s 304-A of I.P.C. In support of the contention, learned Counsel for the Petitioner placed reliance on the gazette Notification dated 19th June, 03 and the decisions in the cases of B.K. Sharma v. State of UP [1987 Crimes (3) 23] of the High Court of U.P., Dev Vrat Mishra v. State of M.P. (ILR 2011 25 (DB) .

4. The learned Panel Lawyer appearing on behalf of Respondent/State argued that the impugned order passed by the trial court is based on material and no interference is warranted in this revision.

5. Heard the learned Counsel for the Petitioner and learned Panel Lawyer for the State also perused the impugned order of the trial court along with all copies of documents and the case diary of the case.

6. On perusal it is found that the Petitioner/accused has possessed the degree of "Ayurvedacharya", Bachelor of Medicine and Surgery from the Board of Indian Medicine U.P. and was also provisionally registered in Madhya Pradesh State as well. Under the said Notification, the State of Madhya Pradesh in exercise of powers conferred by Sub-clause (iii) of Clause cc) of Rule 2 of the Drug & Cosmetic Rule 1945, declares Bachelors of Ayurved with Modern Medicine and Surgery (integrated BAMS) degree holder Ayurvedic Practitioners registered under the Madhya Pradesh Ayurved, Unani & Prakritic Chikitsa Adhiniyam 1970) to practice the Modern system of Medicine which is known as Allopathic Medicine to the extent training received in Modern Medicine. It has come out from the evidence that the Petitioner/accused during treatment administered the drug " Benzyl Penicillin " through injection on the left leg of deceased, who died during treatment of physicians in the State Primary Health Center. It appears that during investigation after getting the report from the State Forensic Laboratory, the Investigating Officer did not send the medical treatment papers provided by the accused-Petitioner, the post mortem report, the report of State Forensic Laboratory to the Specialist of the Medical Board for examination and report about negligence on the part of the Petitioner-accused. It is also true that after enforcement of "The Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaaye (Registrikaran Tatha Anugyapan)Adhiniyam 1973, all clinical establishment (Section 2-A) were made necessarily registered with the supervising authority.

7. In the case of [Martin F. D'Souza Vs. Mohd. Ishfaq](#), the Hon. Apex Court held that to fasten liability in criminal proceedings e.g. u/s 304A, I.P.C. the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus, for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness. It is further observed by the Apex Court in the said case that the professional is one who professes to have some special skill. A professional impliedly assures the person dealing with him (i) that he has the skill which he professes to possess, (ii) that skill shall be exercised with reasonable care and caution.

8. In Para 53 of the said judgment it is held that:

Judged by this standard, the professional may be held liable for negligence on the ground that he was not possessed of the requisite skill which he professes to have. Thus a doctor who has a qualification in Ayurvedic or Homeopathic medicine will be liable if he prescribes Allopathic treatment which causes some harm vide [Poonam Verma Vs. Ashwin Patel and others](#), . In Dr. Shiv Kumar Gautam v. Alima, Revision Petition No. 586 of 1999 decided on 10.10.2006, the National Consumer Commission held a Homeopath liable for negligence for prescribing allopathic medicines and administering glucose drip and giving injections.

9. In Para 52 of Jacob Mathew's case the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection. See:2005 AIR SCW 3685

(i) A private complaint should 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.

(ii) 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 opinion applying the Bolam test.

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled 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 should be withheld. Precautions which Doctor/Hospitals/ Nursing Homes should take:

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in Sarwat Ali Khan v. Prof. R. Gogi and Ors. Original Petition No. 181 of 1997, decided on 18.7.2007 by the National Consumer Commission, the facts were that out of 52 cataract operations performed between 26th and 28th September, 1995 in an Eye Hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in Smt. Indrani Bhattacharjee, Original Petition No. 233 of 1996 decided by the National Consumer Commission on 9.8.2007, the patient was diagnosed as having "Mild Lateral Wall

Eschemia". The doctor prescribed medicine for gastro-enteritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a Cardiologist in writing. Reported in 2007 (5) ALJ 735

(f) Full record of the diagnosis treatment, etc. should be maintained. Application of the above-mentioned general principles to particular cases .

10. Keeping in view the factual aspects of the case and the law laid down in Martin F.D." souza case (supra) but without expressing any comment on the merits of the case and without interfering in the impugned order passed, it is directed that the trial court shall refer the Medical reports of the treatment made by the accused Petitioner containing the prescriptions by the Government Doctors posted at Civil Hospital Ganj basoda District Vidisha, the post-mortem report dated 03rd September 2008, the report dated 30th September 2008 by the Senior Scientist Forensic Laboratory, Sagar to such Panel consisting of the Specialist of Doctors of Medical College and the Director Medico Legal Institute, Gandhi Medical College Bhopal, constituted by the Directorate of Medical Education, within a period of two months from the date of receipt of the order passed by this Court, which shall examine the case and communicate the same within a reasonable time, preferably, within a period of six months from the date of this order, to the trial court and thereafter the trial court shall proceed with the case as per law. It is also directed that the office of the Additional Advocate General, Gwalior shall take necessary steps for transmitting the copy of the order by this Court with requisite directions to the Directorate Medical Education M.P. (Bhopal) for necessary compliance/action, without any kind of delay.

11. In view of what has been stated above, the revision petition stands disposed off.