



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 12.10.2018
CORAM:
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.R.C(MD)No.469 of 2018
and
Crl.M.P.(MD) No.6455 of 2018

Dr.Muthu Shenbagam : Petitioner/ Petitioner/
7th Accused
Vs.

State through Inspector of Police,
Asaripallam, Police Station,
Nagercoil, Kanyakumari District. : Respondent/Respondent/
Complainant

PRAYER: Revision filed under Section 397 read with Section 401 of the Code of Criminal Procedure, to call for the records and set aside the order dated 05.10.2017 passed in Crl.M.P.No.137 of 2015 in S.C.No.191 of 2015 by the learned Principal Assistant Sessions Judge, Kanyakumari Division at Nagercoil by allowing the Criminal Revision.

For Petitioner : Mr.P.H.Manoj Pandian
for M/s.AAV Partners

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor.

ORDER

This criminal revision case is filed against the order dated 05.10.2017 passed in Crl.M.P.No.137 of 2015 in S.C.No.191 of 2015 by the learned Principal Assistant Sessions Judge, Kanyakumari Division at Nagercoil.

2.The case of the prosecution is that the patient by name Rukmani admitted at Government Medical College Hospital at Kanyakumari for family planning operation and was taken to Post Portem Operation Theatre on 19.03.2011. She was administered anesthesia for the operation, but in the course of the operation, her health deteriorated and immediately anesthesia was withdrawn. Later, it was found that the cylinder meant for oxygen was filled with Nitrous Oxide (N2O) and therefore, instead of administering mixture of oxygen and Nitrous Oxide (N2O) in a specific proportion, the patient was administered Nitrous Oxide (N2O) alone. Further, the investigation conducted by the respondent police has brought to light that cylinder No.287717 which was supplied by the the firm by name M/s.Falcon Air, Thoivalal Madhavalayam Extension Road, Nagercoil, Kanyakumari District, under delivery Note No.711, dated 04.02.2011 was filled with Nitrous Oxide (N2O) instead of Oxygen.



3. It is further found in the investigation that the revision petitioner herein who is the Assistant Surgeon attached to the Government Hospital, Kanyakumari District was in charge of the stores and he has failed to supervise properly. The cylinder bearing No.287717 meant for Oxygen was filled with Nitrous Oxide (N₂O) due to his negligence. After completion of the investigation, the prosecution has laid the First Information Report as against twelve accused. The revision petitioner herein is arrayed as 7th accused for making initial in the indent form to fill Nitrous Oxide (N₂O) in the cylinder meant for Oxygen.

4. The revision petitioner herein has filed a petition to discharge him from the prosecution on the ground that on the fateful day, he was off duty and he is no way connected with the mishap occurred on that day. Some of the entries found in the indent form were made by the store keeper (A-6) without his knowledge and he is not responsible for the said insertion. Further, the revision petitioner has pointed out that being a public servant and not removable from service without sanction of the Government, he cannot be prosecuted without previous sanction of the Government as per Section 197 Cr.P.C. Since the respondent has not obtained any sanction to prosecute him, the Court cannot take cognizance.

5. Further to buttress his submission, the learned counsel appearing for the petitioner would submit the order passed by the Government through G.O.(D)No.1216, Health and Family Welfare(I-2) Department, dated 14.11.2014 and would submit that the departmental enquiry was initiated by the Director of Medical Education by framing charges under Section 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, wherein the explanation given by him has been accepted by the Government and he had been exonerated from the charges.

6. Referring this Government order, the learned counsel appearing for the revision petitioner would submit that this order indicated two facts. First the revision petitioner is not guilty and second, he can be removed only by the Government and not by any Subordinate Authorities. In such circumstances, he would canvass that the protection under Section 197 Cr.P.C is very well applicable to the revision petitioner.

7. Per contra, the learned Additional Public Prosecutor has filed his counter and submitted that there is prima facie material available against this petitioner, who is arrayed as seventh accused. Admittedly he is in charge of stores. He has to supervise the indent and receipt of stores materials. The subject cylinder bearing No.287717 which was received by the store was supposed to be filled with Oxygen and the stores records also indicate that till 03.05.2010, it was used only as Oxygen cylinder. However on 19.01.2011 when it was sent for filling to Shivaji & Co, it has been sent to fill Nitrous Oxide (N₂O). The revision



petitioner herein ought to have shown due diligent, while intending for filling the cylinder. Having failed to do so, he is liable for gross negligence causing death.

8. Further pointing out the Tamil Nadu Services Manual Volume-II, which contains the special rules for Tamil Nadu Medical Services, the learned Additional Public Prosecutor would also submit that the revision petitioner who is in the rank of Junior Assistant Surgeon is appointed by the Director of Medical and Rural Health Services, Chennai and therefore can be removed by Director of Medical and Rural Health Services. Therefore, the protection under Section 197 Cr.P.C is not available to the revision petitioner.

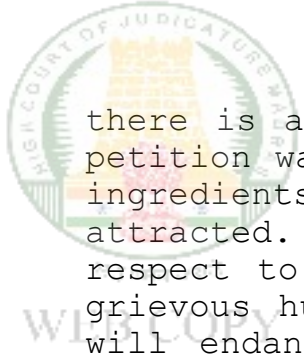
9. Heard the learned counsel appearing for the revision petitioner and the learned Additional Public Prosecutor appearing for the respondent. Records perused.

10. The learned counsel appearing for the revision petitioner would argue vehemently that the Drug Inspector, Tirunelveli immediately after the incident had conducted investigation and filed a complaint against the Gas Company for their act of negligence. The complaint filed against the Gas Company clearly indicates that the error was committed only at their end and not at the hospital. Pursuant to the complaint, the accused Company has pleaded guilty and paid fine amount.

11. In such circumstances, the revision petitioner herein cannot be held responsible for any of the charges alleged against him, more so, for willful negligence. However, the learned Additional Public Prosecutor appearing for the State would contend that neither the finding in the departmental enquiry nor the prosecution against the gas company by the Assistant Director of Drug Controller, will stand in the way of prosecuting the accused for his act of omission. In this regard, this Court is also in agreement with the said submission made by the learned Additional Public Prosecutor.

12. But then, a perusal of the records relied by the prosecution throws some light that this revision petitioner could not be any way responsible for the said incidence. For the said purpose, this Court scrutinized the indent form, empty cylinder delivery note, issued in the name of Shivaji & Co which has been struck off and M/s. Falcon Air name is written and the stock register maintained at MOT-II. In none of the documents, this Court would see that this revision petitioner has affixed his signature to show at his instance Nitrous Oxide (N₂O) was filled in the cylinder bearing No.287717.

13. In such circumstances, the prosecution cannot attribute knowledge about change of gas to this revision petitioner. He cannot even remotely held responsible for filling up of Nitrous Oxide (N₂O) in the cylinder meant for Oxygen. Further more, when



there is a evident to show that on the fateful day, this revision petitioner was not on duty and no way near the operation theatre, the ingredients of Sections 284, 338, 304-A IPC r/w. 304 IPC do not get attracted. While Section 284 IPC deals with negligent conduct with respect to poisonous substance, Section 338 IPC deals with causing grievous hurt to any person by doing rash and negligent act which will endanger human life or the personal safety of others. The materials relied by the prosecution even if found to be proved in toto, the necessary ingredients of knowledge or negligence could not be made out against this revision petitioner. Therefore, this Court allow the Criminal Revision Case. Since no purpose will be served in continuing the trial against this petitioner who is no way found responsible for the change of gas in the cylinder bearing No.287717.

14.As a result, this criminal revision petition case is allowed. The order dated 05.10.2017 passed in CrI.M.P.No.137 of 2015 in S.C.No.191 of 2015 by the Principal Assistant Sessions Judge, Kanyakumari division at Nagercoil is set aside. The revision petitioner/seventh accused is discharged from the criminal prosecution in S.C.No.191 of 2015. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CrI.side)

/True Copy/

Sub Assistant Registrar(CS-I)

To

1.The Principal Assistant Sessions Judge,
Kanyakumari District at Nagercoil.

2.The Inspector of Police,
Asaripallam, Police Station,
Nagercoil, Kanyakumari District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4.The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court, Madurai. **(2 Copies)**

+1CC to Mr.P.H.Manoj Pandian, Advocate, SR.No. 90545

CrI.R.C(MD) No.469 of 2018

12.10.2018

CP

ES/SKN/RSK/SAR 1/12.11.2018/4P/7C