SUPREME COURT OF INDIA

A.S.V. Narayanan Rao

Vs.

Ratnamala

Crl.A.No.1433 of 2013

(H.L. Gokhale and J. Chelameswar JJ.)

13.09.2013

JUDGMENT

CHELAMESWAR, J.

1. Leave granted.

2. This appeal arises out of an order dated 28th October 2010 in Criminal Petition No.6506 of 2007 of the High Court of Andhra Pradesh.

3. The aforementioned criminal petition was filed praying that the proceedings initiated against the appellant herein in C.C. No.600 of 2006 on the file of the XIV Additional Chief Metropolitan Magistrate, Hyderabad for the offence punishable under section 304A IPC be quashed. The said petition along with another similar petition by one of the co-accused was heard and disposed of by a common order (order in appeal).

4. While the petition filed by the appellant herein was dismissed by the High Court, the other petition of the co-accused was allowed.

5. The appellant is a cardiologist. The husband of the first respondent (one Divakar) approached the appellant herein, complaining of a pain in the chest on 22.04.2002. Divakar was admitted in the hospital where the appellant was working and kept in the Intensive Care Unit (ICU). Thereafter, the appellant informed the first respondent that Divakar had suffered a mild heart attack. On 23.04.2002, an angiogram was conducted which showed three blocks in the vessels carrying blood

to the heart. On 25.04.2002 at 9.30 a.m., the appellant unsuccessfully attempted to perform an angioplasty on Divakar. Around 1.30 in the afternoon, the appellant informed the first respondent that the angioplasty failed as the blocks were calcified. Same day at around 3.30 p.m., by-pass surgery was conducted on Divakar in the same hospital. Subsequently, various complications developed and eventually Divakar died on 09.05.2002.

6. On 14.05.2002, the first respondent lodged a complaint against the appellant and others under section 304A IPC which came to be registered as FIR No.416 of 2002.

7. The police on investigation submitted a final report on 02.02.2005 treating the case to be one of lack of evidence. The respondent filed objections before the Metropolitan Magistrate to the final report and prayed the Magistrate to take cognizance of the offence. The learned Magistrate by his order dated 11.12.2006 came to the prima facie conclusion that there exists material to try the accused for the offence punishable under section 304A IPC. Challenging the said order the appellant approached the High Court by way of Criminal Petition No.6506 of 2007.

8. By judgment under appeal, the High Court opined that the material on record "clearly shows negligence on the part of A1"[1] and declined to quash the proceedings.

9. Mr. P.S. Narasimha, learned senior counsel appearing for the appellant submitted that the High Court clearly erred in dismissing the petition of the appellant herein. Learned senior counsel argued that the law laid down by this Court in Jacob Mathew Vs. State of Punjab & Anr. (2005) 6 SCC 1 has completely been ignored by both the learned Magistrate and the High Court in deciding to proceed with the case against the appellant herein. On the other hand, learned counsel for the first respondent submitted that the conduct of the appellant in undertaking the angioplasty without having a standby surgical unit is clearly in violation of the established practice of the medical profession and therefore a clear case of negligence warranting punishment of the appellant.

10. This Court in the case of Jacob Mathew (supra) considered exhaustively the various aspects of negligence on the part of a doctor and laid down inter alia;

"48. ….(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly"."

11. This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for prosecuting doctors on charges of criminal negligence. This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed:-

"52. …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 the Bolam 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 investigating officer feels satisfied that the doctor proceeded against

> would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

12. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records".

13. However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthesian before conducting an angioplasty. According to the High Court, both the above-mentioned 'lapses' on the part of the appellant "clearly show the negligence" of the appellant.

14. The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr. Surajit Dan given before the A.P. State Consumer Redressal Commission in C.D. No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the above-mentioned Dr. Dan's evidence was recorded wherein Dr. Dan in his cross-examination stated as follows:-

> "…Whenever Cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case…."
>
> He further stated;
>
> "…The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery…."
>
> However, the same doctor also stated;

> "….The time gap between the angioplasty failure and the surgery is not THE FACTOR for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

15. Unfortunately, the last of the above extracted statements of Dr. Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

16. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in Jacob Mathew case (supra) that the negligence, if any, on the part of the appellant cannot be said to be "gross". We, therefore, set aside the judgment under appeal and also the proceedings of the trial court dated 11.12.2006.

17. The appeal is allowed, however, there shall be no order as to costs.

[1] The sworn statement of Dr. P.V.N. Rao also discloses that A1 without consulting the Anesthetist and without a surgical stand conducted Angioplasty, which should be done by the Surgeon, as the surgeon was out of station which fact he came to know through the Anesthetist. The operation was delayed by 5 hours due to want of surgeon who has to come from New Delhi, which clearly shows the negligence on the part of A1. Further as the patient was a chronic smoker he should be prepared before undertaking Angioplasty and the Cardiac Anesthesian should be consulted for fitness of the patient before conducting the same.

The entire record adduced does not indicate as to whether A1 assessed the condition of the patient on consultation of the cardio Anasthesian and obtained the fitness certificate for going Angioplasty on the patient.