IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-571-SBA-2006
DATE OF DECISION : 22nd DECEMBER, 2017

State of Punjab

…. Appellant

Versus

Kanwinder Nath Sharma

…. Respondent

CRR No.685 of 2006

Hari Ram and another

Petitioners

Versus

Kanwinder Nath Sharma & another

Respondents.

CORAM : HON'BLE MR. JUSTICE A. B. CHAUDHARI

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Present : Mr. Dhruv Dayal, Sr. DAG Punjab
for the appellant-State in CRA-S No.571-SBA of 2006.

Mr. J. S. Puri, Advocate
for the petitioners in CRR No.685 of 2006.

Mr. Amarjeet Markan, Advocate,
Mr. Aman Dhir, Advocate and
Mr. Mikhail Kad, Advocate
for respondent No.1 in CRR No.685 of 2006.

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A. B. CHAUDHARI, J.

1. Being aggrieved by the judgment and order dated 03.09.2005 passed by Sub-Division Judicial Magistrate, Dhuri, in Challan No.58 of 08.12.1999 and BT No.39 of 02.04.2004 decided on 03.09.2005 arising out of FIR No.120 of 11.06.1999 for offence under Section 304-A of Indian Penal Code (IPC) the State of Punjab had filed

appeal against acquittal i.e. CRA-S-571-SBA-2006 while the complainant Hari Ram and another had filed CRR-685-2006 in this Court, in the matter of acquittal of respondent-Kanwinder Nath Sharma.

Facts:

2. The prosecution story in brief is that Pawan Kumar and Hari Ram moved an application Exhibit P1 to DSP, Dhuri against respondent-Kanwinder Nath Sharma, Sharma Nursing Home, Sangrur Road, Dhuri. It was stated in the complaint that Babita Rani was his sister, married to Satish Kumar at Nabha having a son of 17 years of age. She had one Rasoli in her stomach which was operated upon by Dr. Ashwani Bansal of Bansal Hospital, Laparoscopy Centre, Nabha on 01.03.1998. Thereafter on 15.05.1998 she underwent ultrasound from Nabha. On 22.12.1998 Babita Rani felt some minor pain in her abdomen so also on 02.01.1999 and was advised to undergo tests including sugar test etc., which were undertaken. On 06.02.1999 again she felt pain in abdomen and therefore she was admitted to Sharma Nursing home at about 2.30pm and Dr. Kanwinder Nath Sharma, the respondent admitted her in the hospital. All the previous reports were shown to him, who administered glucose to her. He also checked the blood of the patient and did not tell anything to the relatives despite enquiry. But he had asked them to make arrangement for blood and accordingly one bottle was arranged and blood was given to Babita. Without telling regarding blood pressure etc. respondent asked them to make arrangement for blood and two bottles of blood was arranged by them. Out of them one bottle was injected on 08.02.1999. The respondent stated that she will be alright in a few days.

`On next day i.e. 09.02.1999 at 2.30 pm the respondent told them that the condition of Babita was deteriorating and therefore he forcibly put the patient in car and referred her for Patiala. Though she was not in a good condition no arrangement was made for nurse during journey and when the patient was on the way to Patiala near Village Benra, the glucose drip stopped flowing and as such on way she was admitted in Singla Surgical Hospital, Sangrur where they were told that there was little hope for her survival. Many blood tests were carried out and blood sugar level at random was found 688 mg and blood urea 130. Babita died in the hospital at 4.30 pm and was cremated on 09.02.1999. Thereafter the complainant approached the accused for treatment chart, progress file, test reports etc. but they were not given. According to the complainant, Babita died due to rash and negligent act of the accused. Thereafter the trial Court recorded the detailed judgment and acquitted the respondent. Hence this State appeal against acquittal, so also the criminal revision petition by the complainant.

Arguments:

3. The learned counsel for the State in the appeal and learned counsel for the complainant in the criminal revision petition made the following submissions:

(i) The complainant had filed proceedings under the provisions of the Consumer Protection Act against respondent Doctor and in those proceedings upto the last Court the guilt of the respondent-Doctor was upheld and compensation was awarded from the respondent-Doctoer which stands paid. The Consumer Court had recorded categorical

findings against the respondent about the rash and negligent act on the part of the respondent-Doctor and as such the said finding was required to be properly considered by the learned trial Court before making the order of acquittal. The trial Court however ignored the said finding which constitutes perversity on its part.

(ii) The evidence in the form of extra judicial confession by the Doctor was produced before the Court wherein respondent-Doctor admitted his guilt but the trial Court ignored the same for no justification.

(iii) The fact that the respondent-Doctor had transfused the blood to Babita Rani, the deceased, which turned out to be toxic for her, was duly proved on record by the prosecution evidence by the trial Court which wrongly refused to rely on the said evidence. The fact, that the respondent-Doctor had got the blood boiled, that was to be administered to Babita Rani, which turned toxic, was duly proved.

(iv) The respondent-Doctor did not get the blood tested through matching and all these acts on the part of the Doctor amount to recklessness and rather the recklessness throughout with the patient ultimately resulting into her death.

(v) The findings recorded by the consumer Court were binding on the trial court but it has simply ignored them.

(vi) Lastly the learned counsel for the complainant has pressed into service the doctrine of abandonment of the patient by the Doctor as an Act of recklessness with requisite criminal element within the meaning of Section 304 part II of the Indian Penal Code. The learned counsel for the appellant and the complainant relied on the following

decisions so also the American authorities on the plea of abandonment. The learned State counsel as well as counsel for the revision petitioner-complainant, therefore prayed for the reversal of the judgment of acquittal for being converted into the one of conviction.

4. Per contra, learned counsel for the respondent-accused supported the supported the impugned judgment and order of acquittal of the respondent and made the following submissions:

(i) The counsel for the respondent-accused submitted that the parameters laid down by the Apex Court in the matter of the hearing of the appeal against acquittal, if applied to the present case, the present appeal against acquittal as well as the criminal revision petition, both are liable to be dismissed.

(ii) Perusal of the judgment and reasons given by the trial Court shows that it has considered each and every i.e. major as well as minor, evidence that was produced by the prosecution before the trial Court scrupulously and thereafter given a long drawn detailed judgment.

(iii) The view taken by the trial Court for recording order of acquittal is perfectly a possible view and based on evidence and cannot be faltered as there is no perversity in the matter of appreciation of evidence placed before the trial Court.

(iv) The prosecution failed to prove its case and rather the prosecution could be said to be malafide against the respondent-Doctor or merely on the figment of imagination because the appellants did not at all get known the cause of death of Babita Rani by conducting her post-mortem and obtaining the post-mortem report or any medical opinion. If

the case of the prosecution was that blood given to her became toxic after alleged boiling, the best possible evidence the prosecution should have brought was the post mortem report. No reason or justification has been given by the prosecution as to why the post-mortem was not done. In a criminal case unless the cause of death is known, a person cannot be convicted in the manner sought.

(v) The prosecution miserably failed to prove its case. At any rate the benefit of doubt would go to the accused. The respondent-Doctor also examined two witnesses i.e. Dr. N. S. Balian as DW-1 and Jagdish Kumar as DW-2 and their evidence clearly falsified the case of the prosecution.

(vi) It is not in dispute that the patient was heavily diabetic and admittedly the sugar level had gone above 600 mg which clearly indicated that she might have died because of diabetes. But then it was for the prosecution to prove how she died for which the cause of death ought to have been duly proved by the prosecution, which was not done. The findings recorded by the Consumer Court cannot be pressed into service as the standard of proof in a criminal case and in the consumer case, is total different. The doctrine of abandonment pressed into service also cannot be considered as there is no evidence that the respondent-Doctor had abandoned the patient by referring the patient due to its deteriorating condition for better treatment. But the same shows the bona fides on the part of the Doctor caring for the patient. The counsel for the respondent-accused relied on some judgments and prayed for dismissal of the present criminal appeal and criminal revision petition, both.

Consideration:

5. With the assistance of learned counsel for the rival parties I have gone through the entire record, evidence oral as well as documentary. At the outset the parameters in respect of appeal against acquittal laid down by the Apex Court from time to time and the interference by the appellate Court will have to be kept at the back of mind before deciding the present appeal against acquittal which I do.

6. It is true that the complainant had approached the Consumer Court against the respondent-Doctor- Kanwinder Nath Sharma pleading rash and negligent act on his part and claimed compensation from him. It is also true that the Consumer Court held respondent-Doctor guilty of the deficiency in service, contemplated by the said Act and ultimately awarded the compensation to the complainant before the consumer forum. The same admittedly stand paid by respondent-Doctor. It is also true that the order made by the consumer Court was upheld upto the Apex Court. The submission made by learned counsel for the State as well as complainant that the finding recorded by the Consumer Court would be binding on the criminal Court i.e. this Court and rather this Court will have to consider the findings recorded against respondent-Doctor for the purpose of deciding the present appeal against acquittal, in my humble opinion is misconceived. It is a well settled legal position that the case before the Consumer Court is decided on the basis of preponderance of probabilities and the tort liability. Insofar as the criminal cases are concerned, the standard of proof and the parameters for deciding the same are entirely different and therefore, a person cannot

be convicted on the basis of the findings recorded by the Consumer Court. The decision in a criminal case would be governed by the principles in the criminal jurisprudence namely, the burden of proof, the concept of benefit of doubt and so and so forth. I therefore, do not agree with the submission made by learned counsel for the complainant/State to that effect.

7. The next submission made by learned counsel for the appellant/revision petitioner is about the alleged extra judicial confession by the respondent-Doctor. I have checked up the evidence to that effect. It would be appropriate to quote the finding recorded by the trial Court in that context rather then repeating the reasons thereof. I quote paragraphs 35 to 38 from the judgment of the trial Court, which reads thus:

> "35. To rebut this argument, learned counsel for the accused has referred to the cross-examination of ASI Megh Raj (PW7), wherein he has admitted that this cassette was taken into possession of the police on 5.10.1999, whereas as per statement of Vinod Kumar (PW2), it was prepared between 26/27-2-1999. In the cross-examination, ASI Megh Raj has admitted that he did not know where this cassette remains for continuous period of seven months. He even admitted in the cross-examination that he did not make the inquiry from Vinod Kumar (PW2) that why he has not produced this cassette at the time when it was recorded. He has admitted

that he himself has not heard the contents of the cassette. He even admitted that he has not compared the voice recorded in the cassette with the standard voice of the accused and he cannot tell the reason for the same.

36. Reference was also made to the cross-examination of Vinod Kumar (PW2), author of this cassette, who has admitted that he had handed over this cassette to the police on 5.10.1999 and this cassette remained in his possession since that date till 5.10.1999 and he cannot tell the reason for keeping this cassette with him for such a long period. He has also admitted that it was not heard by ASI Meg Raj, during the investigation of the case, nor he handed over this cassette to any police officials for a period of seven months. He has not denied this fact that some contents of the cassette can be erased and few contents of the cassette can be added at any time.

37. Learned counsel for the accused has further argued that unless and until, there is comparison of voice recorded in the cassette with the voice of the accused, the contents of the cassette are not admissible in evidence and it has no value in the eyes of law. In support of his arguments, reference

> was made to the pronouncement in case titled as State vs. Ravi @ Munna, 2000(1) R.C.C. (Criminal) 690. In this pronouncement, it has been held that type recorded telephonic conversation between accused and family members of the deceased, has no evidentiary value, when no specific voice of the accused was recorded nor was sent for comparison to an expert. Hon'ble Court did not rely upon the tape recorded version.
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> 38. Coming to the case in hand, there is nothing on record that any specimen voice of the accused was not taken in the Court and was sent for comparison purpose. ASI Megh Raj in his cross-examination has admitted that he has not taken the sample voice of the accused for comparison purpose and he also failed to tell the reasons for the same. Therefore, this tape recorded version without comparison from the expert is not admissible in evidence."

8. Apart from that it is clear to me that the prosecution did not bother to get done the authentication of the cassette on which reliance was placed for proving extra judicial confession of respondent-Doctor. There is a procedure that is required to be followed for proving the same, which admittedly was not followed in the present case. Thus the reliance

placed for the above reasons on the alleged extra judicial confession, is misplaced and the said evidence cannot be relied upon.

9. The counsel for the appellant/revision petitioner then contended that before infusion of blood to Babita Rani the deceased, the blood tests were not carried out for matching and, therefore, there was recklessness on the part of the respondent-Doctor. There is also a submission that the blood was kept in the refrigerator and was then taken out and was then got boiled at the boiling point and thereafter the same was administered to Babita Rani, which caused her death as the blood had turned toxic. The submission made is thoroughly based on the oral evidence of the witnesses produced by the complainant and at any rate none of the witness could project or prove the cause of death which is required to be proved to the hilt. It is strange to note that the appellant/revision petitioner did not at all bother to get the post mortem of Babita Rani done nor made any attempt to prove the cause of her death. The cause of death could be known in the background evidence projected only by conducting the post-mortem and also obtaining the FSL report by sending samples of viscera for scientific examination to find out whether the cause of death was due to any toxic substance. The prosecution could have easily got done the post mortem and scientific tests of viscera to prove what is being alleged. The appellant and the investigating officer or the complainant did not at all bother to prove the cause of death in accordance with law as stated above. The parole evidence of the witness saying that blood was kept in the refrigerator, the same was taken out of the refrigerator, the same was boiled to the boiling

point and thereafter the same was administered to deceased Babita Rani and therefore she died in the wake of complete denial of the respondent-Doctor is nothing but a mere figment of imagination. There cannot be any claim for conviction on figment of imagination. In this connection the trial Court has made discussion in paras 57 and 58 of its judgment, which I quote hereunder:

> "57. Now coming to the case in hand, firstly the stand taken was taken by the complainant that patient has died due to rash and negligent act of the accused while giving the treatment and he has administered the Glucose without adding insulin despite knowing the fact that patient is a diabetic patient and thereafter, the stand was taken, rather in the cross-examination of husband of deceased, Satish Kumar (PW6), it has come on the file that they have only grudge that the wrong blood was transfused by the accused to the patient and no other complaint against treatment. All these allegations of the prosecution have been negatived, some by prosecution itself, some in defence. As per cross-examination of Dr. Krishan Singla (PW5), whatever treatment was given by the accused, that was as per medical norms and the patient has no signs of wrong transfusion of the blood. In the complaint Ex.P1, it is mentioned that the Glucose stopped on the way, when the patient

was taken to Rajindra Hospital, but as per cross-examination of Dr. Krishan Singla, when the patient was brought to his clinic, the Glucose was running. Similarly, the treatment given by the accused to the patient was upheld by the Board of Doctors as per their opinions Ex.D2 on the basis of application Ex.D1 moved by ASI Ravinder Kumar.

58. The prosecution has failed to ascertain the cause of death of Babita Rani from any medical professional or from the competent doctor. There is nothing on the record by way of post-mortem examination of the deceased to show the cause of death of patient. Even as per statement of (DW2), the insulin was added in the Glucose administered to the patient. Ex.D1 is silent regarding keeping the bottle of the blood in the freezer and then putting it in boiling water for 10-15 minutes. Even the tape recorded version between Sagar Chand and accused is silent regarding wrong transfusion of the blood by the accused. When it has in the knowledge of the complainant that the patient has dies due to wrong transfusion of the blood, why they have not asked the doctor/accused on this fact when there is long conversation between them regarding the treatment given by the prosecution that the death of the patient

> is the direct result of the wrong treatment given by the accused or due to wrong transfusion of the blood. Evidence has also come on the file that the accused has done cross matching of the blood group, before it was administered to the patient."

10. I agree with the above reasons and the discussion made by the trial Court.

11. The counsel for the complainant on the basis of evidence available on record has pressed into service the doctrine of abandonment recognized in the American Courts. He has relied on the concept of "Patient abandonment" discussed in a write up made by the Gilliland Law Firm PC. I have gone through the said write up. I would quote the following portion about the abandonment of patient obtained from wikipedia, which reads thus:

> In medicine, abandonment occurs when a health care professional (usually a physician, nurse, dentist, or paramedic) has already begun emergency treatment of a patient, and then suddenly walks away while the patient is still in need, without securing the services of an adequate substitute or giving the patient adequate opportunity to find one. It is a crime in many countries and can result in the loss of one's license to practice. Also, because of the public policy in favor of keeping people alive, the professional cannot defend himself or herself by

> pointing to the patient's inability to pay for services; this opens the medical professional to the possibility of exposure to malpractice liability beyond one's insurance coverage.

12. It is not necessary to quote the other write ups produced by counsel as the same is repetition thereof. For the said proposition the learned counsel for the complainant relied on the oral evidence of the witnesses. According to the complainant the physical condition of the patient was such that the respondent-Doctor could not have asked the relatives of the patient to remove the patient from his hospital to the big hospital at Patiala. The evidence is that since the respondent-Doctor wanted to get rid of the patient from his hospital, he having allegedly transfused the toxic substance namely the boiled blood, and that is why it amounts to abandonment of a patient. With the assistance of the learned counsel for the complainant, I have gone through the oral evidence of the witnesses, who deposed accordingly. At the outset it is seen that the patient was found to be highly diabetic and at relevant stage her sugar level had gone above 688 mg. It is also clear from the record that a few days earlier she had undergone a surgery of her stomach in some other hospital and since she developed a pain in the stomach she was brought in the hospital of the respondent-Doctor. The evidence have come on the record that the condition of the patient was deteriorating and the respondent-Doctor took a decision that she needed to be transferred to a big hospital at district place Patiala. There is nothing in the evidence of any of the witness to show that the respondent-Doctor had forcibly

abandoned the patient and on the contrary the cross-examination shows that the respondent-Doctor having found that the condition was deteriorating, asked the relatives of the patient to take her to the district place for treatment. There is no satisfactory evidence on record to show that he had made any force or made any deliberate abandonment of the patient as contended. On the contrary, it appears that the respondent-Doctor took a conscious decision that the patient required a treatment from a hospital at district place Patiala and he should not take further risk. There is no reason why in the present case the Doctor should abandon the patient as contended. I do not find any substance in the said submission made.

13. In the result I find that the prosecution failed to prove its case particularly in the light of the fact that it did not bother to get the cause of death known. A Doctor cannot be convicted in the absence of any cause of death being legally proved before the Court. In that view of the matter, I make the following order:

ORDER

(i) The CRA-S-571-SBA-2006 and CRR-685-2006 are dismissed.

22nd December, 2017 **(A. B. CHAUDHARI)**
'*raj*' **JUDGE**

Whether speaking/reasoned: *Yes* *No*

Whether Reportable: *Yes* *No*