

GAHC010106122010



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 62 of 2010

Md Nurul Islam,
S/o Late Abdul Hussain,
Vill-Ranga Gara,
P.S.- Dhekiajuli,
District- Sonitpur, (Assam.

.....Appellant

-Versus-

The State of Assam,
Represented by the Public Prosecutor, Assam.

.....Respondent

Advocates for the appellant : Mr S Chakraborty, *Amicus*
Curiae.

Advocate for the respondent : Mr P S Lahkar, Addl. P.P..

**BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI**

Date of Judgment : 18.01.2023

JUDGEMENT AND ORDER (CAV)

Heard Mr S Chakraborty, learned *Amicus Curiae*, appearing for the appellant and Mr P S Lahkar, learned Additional Public Prosecutor for the State of Assam.

2. This appeal has been preferred under Section 374(2) of CrPC, 1973, by the accused appellant against the Judgment and Order dated 08.02.2010, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 91/2004, whereby the accused appellant was convicted under Sections 315/304A IPC and sentenced to suffer Rigorous Imprisonment for 5 (five) years for the offence under Section 315 IPC and Rigorous Imprisonment for 2 (two) years for the offence under Section 304-A IPC. Both the sentences were directed to run concurrently.

3. Brief facts of the case is that on 23.03.2003, the informant Sri Lalu Mondal had lodged an FIR before the OC, Dhekiajuli Police Station, stating *inter alia* that while his wife Sandhya Rani Mandal was pregnant by 10 months, he took her to Dhekiajuli Govt. Hospital on 17.03.2003, but the accused Nurul Islam, by force, kept her in his pharmacy, saying that he could terminate her pregnancy and ultimately she died. It is also alleged in the FIR that he paid Rs. 1700/- to the accused for the treatment of his wife.

4. On receipt of the complaint, a case was registered vide Dhekiajuli PS Case No. 67 of 2003, under Sections 304/420 of the Indian Penal Code, and investigation was commenced.

During investigation, the Investigating Officer visited the place of occurrence, conducted the inquest on the dead body of the deceased and prepared the inquest report. The Investigating Officer also forwarded the dead body of the deceased for Post-Mortem examination, to Kanaklata Civil Hospital, Tezpur. In the course of investigation the IO also recorded the statements of the witnesses and prepared the sketch map of the place of occurrence. The Investigating Officer had arrested the accused person and forwarded him to Court. After completion of investigation, charge sheet was submitted against the accused/appellant under Sections 304/420 IPC, before the learned CJM, Tezpur. As Section 304 IPC is exclusively triable by the court of Sessions the case was committed accordingly.

5. During trial, on appearance of the accused before the Court of Sessions, charge was framed under Sections 315/304-A IPC which was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

6. To bring home the guilt of the accused/ appellant, altogether 9 (nine) witnesses were examined by the prosecution. On the other hand, the defence did not adduce any witness in support of his case. After completion of trial, statement of the accused was recorded under Section 313 CrPC and the incriminating material found in the evidence of the witnesses was put before the accused appellant, to which he denied the same.

7. After hearing the arguments advanced by the learned counsel for both the sides, the accused was convicted as aforesaid.

8. Being highly aggrieved and dissatisfied with the Judgment and Order 08.02.2010, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 91/2004, the appellant has preferred this appeal.

9. It was urged by the learned *Amicus Curiae*, appearing for the appellant that the learned trial Court has failed to consider the case that the doctor does not usually bring his patient forcefully from the road for treatment, and in fact, the appellant never called the patient from the road for treatment, as stated in the FIR.

10. It is also submitted by the learned *Amicus Curiae* that PW-5 the Medical Officer who conducted Post-Mortem examination on the dead body of the deceased stated that the cause of death was shock and haemorrhage and ruptured uterus, during labour pain and handling per vaginally.

11. Learned *Amicus Curiae* also submitted that the learned trial Court ought to have considered that the appellant was issued a certificate of alternative medicine, which is valid upto lifetime, by the Registrar of Indian Board of Alternative medicine IBAM/RMP/A-2158. So, he is a registered medical practitioner, declared as a qualified person to practice in alternative medicine. However, he did not provide any treatment to the deceased, he has been falsely implicated in this case.

12. Per contra, learned Additional Public Prosecutor has argued that from the evidence of witnesses, it is crystal clear that the accused appellant is not a qualified doctor and he has treated the wife of the informant, when she was carrying pregnancy of 10 (ten) months. Ultimately, due to his wrong treatment the wife of the informant died. The learned trial Court has rightly convicted the accused appellant under Sections 315/304-A IPC and as such, no interference has been called for by this Court.

13. I have considered the submissions of the learned counsel for the appellant as well as learned Additional PP. I have also perused the record of Sessions Case No. 91 of 2004 and

the documents available in the record.

14. It is an admitted fact that Mrs. Sandhya Rani Mondal died during her pregnancy. Though it is alleged that the wife of the informant was treated by the accused appellant in his pharmacy, but no any documents is available in the record to prove the fact that she was treated by the accused appellant in his pharmacy, when she was pregnant.

15. To prove the case of the prosecution on that point, let me consider the evidence of the witnesses recorded before the trial Court.

16. PW-1 is the informant, Lalu Mondal, who is the husband of the deceased, Sandhya Rani Mondal. He deposed in his evidence that at the relevant time of incident, his wife Sandhya Rani Mondal was pregnant for about 10 months. At the time of her delivery, he took his wife to the chamber of accused Nurul Islam. During that time, the accused Nurul Islam was practicing as a doctor and, therefore, thinking him to be a qualified doctor, he took his wife to his chamber for treatment. As per advice of the doctor, his wife was kept hospitalized in his chamber for three days and he rendered treatment to her including pushing of injection and by providing other medicines during those days. He demanded Rs. 3,000/- rupees from him for the treatment of his wife and he paid Rs. 1700/- to the accused as an advance. The balance amount was to be paid after completion of treatment of his wife.

17. PW-1 also stated that initially he wanted to take his wife for treatment to Dhekiajuli town, but when the accused met him on the road, he told him that he himself would be able to treat her and, therefore, he took his wife to his chamber for her treatment. After three days when the condition of his wife became deteriorated, the accused asked him to take her to Tezpur for better treatment and he also arranged for a car to take her to Dhekiajuli.

Accordingly, he took his wife to Rajkhowa Nursing Home of Dhekiajuli town, but the attending doctor of the said nursing home declared that the chance of survival of his wife was almost nil and, therefore, he brought her back again to the Chamber of the accused. However, accused was not available in his chamber and he could know that the accused had fled away. In the meantime, his wife expired in the Chamber of the accused. Thereafter, he lodged the FIR at Dhekiajuli Police Station, vide Exhibit-1.

18. In his cross-examination, PW-1 replied that the accused had a pharmacy where he also used to give treatment to some people. On the first day, He visited the accused's pharmacy on his own. Behind the said pharmacy, he used to run a small nursing home. Before bringing his wife to the pharmacy of the accused, he did not consult any doctor during the entire pregnancy of his wife. He had to take his wife to doctor on that day as she fell on the ground. This witness also stated that as per request of the said accused, he submitted a petition before the Court in connection with bail prayer of the accused, stating that the accused was not responsible for the death of his wife.

19. PW-2 is Mafizuddin, who is a neighbor of the informant and the deceased. From his deposition, it is revealed that he knew the deceased Sandhya Rani Mandal (wife of Lalu Mondal). He also knew the accused Nurul Islam and he had a pharmacy in their village. He knew that the accused used to treat patients in his pharmacy like a qualified doctor. He came to know that the accused was not a qualified doctor. When he heard about the death of Sandhya Rani, he visited the house of Lalu Mondal as he was one of their villagers and Lalu told him that his wife had expired as a result of the treatment given to her by the accused.

20. In his cross-examination, PW-2 replied that as per his information, the accused used to

give treatment in connection with minor cut and bruises or minor ailments, like fever, disorder of bowel etc.

21. PW-3 is Harmuj Ali. He deposed in his evidence that accused Nurul Islam had a pharmacy in their village, but he was not a qualified doctor. He had heard that he used to treat patients including termination of pregnancy in his pharmacy. When he visited the house of Lalu Mondal, hearing about the death of his wife, Lalu told him that when he took his wife for treatment to Dhekiajuli town, accused met him on the road and told him that he would be able to cure her. Accordingly, Lalu took his wife to the accused's Pharmacy and she was allegedly treated in that pharmacy by the accused for about three days . Lalu also complained that due to wrong treatment, provided by the accused, his wife had ultimately expired.

22. In his cross-examination, PW-3 stated that he never visited the place of occurrence.

23. PW-4 is Bhupen Rai. From his deposition, it discloses that when he came to know that Lalu's wife had expired, he went to his residence to give them condolence. Lalu reported him that his pregnant wife died while she was treated by a doctor.

24. PW-5 is the Medical Officer, Dr. Lakheswar Bhuyan. He deposed in his evidence that on 21.03.2003, he was posted at Tezpur Kanaklata Civil Hospital as Senior Medical and Health officer. On that day, on Police requisition, he had conducted Post-Mortem Examination on the dead body of Sandhya Rani Mondal and found as follows:-

External appearance

An adult female dead body. Rigor Mortis Present.

Wounds:

Abdominal cavity contained blood.

A male full term dead baby was present in the abdominal cavity. Umbilical cord attached to uterus.

Organs of generation, external and internal:-

Uterus-ruptured.

Ext. Genitalia- Vulva odematous

Sharp Cut in left posterior aspect of vulva

2" x 1" x 1" in size present

Blood stain in the thighs and perineum.

All other organs were found healthy. Injuries as described above are ante-mortem in nature.

Doctor opined that the death was due to shock and haemorrhage as a result of ruptured uterus during labour pain and handling per vaginally.

PW-5 was not cross-examined by the defence.

25. P-6 is Biren Chanrda Mondal, who is the co-villager of the informant as well as the accused. He deposed in his evidence that the accused had a pharmacy in their village. He did not know whether the accused is a qualified doctor or not. After the death of the wife of Lalu Mondal, he was told by Lalu Mondal that his wife was treated by accused Nurul Islam, and, thereafter, when she developed complicacy she was sent back to her home and subsequently, she expired in her residence.

26. PW-7 is Md Usman Ali. From his deposition, it reveals that the accused Nurul Islam and the deceased Sandhya Rani Mondal were known to him. At the time of her death, she was pregnant. She was cleaning her house by standing on a 'Murha', but she fell down and sustained injury as a result of which, she later on died.

27. PW-7 was declared hostile at the instance of the prosecution, as he did not support the prosecution case.

28. In his cross-examination, PW-7 admitted that he had stated before the Police that Sandha Rani was brought to the pharmacy of Nurul Islam for two days, and that she was there for the night and he later came to know that Sandhya Rani had died. This witness also stated before Police that the accused Nurul Islam had no certificate or degree to practice medicine etc. and that the accused was looting people by fraudulent act of giving medicine etc. and that he was fraudulently and without any authority doing the act of termination of pregnancy of unmarried/married woman, by taking money.

29. In his cross-examination by the defence, PW-7 replied that his shop was near the pharmacy of Nurul Islam. His pharmacy has three rooms of 10' x 10' size. He was told by Lalu Mondal, husband of Sandhya Rani Mondal that she had fallen and got injury while cleaning the house. On his request, he had given Rs. 200/- to Lalu for treatment of his wife. He has purchased medicine from the pharmacy of accused. As the accused could not give treatment to Sandhya, she was brought back to the house of informant and due to paucity of money he could not take her to Civil Hospital, Tezpur. She was brought from her house to the pharmacy of the accused in a serious condition. After taking her back from the pharmacy, Sandhya died at her house.

30. PW-8 is one Parimal Das, who stated that he knew Sandhya Rani Mondal, who was his neighbor. She died about 2/3 years back. She was at the stage of delivery and taken to hospital where she died. He stated that he knew about her death, when her dead body was taken home.

31. PW-9 was the Investigating Officer. He deposed in his evidence that on 20.03.2003, he was attached to Dhekiajuli Police Station. On that day, the then OC, Dhekiajuli Police Station, received one ejahar from the informant Lalu Mondal and registered a case vide Dhekiajuli PS Case No. 67/2003 and endorsed him to investigate the same. During investigation, he visited the place of occurrence and conducted inquest on the dead body of the deceased and prepared the inquest-report vide Exhibit 3. He sent the dead body for post-mortem examination to Kanaklata Civil Hospital, vide Exhibit-4, the dead body challan. He examined the witnesses and recorded their statements and drew the sketch map of the place of occurrence, vide Exhibit-5. He arrested the accused person and forwarded him to the Court. After completion of the investigation and after collection of the post-mortem examination, he submitted the charge sheet against the accused Nurul Islam under Sections 304/420 IPC, vide Exhibit – 6.

32. In his cross examination, PW-9 replied that he had not seized any documents, regarding pharmacy of the accused person. When he reached the pharmacy, it was under lock and key. He had not prepared the sketch map of the pharmacy as there was no name of the pharmacy. He had not recorded the statement of Dr Rajkhowa of Dhekiajuli, who had got a nursing home at Dhekiajuli. He had also not recorded the statement of the witnesses nearby the house of the accused person.

33. It is not in dispute that at the relevant time of incident the wife of the informant, Sandhya Rani Mondal was carrying pregnancy for about 10 months. According to the PW-1 she was treated by the accused Nurul Islam and she was kept hospitalized in his chamber for about three days for her treatment including pushing of injection and providing medicines.

34. Though it is alleged that the deceased was treated by the accused, but the husband of the deceased has not filed any proof, i.e., any document like prescriptions etc. that the accused had treated the deceased during her pregnancy. All other witnesses examined by the prosecution stated that they came to know from PW-1 that his wife Sandhya Rani was treated by the accused during her pregnancy and subsequently, due to wrong treatment, she died.

35. PW-1 admitted that prior to the date of incident, his wife was not treated by any doctor. PW-1 and some other witnesses stated that the accused was running a pharmacy as well as Nursing home, but the prosecution has failed to submit any document that the accused/appellant was the owner of a pharmacy or a nursing home at the relevant time of incident and he used to treat the patients in his nursing home including termination of pregnancy of unmarried girl or married woman. The Investigating Officer has admitted the fact in his cross-examination that he did not seize any document that the accused was running a pharmacy at the relevant time of incident and that he was the owner of a particular pharmacy or the nursing home, where the wife of the informant was brought for her treatment.

36. In his statement under Section 313 CrPC, the accused appellant admitted that PW-1/informant took his wife to the chamber of the accused as he was practicing as a doctor and thereby thinking him to be a qualified doctor, the informant took his wife to the chamber of the accused. Though the accused in his statement under 313 CrPC, had denied that he had

any pharmacy, but he admitted that he used to sell medicine.

37. The allegation against the accused appellant is that he was practicing as a doctor without having any valid licence or qualification. The accused appellant denied the fact that he had given any treatment to the wife of the informant. The informant has also failed to submit any documents like prescriptions etc. to prove that this wife was treated by the accused appellant.

38. Section 315 IPC, deals with the act done with intent to prevent child being born alive or to cause it to die after birth, which reads as follows:-

“Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.”

39. In the case in hand, the informant has not filed any proof as to how the pregnancy of the deceased got terminated by the accused. Further, there is no presumption of law that in case of termination of pregnancy it has to be presumed that the miscarriage/abortion has been carried with the intention of preventing the child from being born alive. There is no material to show that the accused had intended to prevent the child of the deceased from being born alive. Hence, no offence under Section 315 IPC is made out. Apart from that, from the evidence of the informant as well as other witnesses, it reveals that the informant had to take his wife to the doctor on that day as she fell down on the ground. The other witness,

PW-7 also indicated on that point that the wife of the informant, Sandhya Rani was cleaning her house by standing on a murha. At that time, she was pregnant. She fell down and sustained injuries, as a result of which, she later on died. It is apparent that the deceased was pregnant at the relevant time. While she was cleaning her house by standing on a murha, she fell down and sustained injury on her person, which has led to her miscarriage of pregnancy. Immediately, she was taken to the hospital, may be in the pharmacy or nursing home of the accused appellant, but ultimately she did not survive.

40. As I have already stated that in the case of termination of pregnancy, it cannot be presumed that miscarriage or abortion has been carried out with the intention of preventing the child from being born alive, which is the ingredient of Section 315 IPC. There is no allegation against the accused appellant, that he had such intention to prevent the child of the deceased from being born alive. Hence, Section 315 IPC is not attracted here in this case. Accordingly, accused is acquitted from the said offence.

41. The next question regarding criminal medical negligence, governed by Section 304-A IPC, which reads thus:--

“Section 304A. 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.”

42. The essential ingredients of offence under [Section 304-A](#) of the Indian Penal Code are as under:-

a. Accused caused the death of any person;

b. Death was caused by the accused doing any rash act; or such death was caused by the accused doing any negligent act; and

c. Such a death did not amount to culpable homicide.

43. In order to prove criminal negligence, the prosecution must prove the following ingredients:

(i) Exercise of duty to take care;

(ii) breach of duty to take care causing death; and

(iii) breach of duty must be characterized as gross negligence.

44. A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

45. 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. The degree of negligence must be much higher, i.e., gross one of a very high degree in criminal negligence. Negligence, which is neither, gross nor of a very high degree may provide a ground for action

in civil law but cannot be the basis for prosecution;

46. 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".

47. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

48. In the case of Kusum Sharma & others v. Batra Hospital & Medical Research Centre, reported in (2010) 3 SCC 480, it was held that it is necessary that death should be direct result of the rash & negligent act of the accused and it was further held that the doctor has discretion in choosing treatment in which he proposes to give treatment to the patient and culled out the following principles, which reads thus:-

"89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well- known principles must be kept in view:

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 is 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...."

49. In the case of Malay Kumar Ganguly v. Dr. Sukumar Mukherjee, reported in (2009) 9 SCC 221, the Hon'ble Supreme Court has again reiterated that negligence must be of a gross or a very high degree to amount to "criminal negligence" by observing as under:-

"Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to criminal negligence.

Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only the existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do."

50. In light of the principles of law enunciated by the Hon'ble Supreme Court in the above-stated judgments, it is transparently clear that in order to prosecute and punish a medical professional under Section 304-A of Indian Penal Code negligence contemplated is "gross negligence" that is negligence of very high degree and as such expression "rash or negligent act" occurring in Section 304-A IPC has to be read as "gross negligent act".

51. In the case of Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra; reported in AIR 1965 SC 1616, while dealing with Section 304-A IPC, it was held that:-

"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

52. Thus taking the allegations against the accused appellant, as it is and its face value merely on account of alleged negligent act, in absence of any material on record that the deceased was treated by the accused appellant, being a medical practitioner or not, the accused appellant cannot be held to be gross negligent for commission of the offence under Section 304-A IPC.

53. In view of the aforesaid discussions, I am of the opinion that the prosecution has failed to prove the case against the accused appellant under Sections 315/304-A IPC beyond all reasonable doubt. Hence, the accused is acquitted on benefit of doubt and set at liberty forthwith. The Judgment and order dated 08.02.2010, passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 91/2004 is hereby set aside.

54. LCR be sent back.

JUDGE

Comparing Assistant