Murari Mohan Koley Vs The State and Another

Court: Calcutta High Court

Date of Decision: June 30, 2004

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 482
Medical Termination of Pregnancy Act, 1971 â€" Section 3
Penal Code, 1860 (IPC) â€" Section 201, 314, 92

Citation: (2004) 3 CALLT 609 : (2005) 1 RCR(Criminal) 939

Hon'ble Judges: Pradip Kumar Biswas, J

Bench: Single Bench

Advocate: Sekhar Basu, Ahim Adhya and Sudipto Maitra, for the Appellant; Moloy Kumar Singh, D. Mallick Chowdhury and S.K. Mishra for the Opposite party No. 2 and S.N.S. Alquadri and S.K. Mallick, for the Respondent

Final Decision: Dismissed

Judgement

Pradip Kumar Biswas, J.
This is an application u/s 401 read with Section 482 of the Code of Criminal Procedure filed at the instance of

Sri Murari Mohan Koley, petitioner herein, praying for setting aside of an order dated 11.09.2002 passed by Sri P. P. Roy, learned Sub Divisional

Judicial Magistrate, Howrah, whereby he has taken cognizance of the offence under sections 314/201 of the Indian Penal Code and/or for

quashing the impugned proceeding being G.R. Case No. 245 of 2001 dated 06.11.2001 u/s 314 of Indian Penal Code.

2. The short facts leading to the filing of this revisional application reads as under:

3. The petitioner herein, is an authorised Medical Practitioner as described under the Medical Termination of Pregnancy Act, 1971 (hereinafter

referred to as the "Act of 1971") and is a public servant and in charge of the Family Planning Department of Howrah General Hospital and also the

Bed-in-Charge (Visiting Gynaecologist) and the petitioner is an MBBS (Cal), D.G.O. (Cal), M.D. Gynaecology, and Obstetrics (Cal) D.N.B.

(Obstetrics) and Gynaecology, India. The aforesaid post also allows private practice.

4. It has also been alleged that "Life Care" Nurisng Home located at 185, G.T. Road, Howrah is an authorised place as described under the

Medical Termination of Pregnancy Act, 1971 in short Act of 1971.

5. It has been contended further by the petitioner that in the instant case, it been alleged by the prosecution by way of filing a written complaint

before the Inspector in Charge, Shibpur Police Station by one Sujit Mondal alleging that he has a daughter aged about 6 months and incidentally

his wife Jhuma Mondal again conceived and on 26.09.2001 he got her examined by Dr. Murari Mohan Koley and as per his advice he got her

admitted in ""Life Care"" Nursing Home on 15.10.2001 at 4.30 P.M. for abortion and there was an agreement for payment of Rs. 1000/-.

6. It was further alleged that about 6.30 P.M. on the same date Dr. Koley told him that the condition of the patient is serous and he shall have to

keep the patient in the Nursing Home for further five days and he shall have to pay a further sum of Rs. 5000/- and in the meantime the condition

of the patient become more deteriorated due to profuse bleeding and Dr. Koley shifted his responsibility advising him to get her admitted

immediately in the Howrah General Hospital and without taking money from him requested Howrah General Hospital to get her admitted.

Accordingly at about 7 P.M., Jhuma Mondal was admitted in Howrah General Hospital and at about 9.30 P.M. the patient has died.

7. It was further alleged that Dr. Koley, though a Doctor of a Government Hospital and in spite of repeated requests for admitting her in the

Howrah General Hospital, he got her admitted in ""Life Care"" Nursing Home and without doing full treatment, referred the patient to the hospital

and in this connection, it has further been alleged that the total mismanagement and the greed of the doctor for money, forced his wife towards

death and utter negligence of the doctor caused loss of life of his wife, Jhuma.

8. It was further alleged by the petitioner that as per Post Mortem Report, two injuries were found on the two sides of the Uterus of Jhuma and the

Post Mortem was held on 17.10.2001 at Medical College and Hospital, Kolkata and one U.D. case was started by Howrah Police being Howrah

Police Station Case No. 345 dated 16.10.2001 and the Police started Shibpur P.S. Case No. 245 of 2001 dated 06.11.2001 u/s 314 of the

Indian Penal Code against the present petitioner on the basis of the complaint filed by Sujit Mondal, O.P. No. 2.

9. It has also been contended on behalf of the petitioner that he had no negligence in the connected matter and he was called to Life Care Nursing

Home by Sujit Mondal and on seeing the precarious condition of the patient, he took her to Howrah General Hospital, transmitted blood to her

and he along with a team of doctors took all measures to save the life of the patient, but unfortunately she died in the O.T. and in treating her he

acted as a servant without charging a single farthing for her treatment.

10. It has further been alleged by the petitioner that earlier he filed another application u/s 401 read with Section 482 of the Code of Criminal

Procedure whereby, prayer for quashing of the investigation in Shibpur P.S. Case No. 245/01 u/s 314 of the Indian Penal Code was prayed for

and ultimately, the petitioner did not press the said application and in consequence thereof, the same was rejected by Justice Sujit Barman Roy (As

His Lordship then was) as being ''not pressed'' and thereafter the petitioner having granted bail by the Hon''ble High Court on 11.07.2002.

Appeared before the Court of Sub Divisional Judicial Magistrate, Howrah on 16.07.2002 when he was granted bail by the learned Court below.

11. It has further been alleged that the police thereafter submitted charge sheet against the petitioner before the learned SDJM, Howrah u/s

314/201 of IPC and the learned Magistrate without applying his judicial mind, mechanically took the cognizance of the case and issued process

against the petitioner u/s 314/201 of IPC.

12. Further, it has been contended by the petitioner that for prosecuting him no sanction whatsoever has been obtained and in view of sections 3, 4

and 8 of the Medical Termination of Pregnancy Act, 1971, the petitioner cannot be prosecuted and held liable u/s 314/201 of IPC.

13. Accordingly, being aggrieved by and dissatisfied with the order passed by the learned SDJM, on 11.09.2002 whereby cognizance was taken

against him and thereafter process were issued u/s 314/ 201 of IPC against the present petitioner, the petitioner has come up before this Court

once again for the reliefs, as mentioned at the outset.

14. This prayer, however, has been opposed by the Opposite Party No. 2 as also by the State of West Bengal alleging mainly that the criminal

proceeding can only be quashed at the initial stage, if on the face of the complaint or the FIR, as the case may be, no offence is constituted and the

test is that taking the allegations and the complaint, as they are, without adding anything or subtracting anything, if no offence is made out, then the

High Court will be justified in quashing the proceedings in exercise of its powers u/s 482 and at that stage, the High Court will not embark upon

any sort of enquiry with a view to ascertain the truthfulness or otherwise of the allegation and the claim, that has been made by the petitioner in the

instant case, may be availed of by them before the trial Judge at its appropriate stage.

15. I have heard the learned advocates appearing for the parties at length.

16. The main grievance of the petitioner in this proceeding is that after coming into force the ''Act of 1971'', the provisions of IPC relating to

miscarriage became subservient to the Act because of non-obstante clause in Section 3 of the aforesaid Act of 1971 and as such the continuation

of the proceeding would be regarded as an abuse of the process of the Court and as such it should be quashed. Secondly, it has also been

contended that this petitioner being a public servant removable only by a Governor and the act complained of having been done in course of

discharge of his official duties, no cognizance should have been taken by the Court without the valid sanction and thirdly, in taking cognizance there

was absolute non application of mind by the Court.

17. The learned counsel appearing for the petitioner in elaborating his argument has drawn my attention to the non-obstante clause in Section 3 of

Act, 1971, which reads as under:-

3. (1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that

Code or under any other law for time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy does not exceed twelve weeks but does not exceed twenty weeks, if not less than two registered medical

practitioner are, of opinion formed in goods faith, that -

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall

be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the

purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the

mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in Sub-section (2),

account may be taken of the pregnant women''s actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic,

shall be terminated except with the consent in writing of her guardian.

(4) (b) Save as other provided in clause(a), no pregnancy shall be terminated except with the consent of the pregnant woman"".

18. Drawing my attention to the aforesaid provision of the Act together with Section 8 of the Act of 1971, it has been contended from the side of

the petitioner that a registered practitioner who terminates the pregnancy in accordance with the provisions of the Act, is protected from any

prosecution for the termination of such pregnancy and by provisions of Section 8 of the Act of 1971 he is also protected from any civil action for

compensation for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

19. So, referring to the above, it has been contended on their behalf that the aforesaid provisions of the Act of 1971 taken together with the

provisions of sections 88 of IPC and 92 of IPC protects the petitioner for the act done in good faith for the benefit of a person cannot be regarded

as an offence. So, for such reason, the continuation of the proceeding against this petitioner would certainly be an abuse of the process of the

Court and as such should be quashed.

20. In refuting the aforesaid contention, it has been contended on behalf of the opposite parties that in order to get this protection, the registered

medical practitioner must establish that his action done in good faith, but this is not the appropriate stage when the Court is entitled to embark upon

any sort of enquiry for ascertaining the fact whether or not the act was done in good faith or otherwise. So, it may be made available to them in

course of trial upon proving the same on evidence but at this stage it is not at all available to them.

21. I have given my anxious consideration with regard to the submission made by the parties.

22. It has now become more than settled that in quashing the complaint or the FIR or the charge sheet, the Court has to exercise its power u/s 482

of CrPC with extreme circumspection.

23. In this connection, I may profitably use the dictum of the Apex Court in a decision reported in R.S. Raghunath Vs. State of Karnataka and

another, wherein it was held by the Apex Court that ""We also give a note of caution to the effect that the power of quashing a criminal proceeding

should be executed very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking

upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or

inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice"".

24. So, applying the aforesaid decisions in the given situation and having due regard to the rival contentions made by the parties, I am rather

prompted to hold that to get the protection of Sub-section (1) of Section 3 of Act of 1971, the petitioner as a medical practitioner has to prove

that he has done the same in good faith which may also include the omissions, but this is not the appropriate stage where the Court should go on

embarking upon by way of enquiry as to whether it was done in good faith or otherwise and it is required to be left to be decided by the trial Judge

at its appropriate stage in the trial.

25. So, that being the position, quashing of the proceeding, as prayed for, on the first ground is of no avail to the petitioner.

26. Now, turning to the second grievance of the petitioner regarding question of obtaining sanction, it may be recorded that for prosecuting a

public servant when the Act or action complained of has been performed by him in discharge of his official duties, a sanction is necessary, but it is

now quite settled that such sanction may even be obtained at a latter stage of the proceeding and in view of the fact, it cannot be said with certainty

that the proceeding would be regarded as void ab initio for not obtaining sanction.

27. So, on this ground also, the claim of the petitioner for quashing of the proceeding is not sustainable for the present.

28. Now, turning to the third claim of the petitioner with regard to the non-application of the mind of the concerned Judge in taking cognizance, it

may be stated that the words ""take cognizance"" have not been defined in the Code itself, but it will certainly mean that when the Magistrate on

receiving complaint and/or receiving a police report applies his mind for proceeding further in the concerned matter, then he is said to have taken

cognizance of the offence. Examining the impugned order, in the light of the aforesaid settled position of law, it may be held with certainty that in the

instant case no objection could be taken in respect of the impugned order passed by the learned Magistrate in the matter of taking cognizance and

that being the position, I find no merit in the third claim of the petitioner.

29. Now, in view of what I have stated above, I hold with certainty that in the instant case neither the prayer for quashing as prayed for by the

petitioner nor the prayer for setting aside of the order dated 11.09.2002 passed by the learned. SDJM, Howrah in taking cognizance of the

offence u/s 314/201 of IPC in the connected matter against the petitioner could be entertained and allowed.

In consequence thereof, the revisional application fails.

Liberty is. however, given to the petitioner to raise all his contentions before the trial Judge at its appropriate stage.

Interim orders, if there be any, stand vacated.

Urgent xerox copies, if applied for, may be made available to the parties with utmost expedition.