

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1546 of 2017**

Arising Out of PS. Case No.-58 Year-2010 Thana- MANIYARI District- Muzaffarpur

Dr. Sanat Kumar Son of Late Ganeshi Bhagat, resident of Village- Kerma,
P.S.- Kurhni, District- Muzaffarpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Sanjeev Kumar Mishra, Mr. Jitendra Kumar Miss Rashmi, Advocates.
For the Respondent/s	:	Mr. Zeyaul Hoda, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

17-07-2019

Appellant, Dr. Sanat Kumar has been found guilty for an offence punishable under Section 304 IPC and sentenced to undergo RI for seven years as well as to pay fine appertaining to Rs. 25,000/- in default thereof, to undergo SI for three months, under Section 420 IPC and sentenced to undergo RI for three years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for one month, additionally with a further direction to run the sentences concurrently, vide judgment of conviction dated 08.05.2017 and order of sentence dated 09.05.2017 passed by 8th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 417/2011.

2. Prosecution case, in brief, as is evident from Fardbeyan of Nagina Pandit (PW 2) recorded on 25.04.2010 at about 6:10 PM at the clinic of Dr. Sanat Kumar named as styled



as 'Sewa Sadan' situated at village- Mornifas in front of the dead body of his son, Jitendra Pandit, divulging the fact that his son, Jitendra was suffering from hydrocil disease and accordingly, they both visited the clinic of Dr. Sanat who assured that he will get the hydrocil operated upon and for that, also disclosed fee of operation and also directed that the cost of medicines will be borne additionally by him on a disclosure that he got the relevant degree. Accordingly, he paid Rs. 1300/- as operation fee and also borne cost of medicines. Dr. Sanat Kumar performed hydrocil operation. In the evening, he directed to take away Jitendra to his house and during course of stay at his house, his condition deteriorated. On being informed, Dr. Sanat Kumar instructed to bring at his clinic. He began to administer medicine, even then, condition did not improve. Even at his request, he had not permitted to take the patient away for specialised treatment. At last, when the condition of patient became critical, then only, he allowed. Thereafter, he lifted his son on a tempo for SKMCH but during midst of way at Athgarha Ghat, Jitendra succumbed. Then dead body was taken back to the clinic of Dr. Sanat where police came, recorded his Fardbeyan, prepared inquest report, searched the clinic, seized articles having kept therein and for that, seizure list has been



prepared.

3. After registration of Mainyari PS Case No. 58/2010, investigation commenced and concluded by way of submission of charge-sheet facilitating the trial meeting with ultimate result, subject matter of the instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the CrPC is that of complete denial. It has further been pleaded that the deceased might have been operated upon somewhere else by someone else but, as the appellant has got land dispute with Rambabu Sahni whose wife was Mukhiya became instrumental in getting the dead body dumped at the clinic of the accused, and informed the police, managed the things and got this case filed and for that, oral as well as documentary evidence has been adduced.

5. In order to substantiate its case, the prosecution has examined altogether seven witnesses who are PW-1, Sonelal Pandit, PW-2, Nagina Pandit, PW-3, Nimbua Devi, PW-4, Pintu Pandit, PW-5, Amarnath Singh, PW-6, Dr. Vinod Kumar Mehta, PW-7, Alakh Narain Prasad. Side by side has also exhibited Ext-1, Inquest Report, Ext-1/1, Signature of PW2 on the Fardbeyan, Ext-1/2, Signature of PW-4 on the



inquest report, Ext-1/3, Signature of Incharge on Fardbeyan, Ext-1/4, Signature of SHO on marginal statement of Fardbeyan, Ext-1/5, Signature of I.O on inquest report, Ext-3, Signature of PW-5 on seizure list, Ext-3/1, Signature of Police Officer on seizure list, Ext-4, Postmortem report, Ext-4/1, Signature of Doctor, Ext-4/2, Signature of Doctor, Ext-5, Formal FIR.

6. Defence has also examined altogether five Dws who are DW-1, Sri Lalbabu Singh, DW-2, Suryadeo Thakur, DW-3, Sonelal Rai, DW-4, Manoj Kumar, DW-5, Md. Irfar. Side by side also exhibited Ext-A, Certificate having issued by National Institute of Health & Research, Bihar, Patna. Ext-B, C.C. of Khatiyani No. 1224/3240 & 1027/3247, Ext-C, C.C. of order-sheet of case no. 2/10-11, Ext-D, C.C. of order-sheet dated 28.10.2013 passed in Cr.Misc. No. 18746/2010, Ext-E, C.C. of order dated 08.09.2015 passed in M-1527/15.

7. While assailing the judgment of conviction and sentence, it has been submitted at the end of learned counsel for the appellant that the whole case of the prosecution stood as house of cards, therefore, the finding so recorded by the learned lower court neither is sustainable in the eye of law nor on the factual aspect. In order to buttress such plea, it has been submitted that the doctor who had conducted postmortem has



not been examined. On non examination of the doctor, postmortem report could not be taken into consideration and that being so, cause of death goes out of legal consideration. Then it has been submitted that PW-1 to PW-4 belong to the same family while admittedly, PW-5 is on inimical terms since before and in the aforesaid background, their evidence could not be relied upon, more particularly, when there happens to be absence on independent witness without any explanation irrespective of the fact that all the witnesses have admitted that at that very moment, there was assemblage of more than 50 persons. So, in its totality, the material available on the record did not justify the finding so recorded by the learned lower court.

8. On the other hand, learned APP while supporting the findings recorded by the learned lower court has submitted that after going through the judgment impugned, it is evident that evidence of all the witnesses along with niceties of the trial has properly been appreciated and further, considering the activity of the appellant as is evident from para-27 of the judgment impugned, he has rightly been sentenced as not only Jitendra Pandit became the victim rather brother-in-law of PW-5 also met with similar result at an earlier occasion and for that,



criminal proceeding was already pending since before. So submitted that the instant appeal lacks merit and is fit to be dismissed.

9. From the evidence of PW-6, Dr. Vinod Kumar Mehta, it is evident that he has been examined on account of non examination of Dr. Mumtaz as well as Dr. Shaligram Mandal, member of the board, who conducted postmortem over the dead body of deceased, Jitendra Pandit. It is further evident from his evidence that Dr. Mumtaz Ahmad was suffering from some sort of severe ailment and was unable to depose while Dr. Shaligram Mandal has retired and his whereabouts was not known. In the aforesaid background whether PW-6 was competent enough to depose, could be seen after going through Section 32 of the evidence Act and for better appreciation is quoted below:-

Section 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. -- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death. -- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in



cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

10. It is evident from the deposition of the PW-6 that no cross-examination has been at the end of the defence over the ailment of Dr. Mumtaz rather at para-6, it is evident that the same has been confined only with regard to Dr. Shaligram regarding whom it has been disclosed that after retirement his whereabouts is not known and in the aforesaid background certainly, there would be applicability of Section 32(1) of the Evidence Act and on account thereof, the evidence whatsoever been at his end would be admissible in the eye of law. That being so, what he deposed is to be seen. During his examination-in-chief he has stated that the postmortem was conducted over the dead body of Jitendra by a board of two doctors namely, Dr. Mumtaz Ahmad and Dr. Shaligram Mandal, exhibited handwriting of the postmortem report having been in the pen of Dr. Mumtaz Ahmad, signatures of both the doctors and further also narrated with regard to cause of death, cutting of the blood vessels on account of surgical interference over scrotum by an unskilled causing shock and hemorrhage. That



part of evidence is found unshaken. So from the evidence of PW-6, it has become crystal clear that the allegation of the prosecution with regard to operation of the hydrocil is found duly corroborated.

11. Now coming to the oral evidence, PW-1 is the cousin brother of PW-2, informant. He during his examination-in-chief has stated that he along with his brother (informant) had taken Jitendra to Dr. Sanat for treatment of hydrocil, who said nothing to worry. He will operate. He has demanded Rs. 1800/- as fee excluding cost of medicine which was paid. Operation was conducted on 23.11.2010. On 24.11.2010, condition of Jitendra deteriorated whereupon, Dr. Sanat was informant who directed them to bring him at the clinic. Then he began treatment. They requested that if he is unable to manage the patient, then allow them to take the patient to Bazar but, on one pretext or the other, delayed the matter and lastly, seeing the critical condition of Jitendra, allowed whereupon they lifted to SKMCH but, during midst of way, he died. Then thereafter, they returned back to the clinic of Dr. Sanat and kept the dead body. Police came, recorded Fardbeyan of his brother. Prepared inquest report over which he put his signature (carbon copy). Identified the accused.



12. During cross-examination, he has stated that he had put his signature over the aforesaid document alone, he is unable to say who had subsequently, signed over the same. In para-8, he has stated that at that very time 100-150 persons have assembled. Mukhiya of the Panchayat had not come. Sarpanch also had not come. The Panches and Ward members of the Panchayat were not present. At para-9, he has stated that he knew Dr. Sanat for the last 10-12 years. Earlier he was residing at Samastipur. He has got no animosity with Dr. Sanat. In para-10, he has stated that he happens to be cousin brother of the informant. In para-11, he has stated that Dr. Sanat had not prescribed any clinical examination. In para-12, he has stated that operation was done in the morning. Operation was done on 23.11.2010. He had received the money before operation. He had not issued any prescription. Before operation he had directed that he will take the operation fee. You will have to bear the extra expanses relating to purchase of medicine. Operation took place at 5:00 AM. In para-12, he has further stated that medicine was prescribed by him. No cash memo was issued therefor. At para-13, he has stated that at about 2:00 PM, they proceeded to Medical College. They have gone over auto-rickshaw. They have not visited to the clinic of any doctor. At



para-14, he has stated that who informed the police, he is not knowing. When police came, dead body was at the clinic of Dr. Sanat. In para-15, he has stated that they have demanded compensation from Dr. Sanat to a tune of Rs. 1,50,000/-which was not paid by Dr. Sanat. As he failed to pay, on account thereof, this case has been instituted. Then has denied the suggestion that it is not a fact that accused was absconding since before relating to a case having been instituted for an occurrence dated 21.4.2010 and so, the whole story propagated at their end happens to be false out of local politics in revengeful manner.

13. PW-2 is the informant who has deposed to the effect that his son, Jitendra Pandit (since deceased) was suffering from hydrocil whereupon, they have gone to the place of Dr. Sanat. His clinic lies one Kilometer away from his house. After examination, Dr. Sanat assured that he will operate and for that, he demanded Rs. 1800/- as fee. Further said that they will have to bear the cost of medicines. Had paid and then Dr. Sanat operated upon his son. After operation, his condition deteriorated as, blood began to ooze out. They again visited the place of Dr. Sanat who began to treat. Even thereafter, they requested that if the condition of the patient is not manageable then in that event, allow them to take the patient to Bazar. He



declined by saying whether you are the doctor or me. Saline was administered. Ultimately, his son began to gasp whereupon, Dr. Sanat directed to take the patient to Bazar and in a way to SKMCH, he died. Then thereafter, they carried the dead body to the clinic of Dr. Sanat, where police came, recorded his Fardbeyan (Exhibited), prepared inquest report, conducted raid, recovered itmes for which seizure list was prepared. Identified the accused. He had further stated that he was not knowing since before that Dr. Sanat had no medical degree. During cross-examination at para-7, he has shown the distance in between house of Dr. Sanat and he himself and in likewise manner, the distance to his clinic from his house. In para-9, he has stated that he had gone to the clinic of Dr. Sanat only once during course of present episode. He has further stated that because of the fact that Dr. Sanat had not issued any prescription on account thereof, he is unable to file any prescription having in the pen of Dr. Sanat. He had not given any cash-memo relating to purchase of medicines, so he is unable to file the same. Dr. Sanat had not issued any slip relating to acceptance of Rs. 1800/- as fees. In para-10, he has stated that his son had gone to his house on second day. While he was at his house, his condition deteriorated. He took the patient to SKMCH on a tempo but he



is unable to disclose the name of the driver/owner of the tempo. In para-11, he has stated that after death of Jitendra at Athgarha Ghat, they returned back and came to the clinic of Dr. Sanat and kept the dead body.. He is not remembering at the present moment names of the villagers who have assembled there. In para-12, he has stated that at that very time, Mukhiya, Sarpanch were not present. In para-13, he has stated that during course of Fardbeyan, he has stated that he carried his son over a tempo and when they reached at Athgarha Ghat, he died and then thereafter, returned back to the clinic of Dr. Sanat with dead body of his son. Then he denied the suggestion that no such thing was incorporated in the Fardbeyan. Then he denied the suggestion that Dr. Sanat had not examined the deceased nor he operated him. On account of some sort of undue pressure at the end of the Mukhiya and others, this false case has been instituted.

14. PW-3 is the mother of the deceased and during course of examination-in-chief she has reiterated the version of PWs-1 and 2. Also identified the accused in dock. Also stated that while deceased was being taken to SKMCH, he died in midst of way whereupon, his dead body was taken back to the clinic of Dr. Sanat and was kept there. During cross-



examination at para-8, she has stated that they have got no animosity since before with Dr. Sanat. In para-9, she has stated that at the time of operation, she was there. After operation at about 9:00 AM, she took her son to home. After 10:00 O'clock, his condition began to deteriorate and then he was taken back to the clinic of Dr. Sanat as per his instruction. In para-10, she has stated that seeing the condition of her son, she lost her mental equilibrium, so she is unable to disclose the subsequent event in detail. Then, she denied the suggestion that this case has been instituted motivately.

15. PW-4 is brother-in-law of the deceased. He has stated that after coming to know about the incident, he rushed from his village. Arrived at the clinic of Dr. Sanat where found the dead body of his brother-in-law, police was there since before. Identified his signature over inquest report having prepared at the end of police. During cross-examination, he has stated that he had not gone to the clinic of Dr. Sanat before 25.11.2010. Then has denied the suggestion that there was no clinic Dr. Sanat in the village. He further disclosed that on the same day, he received information regarding death of the deceased over mobile and then rushed.

16. PW-5 has stated that he knew Dr. Sanat as



well as family of deceased Jitendra Pandit who was operated upon by Dr. Sanat on account of suffering from hydrocil. Then thereafter his condition deteriorated. Dr. Sanat had treated subsequently even then his condition deteriorated and, lastly, he was allowed to be taken to a specialized hospital. While being taken to SKMCH, he died in midst of way. Then, thereafter, the dead body was taken back to the clinic of Dr. Sanat where police came. It has also been disclosed at his end that police had conducted raid at the clinic of Dr. Sanat and found different items as per seizure list and for that seizure list was prepared whereupon he had also put his signature (exhibited). Police had recorded his statement. He has further stated that Dr. Sanat happens to be a quack (Jhola-chhap) doctor without having any degree. Identified. During cross-examination he has admitted that Dr. Sanat is on litigating terms with his sister in a criminal prosecution which has been launched at the behest of his sister on account of death of his brother-in-law who was operated upon by the aforesaid Dr. Sanat at an earlier occasion, ultimately costing his life. It has also been admitted by him that he has deposed against the accused at an earlier occasion also in that very case. In para-13, he has stated that the statement of Nagina Pandit was not recorded in his presence. He has further stated



that conduction of raid, preparation of seizure list, the whole event was completed within two hours. Then has stated that he had met with Jitendra a day prior of his operation. Then has denied the suggestion that he has falsely deposed in the background of animosity.

17. PW-7 is the Investigating Officer. He has deposed that after registration of the case, he has been entrusted with the investigation (exhibited all the relevant documents). After taking investigation, first of all he visited the place of occurrence where he recorded further statement of the informant. Then inspected the place of occurrence, which happens to be the clinic of Dr. Sanat, 500 yards away from Kermabazar. Then has given topography of the house. Also located the room wherein Jitendra was operated upon. He has also found the board having affixed 'Seva Sadan', Dr. Sanat Kumar, Physiotherapist, Patna. He had recorded statement of the witnesses. Received supervision note, got the postmortem report and then, submitted charge-sheet under Section 304 and 420 of the IPC. During cross-examination at para-1, he has stated that the informant during his further statement has not stated that he was carrying his son to medical college and during midst of way he died. Then thereafter his dead body was taken back to the



clinic of Dr. Sanat. At the time of entrustment of investigation, the O/C had handed over fardbeyan of the informant, inquest report, seizure list, formal FIR. In para-2 he has stated that he had not mentioned during course of inspection about the P.O. in which village it lies. Then at paragraphs-3 and 4 there happens to be contradiction relating to the witnesses Sonelal (PW-1) and Nimbua Devi (PW-3) but surprisingly enough the attention of those PWs was not attracted during course of cross-examination and that being so, those parts are inadmissible in the eye of law as violative of Section 145 of the Evidence Act. In likewise manner, he has deposed that at para-42 of the Case Diary, he has mentioned names of 12 witnesses carrying conjoint statement and again in spite of non-examination of those witnesses, on a question of defence he has stated what was incorporated. Again violative of the principle of Evidence Act. At para-5 he has stated that place of occurrence lies at village-Mornifas. Then has denied the suggestion that he has investigated the case collusively.

18. The defence has examined DWs nos.1, 2, 3 and 4 to the effect that after coming to know about the death of Jitendra they had gone to the place of Jitendra where Mukhiya and her husband Ram Babu were present and at whose instance



the dead body was taken to the clinic of Dr. Sanat where police was informed by Mukhiya's husband who managed the whole event subsequently. During cross-examination all the witnesses had admitted that Dr. Sanat is a doctor who used to treat the patient. DW-2 at para-2 has stated that police had conducted raid at the clinic of Dr. Sanat and therefrom articles were seized. He has further admitted that at the time of operation of Jitendra, it was disclosed that some times operation was being conducted. He has further stated that he is not knowing whether Dr. Sanat has got license or not. DW-3 has stated at para-1 of the cross-examination that on account of failure of the operation, Jitendra died. He is unable to say for what he was operated upon. Dr. Sanat is not a fit doctor. DW-4 in para-1 of the cross-examination has stated that he is unable to say what kind of operation was done. Then said that Dr. Sanat had not treated him then corrected he has got no information. DW-5 is a formal witness who has exhibited one certificate issued by National Institute of Health Education and Research, Bihar, Patna but he failed to say whether the aforesaid institution had issued license for treatment nor exhibit-A suggests like so. It is further evident from other documentary evidence (exhibit-B, C,D and E) that happens to be a proof of litigation amongst Rambabu Sahani



along with Dr. Sanat Kumar, Lalbabu and Haricharan Prasad.
This Lalbabu is DW-1.

19. After having analytical approach of the evidences available on the record in consonance with the applicability of Section 32 of the Evidence Act, it is evident that evidence of PW-6 is admissible in the eye of law and that being so, the cause of death on account of surgical interference by an unskilled person is found duly substantiated. Furthermore, although during cross-examination of the witnesses, it has been suggested that due to presence of Rambabu Sahani this case has been instituted, has not been accepted by any of the PWs. Apart from this, the recovery of large number of items as substantiated by PW-5 as well as PW-78, I.O. is found not at all controverted at the end of appellant during course of cross-examination. Furthermore, there happens to be consistency amongst the PWs over the performance of operation at the end of the appellant, Dr. Sanat relating to hydrocil over deceased, Jitendra and which, on account of being unskilled ultimately cost life of the deceased. In spite of prevalence of enactment forbidding the quack (Jhola-chhap) doctors having the directive at the end of Hon'ble Apex Court, they survive and that happens to be the reason behind costing life of a human being by way of their



appearance pursuance impressing upon an illiterate poor peasant to surrender themselves at their hands and some times like the present one cost their life.

20. Before concluding, the relevant passage of the judgment in *Jacob Mathew vs. State of Punjab and Ors.* reported in (2005) 6 SCC 1 needs to be recapitulated while summing up the issued over medical negligence which is as follows:-

“ 48. Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors of "Errors, Medicine and the Law" (pp. 241-248), (recorded at the end of the book in the chapter titled - 'Conclusion') highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote :-

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity - in principle - from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is



likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (ibid, pp. 242-243)

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid, p. 245).

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid, p.246). A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid, p.247). While expectations from the



professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high - a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (ibid, p.248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society, (ibid, p. 248).

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

21. From the evidence as discussed herein above
is abundantly clear that the accused who was/is not at all



authorized to treat, even accepting Ext-A, is a physiotherapist indulged in such kind of activity knowingly, intentionally, on account thereof, it could not be a case under Section 304A IPC. That being so, the finding recorded by the learned lower court is affirmed. That being so, this appeal sans merit, accordingly, is dismissed. Appellant is under custody which he will remain till the date of saturation of sentence.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	21.07.2019
Transmission Date	21.07.2019

