

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : February 14, 2013

Pronounced on : March 04, 2013

+ **CRL.REV.P. 83/2004**

O.N. KAUL

.... Petitioner

Through: Mr.Sudhir Nandrajog, Senior
Advocate with Mr.Amir Singh
Pasrich, Mr.Avi Singh and
Ms.Mohana Malhotra, Advocates

Versus

STATE

..... Respondent

Through: Mr.Sunil Sharma, Additional
Public Prosecutor for respondent –
State with Sub-Inspector Bhoop
Singh, Police Station IGI Airport,
Delhi.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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JUDGMENT

1. Aggrieved by impugned order directing framing of charges under Section 304-A of IPC and the charge framed against petitioner on 26th September, 2003 in FIR No. 379/1998 registered at Police Station IGI Airport, New Delhi, this revision petition is preferred by petitioner – accused on the ground that none of ingredients of Section 304-A of IPC are satisfied warranting framing of charge of criminal negligence against petitioner – accused.

2. Factual background of this case as noted in the impugned order of 26th September, 2003 (Annexure P-2) is as under:-

“On the intervening night of 11/12.8.98 deceased Sarvan Ram boarded in the flight of Air France to go to London but at about 0040 hours due to not feeling well he was off-loaded from the flight and was made to sit near Gate-I of Departure. Duty Manager of Air France Shri O.N. Kaul, the accused, was informed immediately but he did not get the deceased admitted in the hospital and did not provide any medical assistance. He has further argued that letter of Sh. A.K. Jain, Station Manager Air France dated 19.5.99 shows that Mr. Kaul was on duty from 19.00 hours to 0630 hours and statements of all the witnesses who were posted on that night proved that Mr. Kaul was duly informed regarding the off-loading of deceased (Passenger) but accused did not care to get him hospitalized between 0040 to 11.00 hours while the medical facility was very much available at the Airport. Moreover, accused had mentioned on the notice board regarding the off-loading of the deceased and instructed to get him hospitalized and at about 6.30 a.m. he left the place of duty without making any sincere effort to provide medical assistance to the deceased between the period of 11 hours.”

3. Trial court in the impugned order (Annexure P-2) has accepted the stand of respondent – State that criminal omission of petitioner not ensuring medical assistance to its passenger Sharvan Ram who had not boarded the flight of Air France due to ill health and had ultimately suffered a severe heart attack after 11 hours

would satisfy the ingredient of being criminally negligent, and has called upon the petitioner - accused to face the trial for the offence of criminal negligence.

4. On behalf of petitioner, learned senior counsel had vehemently contended that none of the requirement of Section 304-A of IPC or of criminal negligence are made out as petitioner is not a medical person and cannot be expected to understand the medical condition of a passenger and without actual knowledge of the fact that passenger Sarwan Ram was uncomfortable due to heart problem, petitioner did not owe duty of care towards the said passenger and so question of its breach would not constitute any criminal liability.

5. Attention of this Court was drawn by learned senior counsel for petitioner to Section 17 of *The Carriage by Air Act, 1972*, and to Section 12 of *The Airports Authority of India Act, 1994*, to point out that it is the function of Airport Authority of India to provide rescue and other facilities to passengers at the Airport in coordination with other agencies and duty of the Airlines is in respect of any incident having taken place on the board of the Aircraft or in the course of any of the operations of embarking or disembarking.

6. During the course of hearing, learned senior counsel for petitioner had pointed out that the complainant/first informant – Ajay Kumar who was a loader of Concord attached to Air France does not name petitioner but has infact named one M.R. Kaul. It

was pointedly urged by learned senior counsel for petitioner that on the Flight Information Board (*which all day staff are obliged to read and act upon*) it was got displayed by petitioner that the self off-loaded passenger was sitting near Gate No.1, and a staff member had been duly deputed to remain with the passenger with direction to be relieved only after a replacement was in place and so, no culpable negligence can possibly be attributed to petitioner.

7. To highlight the elements of Section 304-A of IPC, on behalf of petitioner, reliance was placed on a decision of coordinate bench of this Court in Crl. Appeal No.794/2007, *Sushil Ansal vs. State of Delhi through CBI*, rendered on 19th December 2008. To urge that petitioner is not an expert and so he cannot be attributed lack of care, reliance was placed by learned senior counsel for petitioner upon decisions in *V. Kishan Rao vs. Nikhil Super Specialty Hospital & Anr.*, (2010) 5 SCC 513; *Kusum Sharma & Ors. Vs. Batra Hospital and Medical Research Centre & Ors.*, (2010) 3 SCC 480.

8. Learned senior counsel for petitioner had also relied upon decisions in *Jacob Mathew vs. State of Punjab & Anr.*, (2005) 6 SCC 1; *Satya Prakash vs. State of Rajasthan*, 1986 Cri.LJ 542, Rajasthan High Court, to urge that Section 304-A IPC requires the existence of culpable negligence and this necessary ingredient is lacking in the instant matter.

9. To further contend that Section 304-A IPC requires that death should have been the direct result of a rash and negligent act,

learned senior counsel for petitioner had placed reliance upon decisions in *Guljeet Singh Kochar & Anr. Vs. State*, 121 (2005) DLT 516; decision of this Court in Crl. M.C.No.1941 of 2008 *Rajneesh Kler & Ors vs. State*, rendered on 28th January, 2009; *P.S. Jose vs. State of Kerala & Ors.*, 1994 Cri.LJ 363 Kerala High Court.

10. It was further contended on behalf of petitioner that Section 304-A IPC requires that the act causing death must be *causa causans* and it is not enough that it may have been *causa sine qua non*. To contend so, learned senior counsel for petitioner had relied upon a decision of coordinate bench of this Court in Crl. Rev.P. No. 930 of 2003, *Ataur Rehman vs. State*, rendered on 23rd November 2009.

11. During the arguments, reliance was placed upon another decision in *Amanullah Khan vs. State*, 133 (2006) DLT 345 by learned senior counsel for petitioner to contend that alleged negligence attributed to the petitioner does not stand corroborated from the Post Mortem Report and so, culpable negligence cannot be attributed to petitioner.

12. Finally, learned senior counsel for petitioner had relied upon decisions in *Dilawar Balu Kurane vs. State of Maharashtra*, (2002) 2 SCC 135; *Mir Nagvi Askari vs. CBI*, (2009) 15 SCC 643 to contend that if there are two views possible, charge ought not to be framed. Thus, setting aside of impugned order and the charge framed is sought on behalf of petitioner.

13. Learned Additional Public Prosecutor for respondent – State with his usual vehemence had asserted that it was the legal duty of petitioner to have informed Manager of Airport Authority of India about passenger Sarwan Ram being off-loaded due to ill health and what was expected of petitioner as a prudent person was that without losing any time, he should have promptly arranged for medical assistance to passenger Sarwan Ram and instead thereof, petitioner had been busy for many hours in tracking the relatives of passenger Sarwan Ram, who had purportedly informed at the counter of Air France that he is not well and he be sent to any hospital but till 11 AM, he has not been sent to Hospital. This finds mention in the FIR in question, registered at the instance of Ajay Kumar, Supervisor with Concord attached with Air France.

14. According to learned Additional Public Prosecutor for respondent-State, aforesaid negligent omission on the part of petitioner clearly brings out this case within the ambit of Section 304-A of IPC and so, impugned order does not suffer from any illegality or infirmity, as it is settled law that even on suspicion, an accused can be called upon to face trial for the alleged offence and the decisions relied upon on behalf of petitioner do not provide any assistance or justification to discharge petitioner – accused.

15. The contentions advanced on behalf of both the sides, impugned order and the decisions cited, have been meticulously considered while being conscious that to determine whether an act constitutes criminal negligence, the court has to be satisfied that:-

- (1) a duty of care, owed by the accused, and its consequent breach;*
- (2) Forseeability of the likely consequence of such breach;*
- (3) the nature and degree of risk of causing death or bodily harm;*
- (4) The co-relationship between the degree of risk and the culpability of the accused is directly proportionate. In other words higher the degree of risk, the greater blameworthiness of the acts for the consequence.*
- (5) the consequence i.e. death, bodily harm or simple hurt, determines the criminality of the action. In case the consequence being death the accused would be guilty under Section 304-A IPC. In other cases he would be guilty under Section 337/338 IPC.*

16. This Court is equally conscious of the fact that simple lack of care will constitute civil liability and a high degree of negligence is required to bring the culpable act within the ambit of criminal negligence. The essential component of negligence are three:- ‘duty’, ‘breach’ and ‘resulting damage’. Some basic principles disclosing criminal negligence, as reiterated by Apex Court in its recent decision in *Kusum Sharma* (supra) are as under:-

“(I) Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

(II) Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.”

17. Upon having heard learned senior counsel for petitioner as well as learned Additional Public Prosecutor for respondent-State, this Court finds that the parameters governing framing of a charge by invoking Section 226 and 227 of the Code of Criminal Procedure, as reiterated by the Apex Court in *Amit Kapoor v. Ramesh Chander*, (2012) 9 SCC 460, are as under:-

“4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If ‘the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing’, as enjoined by Section 227. If, on the other hand, ‘the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— ... (b) is exclusively triable by the court, he shall frame in writing a charge against the accused’, as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear

that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the

Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.”
(underlined to supply emphasis)

18. In the light of the afore-noted legal position, it becomes evident that at the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see at this stage is whether the material on record and the facts would be compatible with the innocence of the accused or not? The final test of guilt is not to be applied at this initial stage.

19. When judged while applying afore-noted parameters, this Court is of *prima facie* opinion that petitioner certainly owed a

duty of care to have ensured prompt medical assistance to passenger Sarwan Ram as petitioner was well aware that this passenger was off loaded due to ill health and so petitioner cannot get away at this initial stage of trial by urging that duty of care was of Airport Authority of India and not of Air France because it is not even the case of petitioner that he had informed Manager of Airport Authority of India about its passenger being off-loaded due to ill health. Had petitioner done so, then perhaps it could have been said that petitioner had acted as a prudent person. The tests to determine existence of criminal negligence as already highlighted in the preceding paragraph No.15 are not to be meticulously applied at this initial stage of trial and a *prima facie* view only has to be taken. Whether the alleged negligence on the part of petitioner is of a very high degree or not, cannot be pre-judged at the threshold of the trial. Similarly, whether any official from Airport Authority of India with the name of M.R. Kaul was there or not, is a matter of evidence and this disputed question cannot be gone into at this initial stage. Petitioner may not be an expert but it was atleast expected from him was that he should have ensured prompt medical assistance to passenger Sarwan Ram who had been suffering from impending heart attack for about 11 hours. If this is not gross criminal negligence, then what is it, is a question which ought to be considered at the final trial stage in this case and is not required to be answered at this initial stage. While accepting the legal position, as highlighted in the cited decisions, I am unable to

accept petitioner's plea that if two views are possible then charge ought not to be framed, the Apex Court in *Amit Kapoor* (supra) has recently reiterated that even on a strong suspicion, an accused can be called upon to face the trial for the alleged offence.

20. Upon a bare perusal of the statement of the first informant - Ajay Kumar and material witnesses Rahul Moja and Rakesh Sharda, I find myself in complete disagreement with the stand put forth on behalf of petitioner of ingredients of Section 304-A of IPC being lacking in the instant case. Thus, finding no illegality or infirmity in the impugned order and the charge framed, I dismiss this revision petition while refraining to comment on the merits of this case, lest it may prejudice petitioner at trial.

21. This petition is disposed of with a direction to the trial court to expedite trial of this case and to make all the endeavours to complete the trial within a calendar year of date fixed for evidence by drawing a time schedule of trial while making it clear that any adjournment sought would not derail the time schedule fixed in this case. Both the sides to appear before trial court on 15th March, 2013 for trial in this case to commence. Registry to ensure that records are remitted back to trial court within a week.

(SUNIL GAUR)
Judge

March 04, 2013
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