IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.262 OF 2017

Bijayprakash Ramilan Sharma .. Applicant
Vs.
The State of Maharashtra .. Respondent

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Mr.Anil Lalla a/w. Ms.Manali Mengde i/b. M/s. Lalla & Lalla, Advocate for the Applicant.
Mr.Swapnil S. Pednekar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 9, 2018.

P.C. :

The applicant is prosecuted for the offence punishable under Section 304(II), 420 read with Section 34 of the Indian Penal Code (IPC). The First Information Report (FIR) has been registered vide C.R. No.80 of 2014 on 15th February, 2014.

2 The case of the prosecution is that the deceased had a throat infection and it was suspected that he was suffering from tonsils. The deceased was aged about 20 years. It was noticed that there was a swelling in his throat and, hence, he was taken to Shifa Hospital. The applicant–accused was present at the hospital. The said hospital is owned by accused no. 1–Naseem

Khan. After examining the deceased, the applicant – accused gave injection and also prescribed some tablets. While returning home the victim found it difficult to speak and the right leg was swollen. The part of the body where the injection was administered had become dark. On 13th February, 2014, the deceased was taken to the said hospital again. The accused prescribed an ointment and medicine. The victim was advised to approach Rajawadi hospital for further treatment. However, there was no improvement in the condition of the deceased and on the contrary, the condition of victim had deteriorated. On 14th February, 2014, he was taken to the Rajawadi Hospital. The doctors in the said hospital prescribed certain medicines. However, even thereafter there was no improvement in the health condition of the deceased. Since the health of the victim had deteriorated in pursuant to the injection administered at Shifa Hospital, he was again taken to the said hospital. The co-accused Dr.Naseem Khan was present at the hospital. He was informed that the applicant – accused had given injection to the deceased which has resulted in swelling of his leg. The victim was, thereafter, taken to the J.J. Hospital and was admitted at the said hospital. On 15th February, 2014, the victim Avinash expired. The opinion of the doctors was that the deceased had died on account

of infection due to injection. It is, therefore, alleged that there was negligence on the part of the doctor and that the applicant–accused had no authority to prescribe medicines to the patient. He had given injection to the deceased which has resulted in death.

3 On completing investigation, the charge – sheet was filed before the competent Court. The case committed to the Court of Sessions. The applicant, therefore preferred an application for discharge before the Sessions Court. The said application was rejected vide order dated 7th March, 2017.

4 Learned advocate for the applicant submitted that there is no evidence to substantiate the charge under Section 304(II) or Section 420 of the IPC. The alleged act does not amount to culpable homicide not amounting to murder. It is submitted that the the charge under Section 304(II) of IPC is not made out. There is no evidence to frame charge under Section 304(II) of IPC. It is submitted that the Sessions Court had completely overlooked the said aspect and rejected the application for discharge. He submitted that there is no criminal negligence while committing the alleged act. The FIR was registered without adhering to the norms laid down in the

Decision of the Supreme Court in the case of ***Jacob Mathew Vs. State of Punjab & Anr.***[1] It is further submitted that the applicant is not responsible for the unfortunate death of the deceased. He had provided the best known and available medical treatment to the deceased. It is further submitted that during the intervening period, the deceased was also treated at Rajawadi Hopsital and, thereafter, at J.J. Hospital. After giving treatment at Rajawadi Hospital, he was sent back home after prescribing certain medicines. It is, thus, submitted that the death of the deceased cannot be attributed to any act of the accused. It is submitted that the FIR was registered by the police without obtaining any medical opinion from the panel of doctors from the same branch of medicine to suggest that the line of treatment adopted by the applicant was improper and no such opinion is obtained and there is nothing on record to show that any such information is being obtained by the police. This is in contravention of the guidelines laid down by the Supreme Court of India in the aforesaid decision. It is submitted that the applicant cannot be attributed any knowledge that the treatment provided by the deceased would certainly cause his death and, therefore, invoking Section 304(II) of IPC is totally misplaced and

1 2005(3) Crimes 63 (SC)

erroneous. It is further submitted that there is no material on record to indicate that there was gross negligence on the part of the applicant. The applicant being a Doctor had prescribed medicines and administered injection to the deceased. The applicant is Doctor by profession and inspite of being Homeopathic can prescribe allopathic medicines. It is submitted that the communication issued by the Homeopathic Institute clearly indicate that the applicant had completed the course of BHMS, (Homeopathic course) and, therefore, the applicant was a Doctor in Homeopathy.

5 It is submitted that on the basis of the letter issued by the Maharashtra Medical Council, it cannot be said that the applicant is not doctor, and, therefore, there is nothing to indicate that the medicines was prescribed by the applicant without being qualified to be a Doctor. Reliance was also placed on the decision Supreme Court in the case of ***Suresh Gupta Vs.Govt. of N.C.T. Of Delhi & Anr.***[2]

6 Learned APP Mr.Pednekar submitted that *prima facie* case is made out to support the charge levelled against the

2 2004 All MR (Cri.) 2881 (S.C.)

applicant. At the stage of framing of charge, the Court is not required to enter into detailed inquiry and what is required to be seen is that the documents on record *prima facie* makes out case for framing of charge. The defence of the applicant based on disputed question of fact, which may be considered at the stage of trial and not at the stage of Sections 226 and 227 of Cr.P.C. The FIR clearly mentions that the applicant was taken to the Shifa Hospital where the applicant was present and injection was given to him which has resulted into infection and caused death of the deceased. It is submitted that the applicant was an intern and he had no authority to administer injection or give treatment to the deceased. The owner of hospital i.e. the co-accused Naseem Khan was not present in the hospital during the treatment given to victim by the applicant. It is submitted that the applicant has stated in the application that he was employed as intern in Shifa Hospital owned by Dr.Naseem Khan (co-accused). It is submitted that intern is supposed to assist the doctor and not qualified to diagnose ailment or prescribe the medicines. It is submitted that after injection was administered, the victim had developed serious problems. The leg of the applicant had swollen and the portion where the injection was administered had become dark and, thereafter, the victim has expired. It is further submitted

that in the certificate of cause of death issued by the J.J. Hospital, the death was shown as due to “sepsis following intramuscular injection (unnatural)”. It is, thus, submitted that considering the opinion of the medical officer, it is apparent that the death was a direct result of intra- muscular injection. It is further submitted that the postmortem of the deceased was conducted at J.J. Hospital and opinion given by the doctors as to the probable cause of death clearly states that there is evidence of sepsis following intramuscular injection (unnatural). Learned APP also pointed out the communication issued by the Magadh Homeopathic Mahavidyalaya Medical College and hospital, wherein it is stated that the applicant has completed his final BHMS examination., however, he has not completed his internship. He also pointed out the communication issued by the Maharashtra Institute of Homeopathy, wherein it is stated that the applicant accused cannot practice in the State of Maharashtra without registration certificate issued by the Maharashtra Medical Council. Mr.Pedenkar, therefore, submitted that the applicant had no authority to practice as a Doctor and he cannot be termed as “Doctor”. In the circumstances, he had not authority to treat the patient or prescribe any medicines. It is submitted that the guidelines issued in the case of Jacob

Mathew's case was to protect the doctors from malicious prosecution. In the present case, it is doubtful whether the applicant accused had an authority to practice as a doctor and, therefore, the said guidelines are not applicable to him. It is, thus, submitted that the application for discharged preferred by the applicant had been rightly rejected by the Sessions Court.

7 It is apparent from record that the deceased had complained about pain in his throat which was suspect to be on account of tonsils. He was taken to Shifa Hospital where the applicant was present. Dr.Naseem Khan who owns the said hospital and the incharge of the said hospital was absent. The applicant examined the patient and gave injection and also prescribed certain medicines. Immediately after the injection was administered, the patient had developed the infection. His right leg was swollen, he could not speak, the portion of the body where injection was given had become dark. The provisional certificate of cause of death issued by the Doctors clearly indicate that the death was caused due to Sepsis following intra muscular injection (unnatural). The deceased was taken to the J.J. Hospital and in pursuant to his death, the postmortem was also conducted in the said Hospital. The opinion as to cause of death is reflected

in the postmortem report which is signed by the Associate Professor of Department of Forensic Medicine Grant Medical College, Mumbai and resident Doctor Sir J.J. Hospital, Mumbai. The opinion as to the probable cause of death states that there is evidence of sepsis following intra muscular injection. The applicant has admitted that he was employed as an intern in the said hospital. The communication issued by Magadh Homeopathic Medical College and Hospital at Bihar shows that he had not completed internship after completing the course. However, the said communication also mentions that the applicant had completed final BHMS examination. The opinion as to cause of death, as stated hereinabove indicate that the death was caused due to sepsis following intramuscular injection was *prima facie* result of the injection,. At the stage of framing of charge, the Court is not required to conduct the roving inquiry and what is required to be seen is whether *prima facie* case is made out for framing charge on the basis of the charge – sheet on record. The defence, if any, is to be considered during the trial.

8 It is true in the case of ***Jacob Mathew (Supra)*** relied upon by the counsel for the applicant the Apex Court has observed that before registration of FIR, the police are required

to take opinion of the panel of medical officers. However, in the present case, in the circumstances, as stated hereinabove, the prosecution would not vitiate for not obtaining separate opinion. It is pertinent to note that in the present case, the patient was taken to the J.J. Hospital and, thereafter, he died at the said hospital. The postmortem was conducted by the hospital and the cause of death issued by the doctors of the said hospital who are from the department of Forensic Medicine Grant Medical College, Mumbai. It is stated that there is evidence of sepsis following intra muscular injection. Whether the applicant had an authority to prescribe medicine being intern will be considered during trial. The defence of applicant that there was no negligence will be scrutinised during trial.

9 FIR was registered under Section 304(II) of IPC. The contention of the applicant is that no offence under Section 304 (II) of IPC is made out in the present case. The submission is well founded. To constitute an offence under Section 304(II) of IPC. The act must be done with the knowledge that it is likely to cause death, but, without any intention to cause death or to cause such bodily injury as is likely to cause death. The facts in the present case would not attract the aforesaid provision. *Prima facie*, the

case would be covered by Section 304-A of IPC. The said provision relates to offence of causing death by negligence. As per the said penal provision whoever, cause the death of any person by doing any rash or negligent act not amounting to culpable homicide can be punished with sentence provided therein.

10 The offence under Section 304(II) of IPC was triable by Court of Sessions. However, the offence under Section 304-A of is triable by Court of Magistrate of First Class. The Sessions Court will have to relegate the case to the Court having competent jurisdiction to try the offences.

11 In the aforesaid circumstances, I pass the following order:

:: O R D E R ::

(i) Criminal Revision Application No.262 of 2017, is partly allowed;

(ii) The charge under Section 304(II) of IPC, is quashed and set aside;

(iii) The trial may proceed for the offence punishable under Section 304-A of IPC and the other offences alleged against the applicant;

(iv) The Sessions Court is directed to pass appropriate orders for remanding the case to the competent Court.

(**PRAKASH D. NAIK, J.)**