(2007) 10 AP CK 0008

Andhra Pradesh High Court

Case No: Criminal Appeal No. 452 of 2003

Katcherla Venkata Sunil		APPELLANT
	Vs	
Dr. Vanguri Seshumamba and Others		RESPONDENT

Date of Decision: Oct. 4, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 174, 251
- Penal Code, 1860 (IPC) - Section 304A, 34, 80, 88

Citation: (2007) 2 ALD(Cri) 1001 : (2008) CriLJ 853 : (2008) 1 RCR(Criminal) 537

Hon'ble Judges: B. Seshasayana Reddy, J

Bench: Single Bench

Advocate: C. Praveen Kumar, for the Appellant; E.V.V.S. Ravi Kumar, for Respondent Nos. 1 and 2 and Additional P.P., for the Respondent

Final Decision: Dismissed

Judgement

B. Seshasayana Reddy, J.
State assailed in this Criminal Appeal acquittal of A1-Dr.Vanguri Seshumamba and A2 - Dr. S. Jagadeeswari for the offence u/s 304-A r/w. Section 34 IPC passed in C.C. No. 1 of 1999 on the file of II Additional Judicial Magistrate of First Class, Kakinada.

2. A1 is a private medical practitioner and she is running a private nursing home under the name and style of Vasudha Nursing Home at Kakinada. A2 is an Obstetrician and Gynaecologist in Government General Hospital, Kakinada and she was a Professor in Rangaraya Medical College, Kakinada. Dr. Sailaja was a student of P.G. Diploma course in Gynaecology and Obstetrician in Rangaraya Medical College, Kakinada in 1997. She developed a small boil viz., Bartholin Abscess in her vaginal area. She appraised her ailment to A2 and sought for leave for few days for the purpose of undergoing treatment at Visakhapatnam. A2 examined her on 21.5.1997 and diagnosed her ailment as perianal abscess. A2 referred her to the nursing home

of A1 and informed her that she would herself conduct surgery. A2 told Dr. Sailaja that the surgery she had to undergo involves simple process. Despite Dr. Sailaja''s dis-inclination to undergo surgery at the nursing home of A1, A2 insisted her to undergo surgery in the nursing home of A1. A2 examined Dr. Sailaja and prescribed her certain preliminary tests. On the advice of A2, she got admitted in the nursing home of A1 on the morning of 23.5.1997. Blood test was conducted and hemoglobin was found to be 10.6 gms. Neither blood count was done nor urine test was conducted. When it was brought to the notice of A2, A2 stated to have told her that there would not be any problem even if the said tests were not conducted. Dr. Sailaja was taken into operation theatre in the nursing home of A1 at 8 A.M. on 23.5.1997. A2 conducted surgery without the assistance of Anaesthetist. Surgery was completed around 8.30 A.M. on 23.5.1997 and she was brought out of the operation theatre and was placed in room No. 15. At about 9. A.M. Dr. Sailaja developed shivering and her condition started deteriorating. P.W. 1, the brother of Dr. Sailaja informed her condition to A1 who did not bestow any attention and whereby she developed high fever and became speechless. At 9.45 A.M. Dr. Sailaja got high temperature and some fluids came out from her mouth, but A1 did not take serious note of her condition and instead she advised P.W. 1 to bring some painkillers. By the time P.W. 1 brought painkillers, her condition became worse. At about 10.05 a.m. A1 asked P.W. 1 to bring paracetamol injection and accordingly he brought the injection by 10.15 a.m. A1 sent for A2 and both of them examined Dr. Sailaja and advised P.W. 1 to shift her to Government Hospital, Kakinada. P.W. 7-Dr.Shivasankar, Professor and Head of Department of Medicine, examined Dr. Sailaja at 11.10 a.m. and declared her dead. P.W. 1 presented a report before the Station House Officer, II Town Police Station, Kakinada on 23.5.1997. Basing on the report, a case in Crime No. 62 of 1997 u/s 174 Cr.P.C came to be registered. Dr. K.S.N. Prasad, Professor conducted post mortem examination on the dead body of Dr. Sailaja (hereinafter referred to as ''the deceased''). Sri. C.V.S.R. Prasad who is the husband of the deceased submitted a complaint on 7.7.1997 to the Additional Director General of Police, Hyderabad. The section of law came to be altered from Section 174 Cr.P.C. to Section 304A IPC. The CB-CID took up investigation and filed their final report referring the case as a mistake of fact. Thereupon, P.W. 1 presented a protest petition before II Additional Judicial Magistrate of First Class, Kakinada.

3. The learned Magistrate recorded the sworn statement of the complainant - P.W. 1 and took the case on file as C.C. No. 1 of 1999 and issued process to the accused. The accused entered appearance and thereupon the learned Magistrate examined them u/s 251 Cr.P.C. putting the substance of the accusations levelled against them. The accused pleaded not guilty and claimed to be tried.

4. To bring home the guilt of the accused for the offence u/s 304A r/w. Section 34 IPC, the complainant besides examining himself as P.W. 1, examined six more witnesses as P.Ws. 2 to 7 and proved six documents. The accused adduced neither

ocular nor documentary evidence. The plea of the accused was that there was no negligence on their part in performing the surgery or post operative care.

5. The learned Magistrate, on considering the evidence brought on record and on hearing the complainant and the accused, found the accused not guilty for the offence u/s 304A r/w. Section 34 IPC and acquitted them accordingly, by judgment dated 03.02.2003. The acquittal of the accused for the offence u/s 304A r/w. Section 34 IPC is under challenge in this Criminal Appeal by the State.

6. Heard Sri C. Padmanabha Reddy, learned Senior Counsel appearing for the appellant/complainant and Sri T. Niranjan Reddy, learned Counsel appearing for the respondents 1 and 2/accused.

7. Learned Senior Counsel appearing for the appellant/complainant submits that there is gross negligence on the part of A2 in performing surgery on the deceased without taking necessary precautions in the course of surgery. A further submission has been made by learned Senior Counsel that there is callous negligence on the part of A1 in not taking post-operative care. Therefore, both A1 and A2 are liable for punishment u/s 304A IPC. Learned Senior Counsel took me to the evidence of P.W. 5, P.W. 6 and P.W. 7 in great detail to convince that there was callous negligence on the part of the respondents 1 and 2/accused while performing surgery and also post-operative care. In support of his submissions, reliance has been placed on the decisions of the Supreme Court in Jacob Mathew Vs. State of Punjab and Another, .

8. In Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another, , the Supreme Court held that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". It is not merely lack of necessary care, attention and skill. Paras. 25 to 27 of the judgment read as hereunder:

25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrongdoing i.e. a higher degree of morally blameworthy conduct.

26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against the doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

27. See the following concluding observations of the learned authors in their book on medical negligence under the title Errors, Medicine and the Law (by Alan Merry and Alexander McCall Smith at pp.247-48). The observations are apt on the subject and a useful guide to the courts in dealing with the doctors guilty of negligence leading to death of their patients:

Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high - a standard traditionally described as gross negligence.

* * * *

Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life''s misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis.

9. In Jacob Mathew Vs. State of Punjab and Another, , the Supreme Court held that in order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences.

10. Learned senior Counsel appearing for the appellant laid much emphasis on para. 25 of the cited decision, which reads as hereunder:

25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater

chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

11. The learned senior Counsel by referring the above decisions contends that A1 Dr. Vanguri Seshumamba grossly failed to provide post operative care to the deceased and whereas A2 Dr. S. Jagadeeswari did not take proper care either in pre-operation procedure or during the process of surgery. He would also contend that there is serious culpable negligence on the part of A2 Dr. S. Jagadeeswari in not performing surgery on noticing Bartholin cysts or abscesses in vaginal area on 21.05.1997 itself. Placing reliance on the evidence of PWs. 5 and 6, the learned senior Counsel submits that there is gross negligence and recklessness on the part of the accused in pre-operative and post-operative process and therefore, they are liable for punishment u/s 304A IPC.

12. Learned Counsel appearing for the respondents 1 and 2/accused submits that the evidence of PWs. 5 and 6 does not in any way help the prosecution to prove gross negligence or recklessness on the part of the accused in performing the operation on the deceased for incision and drainage of infected Bartholin cysts, since they gave their respective opinions vide Exs.P4 and P5 without reference to Ex.P1 case-sheet in respect of the deceased maintained by Vasudha Nursing Home, Kakinada. He would further submit that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

13. The following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable views are possible on the basis of evidence on record and one favourable to the accused has been taken by the trial court, it ought not to be disturbed by the appellate Court.

14. Section 304A IPC reads as hereunder:

304-A. Causing death by negligence.-Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

15. Sections 80 and 88 of IPC need to be referred at this juncture and they are thus:

80. Accident in doing a lawful act.-Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

88. Act not intended to cause death, done by consent in good faith for person''s benefit. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

16. When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as ''criminal''. It can be termed ''criminal'' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient''s safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient''s death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and

caution might create civil liability but would not suffice to hold him criminally liable.

17. Indisputably, A2 Dr. S. Jegadeeswari performed surgery on the deceased in the nursing home of A1 Dr. Vanguri Seshumamba for incision and drainage of infected Bartholin abscess on 23.05.1997 between 8.00 and 8.30 a.m. The deceased developed post-operative complications and ultimately died of the same. PW.7 Dr. M. Siva Sankar is the doctor who declared the deceased dead at 10.30 a.m. By the time the deceased was shifted to Government General Hospital, Kakinada, her condition was stated to be precarious and within few minutes she became late. According to PW.7, the deceased died of ''hyper pyrexia'' and ''circulator failure''. He explains the meaning of ''hyper pyrexia'' as high fever and ''circulator failure'' as non-circulation of blood through the circulatory system. He also admits in cross-examination that Bartholin abscess could lead to sudden death because of septicemia.

18. PW. 1 is the brother, PW. 2 is the husband, PW. 3 is the maternal grand mother and PW. 4 is the neighbour of the deceased. PW. 2 came to Kakinada after the death of the deceased. Therefore, his evidence may not be of much avail to the complainant. PW. 1 is the complainant. He was with the deceased right from the time of admission of the deceased in the hospital till PW. 7 declared the deceased as dead. According to him, A1 Dr. Vanguri Seshumamba did not conduct proper tests before the deceased being subjected to surgery for removal of Bartholin abscess developed in her vagina. He also testifies that A2 Dr. S. Jagadeeswari has performed the surgery without the assistance of Anaesthetist. Both these contentions proved to be false by the entries made in Ex.P1 Case- sheet maintained by Vasudha Nursing Home at Kakinada. P.W. 1 admitted in cross examination that A1 Dr. Vanguri Seshumamba gave Avil injection to the deceased and one Dr. B.R. Rao, General Anaesthetist, attended the hospital at 8.30 a.m. on 23.05.1997. For better appreciation, I may refer the relevant portion in the cross-examination of PW. 1 in his own words and it is thus:

I have mentioned in my Ex.P2 report that A1 in her hospital she gave avail injection to my sister through a nurse and it is also mentioned in Ex.P2 that the shivering is not controlled even the avil injection has been injected to my sister. Then she was shifted to down stair and provide Oxygen to her. It is also mentioned in my Ex.P2 report that I am not having any doubt both the doctors. It is not true to suggest that there is no post operative or pre-operative complications to my sister, that I am deposing false by the influence of my brother-in-law Prasad. It is not true to suggest that the Anaesthetist Dr. Raghavaendra Rao has attended the operation and there is an assistance of Anaesthetist while conducting the operation, that I am deposing false. It is not true to suggest that myself and my brother-in-law are developed the subsequent events, then after giving Ex.P2 report to the police. It is not true to suggest that I am deposing at the first time in the court that A2 has read over Ex.P2 after giving to the police that I did not state even before the police or CBCID police

at the time of examination. I received the referred notice from the C.B.C.I.D. in the month of February, 15th, 1999 after two months I filed this complaint against the accused. It is not true to suggest that the referred notice is served on me on 31.1.1999. It is true that in the said referred notice it is clearly mentioned if I oppose the report filed by CBCID police, I should prefer any complaint under a protest before the Magistrate concerned within 7 days. It is true that Ex.P1 report revealing that urine and blood tests were conducted. It is true that in Ex.P1 it is disclosing that Dr. B.R. Rao, General Anaesthetist attended the hospital at 8.30 a.m. on 23.05.1997. it is not true to suggest that there is no negligence on the part of A1 and A2 in treating my sister and conducting operation that I am deposing false to harass A1 and A2 by colluding with my brother-in-law.

19. PW. 5 Dr. D.V. Nanda Kumar, admits in cross-examination that he gave his opinion without going through the case-sheet and postmortem report of the deceased. He also admits that the deceased was operated with the assistance of Anaesthetist. PW. 6 Dr. Y. Satyavanthulu admits in cross-examination that the deceased was operated after antibiotic therapy. For better appreciation, I may refer the relevant portion in the cross-examination of PW. 6 in his own words and it is thus:

Only a Gynecologist shall conduct the surgery for Bartholin Abscess but not by a Civil Surgeon. I came to know that A2 is a senior most doctor in the State and a Professor of Gynecology.

It is true that after antibiotic therapy only, operation was conducted as per Ex.P1. I have not verified Ex.P1 case sheet before giving my opinion. I gave my Ex.P5 opinion without verifying Ex.P1 case-sheet. I did not verify from the patient about the drugs administered to her prior to and subsequent to the operation.

I have seen the post mortem report. As per post mortem certificate, the patient did not die after breathlessness and respiratory problem, but she died because of septicemia and septic shock.

Since two days prior to the deceased going to A2, she is suffering with Bartholin Abscess. The deceased being a Doctor herself was negligent in going to the Doctor though she is aware that she is having Bartholin abscess since two days.

I do not know whether the deceased was working under Dr. Karuna. I have not verified whether the deceased was under Dr. Karuna or under Dr. S. Jagadeeswari (A2).

On 22.5.1997 the deceased underwent blood test, and joined in the hospital on 23.5.97. It is true that if the patient joined in the hospital on her own date, the doctor cannot be held negligent. Nobody conducts operation against the will of the patient.

On the evening on 21.5.1997 the deceased went to A2. A2 prescribed antibiotic drugs to the patient. It is my duty to enquire the doctor who conducted operation about what had happened. Without doing the same, basing on the information of relatives of the deceased, I issued Ex.P5 opinion. It is not true to say that my opinion (Ex.P5) is preconceived opinion and biased one.

20. It is explicit from the evidence of PWs. 5 and 6 that they gave their respective opinions, which have been exhibited as Exs.P4 and P5, without going through the case-sheet, which has been exhibited as Ex.P1, maintained by Vasudha Nursing Home, Kakinada. After going through the entries in Ex.P1 case-sheet, they admit that necessary antibiotics were administered to the deceased. The deceased was a student of Postgraduate Diploma in Gynecology and Obstetrics.

She was aware of her disease and the gravity of it. She did not choose to undergo the operation immediately. She waited till the arrival of her brother with necessary funds to meet the medical expenses and thereafter got herself admitted in the nursing home run by A1. Therefore, neither A1 nor A2 could be held responsible for the deceased getting delayed her disease being treated. It has also come on record that A2 Dr. S. Jagadeeswari performed the operation with the assistance of Anaesthetist. After the deceased regained consciousness, A2 Dr. S. Jagadeeswari left the nursing home. The deceased died of developing post- operative complications. A1-Dr. Vanguri Seshumamba provided necessary treatment such as putting Oxygen before the deceased being shifted to Government General Hospital, Kakinada. The trial Court considered the evidence brought on record in right perspective and found that there is no recklessness or negligence on the part of the accused. I do not see any flaw in the finding recorded by the trial Court.

21. Accordingly, the criminal appeal fails and it is hereby dismissed.