

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

984 CRIMINAL APPLICATION NO.461 OF 2022

Kishor S/o Shrikishan Lakhote.

... Applicant

Versus

1. The State of Maharashtra.

2. Smt. Vidya W/o Shalikram Mahajan.

... Respondents

...

Mr. B. R. Waramaa, Advocate for Applicant.

Mr. A. R. Kale, APP for Respondent No.1 / State.

Mr. A. J. Patil & Mr. A. B. Parte, Advocate for Respondent No.2.

...

CORAM : **R. G. AVACHAT and
SANJAY A. DESHMUKH, JJ.**

DATE : 22nd August, 2023.

Per Court:

. Heard.

2 This application, under Section 482 of the Code of Criminal Procedure, has been filed for quashment of FIR and consequential charge-sheet in SCC No.360 of 2020, for the offence punishable under Section 304A of the Indian Penal Code and Section 33 of the Maharashtra Medical Practitioners Act.

3 In short, the case of the prosecution is that the applicant, a pharmacist issued / gave tablets "SINODEC-COLD" instead of the

prescribed tablets “REFCOLD” on 26th January, 2019. The patient / victim died on the following day i.e. on 27th January, 2019. According to the prosecution, because of that tablets “SINODEC-COLD”, the patient suffered reaction and died due to *pulmonary edema*. According to the prosecution, it is a case of *causa causans* i.e. cause of death is consumption of these tablets.

4 The learned counsel for applicant first took us through the judgment of the Honourable Apex Court in the case of ***Jacob Mathew Vs. State of Punjab, 2005 AIR (SC) 3180***. He particularly relied on some paragraphs of the said judgment. We propose to reproduce the said paragraphs as under:-

“8. The referring Bench in its order dated 9.9.2004 has assigned two reasons for their disagreement with the view taken in Dr. Suresh Gupta's case which are as under:-

(1) Negligence or recklessness being 'gross' is not a requirement of Section 304A of IPC and if the view taken in Dr. Suresh Gupta's case is to be followed then the word 'gross' shall have to be read into Section 304A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of section 304A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter

shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

13. The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence upto the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In *R. v. Lawrence*, [1981] 1 All ER 974 (HL), Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R. v. Caldwell* 1981(1) All ER 961 (HL) and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those

harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it."

15. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, stated, "Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case — "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy, *ibid*, Para 1.13)

16. The fore-quoted statement of law in *Andrews* has been noted with approval by this Court in *Syad Akbar v. State of Karnataka* (1980) 1 SCC 30. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable

doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where 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.

28. *Res ipsa loquitur* is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule (See *Syad Kabir v. State of Karnataka* (1980) 1 SCC 30). Incidentally, it may be noted that in *Krishnan and Anr. v. State of Kerala* (1996) 10 SCC 508 the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned judges constituting the Bench has in his concurring opinion merely stated "*res ipsa loquitur*". Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304A IPC cannot be decided solely by applying the rule of *res ipsa loquitur*.

30. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal

patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society.

38. We are inclined to, and we must - as duty bound, take note of some of the relevant decisions of the Privy Council and of this Court. We would like to preface this discussion with the law laid down by the Privy Council in *John Oni Akerele v. The King* AIR 1943 PC 72. A duly qualified medical practitioner gave to his patient the injection of Sobita which consisted of sodium bismuth tartrate as given in the British Pharmacopoea. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. The matter reached in appeal before the House of Lords. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are also relevant before us, what their Lordships have held can be summed up as under:-

- (i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.;
- (ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.
- (iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence

intelligible, except by means of illustrations drawn from actual judicial opinion.

.... The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck." (emphasis supplied)

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

39. The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra* (1965) 2 SCR 622, while dealing with Section 304A of IPC, the following statement of law by Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap* 4 Bom LR 679, was cited with approval:-

"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*."

44. In *Poonam Verma v. Ashwin Patel and Ors.*, (1996) 4 SCC 332 a doctor registered as medical practitioner and entitled to practice in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The

doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence per se actionable in civil law. Dr. Laxman Balkrishna Joshi's case (supra) was followed. Vide para 16, the test for determining whether there was negligence on the part of a medical practitioner as laid down in Bolam's case (supra) was cited and approved."

5 According to the learned counsel for applicant, there has to be an opinion of an expert to suggest that the contents of both the medicines i.e. one prescribed by the doctor (deceased accused) and the one provided by the applicant herein, were grossly inconsistent. Such an expert's report is not before the Court. He would further submit that the committee of the doctors constituted in view of the directions in ***Jacob Mathew*** (supra), neither favour the prosecution and even nor the applicant herein. The committee has not given any exact opinion about the cause of death since the tablets provided were not provided to the committee for analysis. According to the learned counsel, for directing the applicant to face trial for the offence punishable under Section 304A of the Indian Penal Code there has to have a *prima-facie* case of gross or culpable negligence on his part. He would further submit that the same is not forthcoming from the

police papers and therefore, directing the applicant to stand trial would be an abuse of process of Court. The wrappers of both the medicines were referred and relied on to suggest that the contents of both the medicines are similar.

6 The learned APP for the State and the learned counsel for the informant would, on the other hand, submit that the prescription issued by the deceased doctor specifically states “No Substitute”. This was a direction to the pharmacist either to provide medicines given therein or not at all. Still the applicant gave the tablets “SINODEC-COLD”. Within twenty-four hours of taking such medicines, the victim suffered reaction and even passed away. The first paragraph of the committee’s report has been specifically adverted to ultimately contend that there is *prima-facie* material to proceed against the applicant for the offence punishable under Section 304A of the Indian Penal Code.

7 Considered the submissions advanced. The observations made by the Honourable Apex Court in ***Jacob Mathew*** (supra) are very well on the mind of this Court. We have now to appreciate the factual matrix in light thereof. The facts of the present case suggest that the doctor (deceased accused) prescribed two medicines, viz. (1) Tab. Azithro 250 mg (6); and (2) Tab. Refacold (6). The prescription contained a rider, “No Substitute”. Admittedly, the applicant,

pharmacist, issued "SINODEC-COLD" instead of prescribed tablets "REFCOLD". Here itself, the applicant has committed a gross negligence in issuing a different medicine. According to the learned counsel for applicant, the contents of both the tablets were more or less similar and therefore, there was no question of the patient suffering from any reaction by taking such medicines. It may be a case of his defence. That cannot be looked into here. The fact remains the applicant has provided a different medicine. He could have refused to give the medicine, when same was not with him.

8 The report of the committee is on the record. The first two paragraphs of the report are reproduced hereinbelow:-

“उपरोक्त संदर्भित विषयानुसार मयत शालीकराम परशुराम महाजन रा. अमळनेर यांना तब्बेत बिघडल्याने तपासणी करून व्दारका क्लीनिक मध्ये त्यांना गोळ्या लिहून दिल्या. त्यानुसार मेडीकल मधुन Sinodec-Cold हि डॉक्टरांनी लिहून दिलेली गोळी परस्पर बदलून देण्यात आली ती गोळी बदलवून देण्याचा अधिकार मेडीकल वाल्यास नाही. क्र. २ च्या Refee-Cold गोळी ऐवजी दिलेल्या Sinodec-Cold गोळी दिल्यामुळे कमी जास्त तिव्रतेच्या प्रमाणात ठराविक पेशंटला (ज्यांना संबंधित गोळीतील केमीकल घटकांची अॅलर्जी असेल त्यांना) अॅलर्जीक रिअॅक्शन येवून कमी तिव्रतेची रिअॅक्शन किंवा गंभिर तिव्रतेची रिअॅक्शन येवून मृत्यु ओढवु शकतो.

२) डॉक्टरांचे शिक्षण बघता सदरच्या गोळ्या लिहून देण्याचा त्यांना अधिकार नाही.”

9 It is true, perusal of the subsequent paragraphs of the report of the committee indicate that the committee tried to run with the hare and hunt with the hounds. The fact, however, remains that in the first paragraph of the report, it has been observed that the patient might have died of reaction of the tablets "SINODEC-COLD". This much expert's opinion is sufficient for proceeding against the applicant herein.

10 In our view, it is not a case of no material to proceed against the applicant. The application is liable to be rejected. The application is, therefore, rejected. The observations made herein-above are *prima-facie* in nature. The Trial Court shall not be influenced thereby.

[SANJAY A. DESHMUKH, J.]

[R. G. AVACHAT, J.]

nga