

(2011) 11 CAL CK 0021

Calcutta High Court

Case No: CRR No. 1625 of 2011

Nilabha Bhaduri

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Nov. 30, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 397, 401, 482
- Penal Code, 1860 (IPC) - Section 304A

Citation: (2012) 2 CHN 132

Hon'ble Judges: Kalidas Mukherjee, J

Bench: Single Bench

Advocate: Milan Mukherjee, Subir Ganguly and Sumanta Ganguly, for the Appellant;
Samser Ali for the State, for the Respondent

Final Decision: Allowed

Judgement

Kalidas Mukherjee, J.

This is an application u/s 397/401 read with section 482 of the Code of Criminal Procedure praying for quashing of the proceedings being G.R. No. 1590/10 arising out of Baguiati P.S. Case No. 174/2010 dated 28.04.2010 u/s 304A of the Indian Penal Code now pending before the Court of the learned Chief Judicial Magistrate at Barasat, North 24 Parganas. The prosecution case, in short, is that Probhat Kumar Pal, the informant, lodged complaint with the Officer-In-Charge, of the Baguiati P.S. alleging that his wife Sima Das, since deceased, had been suffering from anemia and on 22.04.10 she was admitted in Uma Medical Related Institute (P) Ltd. under Dr. Nilabha Bhaduri for undergoing Laparoscopic Hysterectomy Operation. On 23.04.2010 in the morning the operation was done and after about two hours the doctor told the informant that operation was successful. It has been alleged that the informant never noticed any improvement of the patient to recover from the ailments. On being asked by the informant, the Doctor told him that the condition of the patient was improving. On 25.04.2010 in the afternoon, the informant noticed

that there was rise in the pulse rate of the patient. The Doctor came and shifted her to ICCU. On being asked, the Doctor again assured the informant that the patient was improving. In the evening the informant and the members of his family noticed that the condition of the patient was precarious. At about 7.00 p.m. the Doctor told the informant that the patient should be shifted to better hospital and asked him to make arrangement for an ambulance fitted with ventilation facility. The informant arranged the said ambulance and at about 10.30 p.m. the patient was shifted to Apollo Hospital and on 26.04.2010 in the morning the patient expired.

2. It has been alleged that Dr. Nilabha Bhaduri and Uma Medical Related Institute (P) Ltd. authorities were fully responsible for the death of the patient.

3. It has further been alleged that the informant arranged five units of blood from Life Care Medical Complex, Kolkata. On 25.04.2010 in the morning the condition of the patient become abnormal and the patient had developed complications of vomiting, fever and convulsion. It has been alleged that all the precautions were not taken by the Doctor and, as a result, the patient was deprived of the better treatment. After receipt of the complaint, the Baguiati P.S. Case No. 174/10 dated 28.04.2010 was started and after completion of investigation charge sheet was submitted.

4. It is contended by the learned Counsel appearing for the petitioner that the alleged Medical negligence on the part of the petitioner herein as alleged in the FIR is false. Learned Counsel for the petitioner contends that in the chargesheet three private persons have been cited as witness; no Doctor has been cited as witness in the chargesheet.

5. The learned Counsel has referred to and submitted the decisions reported in 2011 (3) CLJ (Cal)188, Dr. Tapas Bhattacharjee & Anr., petitioners vs. State of West Bengal & Anr., respondents; 2005 SCC (Cri) 1369, Jacob Mathew, appellant vs. State of Punjab & Anr., respondents; 2009 (2) C Cr. LR (SC) 563 Martin F. D'Souza, appellant vs. Mohd. Ishfaq, respondent.

6. The learned Counsel appearing for the State opposes the prayer made in this application. It is submitted on behalf of the State that there was serious allegations of harassment made by the petitioner herein and the said Uma Medical Related Institute (P) Ltd. did not have the required facilities for hysterectomy operation. The learned Counsel produced the case diary. It is submitted that a committee of Doctors was constituted, but the I.O. without obtaining the report of the committee submitted chargesheet with the prayer for submitting the supplementary chargesheet. It is contended that since a committee was formed to enquire into the allegations made by the informant of this case, at this stage there is no ground to quash the proceedings.

7. I have gone through the materials appearing in the case diary. Three private persons, namely, Prasanta Saha, Asim Karmakar and the complainant are the

witnesses cited in the chargesheet. The Doctors of the said medical centre in their statements u/s 161 Cr.P.C. did not support the prosecution case. It appears from the statement of the private witnesses that on 23rd April, 2010 the operation was done and thereafter the Doctor told that blood was required to be transfused. It further appears that the informant collected blood and thereafter it was transfused, but inspite of all the efforts taken, condition of the patient deteriorated. From the statements of the witnesses recorded u/s 161 Cr. PC it appears that the allegation is based on the fact that even after transfusion of blood the condition of the patient deteriorated and much delay was caused by the Nursing Home authority to release the patient to be shifted to the Apollo Hospital. On the point of the deterioration of the condition of the patient after operation, the observation made by the Hon"ble Apex Court in paragraph 47 in the case of Martin F. D'Souza vs. Mohd. Ishfaq (supra) is quoted hereunder :-

Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.

8. It has further been observed in paragraph 50 of the aforesaid decision as follows :-

To fasten liability in criminal proceedings e.g. u/s 304A, IPC 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.

9. I have gone through the history-sheet of the treatment of the patient as appearing in the case diary. It appears therefrom that the conditions of the patient stage by stage were noted and on 25.04.2010 it was noted that the patient party wanted to take the patient to a higher centre. When the patient was being shifted to Apollo Hospital it was noted on 25.04.2010 at 9 p.m. that the patient was being shifted and it was noted that Doctor will accompany the patient during shifting.

10. It has been observed in paragraph 117 in the case of Martin F. D'Souza vs. Mohd. Ishfaq (supra) as follows:-

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field

relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacom Mathew's case (supra), otherwise the policemen will themselves have to face legal action.

11. It appears from the case diary at page 116 that a joint Enquiry Committee was formed by Chief Medical Officer of Health, North 24- Parganas, Barasat, comprising of four Doctors to enquire into the Baguiati P.S. Case No. 174/10, dt. 28.04.2010 u/s 304A IPC regarding the alleged negligence of treatment of late Sima Pal who was treated at Uma Medical Related Institute Pvt. Ltd.

12. It has been submitted by the learned Counsel appearing for the State that the Investigating Officer without collecting the report of the said Enquiry Committee submitted chargesheet with a prayer for permission to submit supplementary charge sheet. From the guidelines given by the Hon"ble Apex Court in the case of Martin F. D'Souza vs. Mohd. Ishfaq (supra) at paragraph 117 it is clear that before issuing notice to the Doctor or the hospital against whom the complaint was made, the Court should refer the matter to a competent Doctor or Committee of Doctors specialized in the field. Therefore, it was incumbent upon the I.O. to arrange for such committee of Doctors for opinion as to the alleged medical negligence. But in the instant case there is nothing in the case diary to show that after the FIR was lodged any such attempt was made by the Investigating Officer for the formation of such a committee. The said committee was formed at a later stage and the said order was signed by the Chief Medical Officer of Health North 24-Parganas, Barasat, on 19.11.2010. It has been stated in page 6 of the instant revisional application that on 03.05.2010 the petitioner surrendered before the learned Court below and he was enlarged on bail on that date. It is clear that the said direction and guidelines given by the Hon"ble Apex Court in the case of Martin F.D'Souza vs. Mohd. Ishfaq (supra) have not been followed by the prosecution. In view of the guidelines given by the Hon"ble Apex Court, the contention of the learned Counsel appearing for the State that because of the laches on the part of the Investigating Officer, the prosecution the case would not fail, is not acceptable.

13. Having heard the learned Counsel appearing for the parties and in view of the principles enunciated in the aforesaid decisions, I find that the facts complained of do not, in the circumstances of the case, constitute the alleged offence. The continuation of the proceedings in the learned Court below would be sheer abuse of the process of the Court. Therefore, it is a fit case for quashing of the proceedings pending before the learned Court below.

14. Accordingly, the proceedings of the Case No. 1590/10 arising out of Baguiati P.S. Case No. 174/10 u/s 304A IPC now pending before the Court of Learned Chief

Judicial Magistrate at Barasat, North 24 Parganas stand quashed.

15. The application is thus allowed. Accused person is discharged from the bail bonds. Urgent photostat certified copy, if applied for, be handed over to the parties as early as possible.