

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL REVISION APPLICATION NO. 12 OF 2018
WITH
CRIMINAL APPLICATION NO. 991 OF 2018**

YOGESHEAR S/O JAYRAM KAMBLE

Age : 49 years, Occu: Labour,

R/o Ghodka, Taluka Loha, District Nanded.

... Applicant
(Orig. Accused)

Versus

THE STATE OF MAHARASHTRA

through Police Station, Daithana,

Taluka and District Parbhani.

(Copy to be served on P.P.

High Court of Bombay Bench

at Aurangabad)

... Respondent

.....

Mr. Kuldeep S. Kahalekar h/f Mr. N. S. Ghanekar, Advocate for the
Applicant.

Mr. R. V. Dasalkar, APP for Respondent-State.

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CORAM : V. K. JADHAV, J.

DATE : 15th APRIL, 2019

JUDGMENT :-

1. The applicant, who is the original accused in R.C.C. No.457 of 2008, has preferred this Criminal Revision Application against the judgment and order dated 02.01.2018 passed by the Sessions Judge, Parbhani in Criminal Appeal No.45 of 2012 confirming thereby the conviction of the accused under Section 33(2)(a) of the Maharashtra Medical Practitioners Act, 1961.

2. Brief facts giving rise to the present Criminal Revision Application are as follows:

a. On the basis of the report lodged by one Padminbai Digamber Kaldate, crime no. 48 of 2008 came to be registered against the applicant/accused. It has been alleged in the complaint that the informant is working as a maid servant. She was suffering from arthritis and though she had taken treatment, she could not get relief. She got information that one *maharaj* (the applicant herein) from village Pokharni is giving treatment for old ailments. Thus, she had visited village Pokharni to meet the said *maharaj* (the applicant) and also taken medicine. On 03.07.2008, she along with her friends had been to the place of the applicant at Pokharni. She was called inside. The applicant had examined her and as alleged by the informant Padminbai, the applicant outraged her modesty. The Investigating Officer has carried out investigation. He has visited the spot of incident and drawn spot panchanama Exhibit 30. At the time of drawing spot panchanama, the Investigation Officer has seized certain medicines which can only be prescribed by a registered medical practitioner. The Investigating Officer has recorded statement of the witnesses and after completion of investigation, submitted charge sheet against the accused.

b. The trial court has framed charge against the accused for the offences punishable under Sections 354, 419, 420 and 336 of IPC and Section 33(2)(a) of the Maharashtra Medical Practitioners Act, 1961 (for short, “the Act of 1961”). The Judicial Magistrate, First Class, Court No.8, Parbhani, by judgment and order dated 15.05.2012 in R.C.C. No. 457 of 2008, convicted the applicant/accused for the offences punishable under Sections 354, 419 and 420 of IPC and under Section 33(2)(a) of the Act of 1961 and directed to undergo the sentence as detailed in the order. Being aggrieved by the same, the applicant/accused preferred Criminal Appeal No. 45 of 2012. The learned Sessions Judge, Parbhani, by judgment and order dated 02.01.2018 in Criminal Appeal No. 45 of 2012, has partly allowed the appeal, set aside the order of conviction and the sentence passed thereunder for the offence punishable under Sections 354, 419 and 420 of IPC and acquitted the applicant/accused of the aforesaid offences. However, learned Sessions Judge confirmed the order of conviction passed by the trial court under Section 33(2)(a) of the Act of 1961. Hence this Criminal Revision Application.

3. Learned counsel for the applicant submits that there is an inordinate delay of two days in filing the FIR without any explanation. Learned counsel submits that the present Criminal Revision Application has been preferred only to the extent of the confirmation order passed by the learned Sessions Judge in the appeal to the extent of the conviction recorded against the applicant under Section 33(2)(a) of the Act of 1961. Learned counsel submits that the description of the said medicine alleged to have been seized from the possession of the applicant has not been mentioned either in the *panchnama* or in the *muddemal* list. The prosecutrix Padminbai has not deposed about handing over of the medicine to the Investigating Officer at the time of lodging of the complaint or subsequent thereto. Learned counsel submits that the Investigating Officer has not sealed the said medicines allegedly seized from the possession of the applicant/accused and also not sent the said medicines or sample thereof to the Government lab. The Investigating Officer has sent those medicines to one Medical Officer attached to the Primary Health Center, Daithana. The prosecution has examined PW 7-Dr. Farookh Sharif Maniyar, who happened to the said Medical Officer attached to the Primary Health Center, Daithana. Learned counsel submits that the

evidence of PW 7 is inconsistent and vague. He has failed to describe the medicines sent to him by the Investigating Officer alongwith a letter. The said letter has also not been produced on record, nor the prosecution has examined the said constable who had taken the said medicines to this witness. Learned counsel submits that even the certificate Exhibit 48 issued by PW 7 Dr. Farookh Maniyar only refers the medicines brought before him as allopathic medicine and the medicines can be prescribed by only a registered medical practitioner and not by any private unregistered practitioner. PW 7 Dr. Farookh Maniyar has not given details of the said medicines in the certificate Exhibit 48. Learned counsel submits that both the courts below have not considered this material aspect of the case and convicted the accused for the offence punishable under Section 33(2)(a) of the Act of 1961. Learned counsel submits that in terms of the provisions of Proviso (iv) to Section 2(2) of the Act of 1961, a person who, without personal gain furnishes medical treatment or does domestic administration of family remedies, shall not be deemed to practise medicine for the purpose of Section 33 of the Act of 1961. The judgment and order of conviction under Section 33(2)(a) of the Act of 1961 by the courts below is thus liable to be quashed and set

aside and the applicant/accused may be acquitted of the aforesaid offence under the Act of 1961.

4. Learned APP submits that the evidence of prosecution witnesses is consistent, reliable and trustworthy. During the course of investigation, the Investigating Officer has seized the medicines from the possession of the applicant/accused and the same has also not been denied by the applicant/accused. The Investigating Officer has sent the said medicines for examination to the Medical Officer attached to the Primary Health Center, Daithana. The prosecution has examined the said Medical Officer PW 7 Dr. Farookh Maniyar who has categorically opined that the medicines brought to him were belonging to allopathic category and those medicines can only be prescribed by a registered medical practitioner and not by a private unregistered medical practitioner. He has issued the medical certificate Exhibit 48 and further identified the medicines contained in Articles "A" and "D" which were shown to him before the court. Both the courts below have rightly recorded conviction under Section 33(2)(a) of the Act of 1961 and sentenced the applicant/accused to suffer two years rigorous imprisonment and pay fine of Rs.2,000/-, in default of payment of fine to suffer simple

imprisonment for three months. There is no substance in this Criminal Revision Application and it is liable to be dismissed.

5. I have carefully gone through the prosecution evidence. PW Padminbai mainly deposed about outraging of her modesty by the applicant/accused when she had been to his place at village Pokharni along with her friends to seek relief from arthritis she is suffering from. PW 1 Padminbai has nowhere deposed that the applicant/accused had prescribed some medicines to her and also treated her at the time of her so-called medical examination. She has deposed that she had taken two days time for lodging the complaint.

6. PW 2 Gangadhar Wagh, who happened to be the *panch* witness, had accompanied the police on 05.07.2008 i.e. two days after the alleged incident in Korde's mansion at village Pokharni. According to him, the police seized the cash amount from the applicant and also the medicines in the bags. He has thus supported the contents of the spot *panchanama* Exhibit 30 and the seizure *panchanama* Exhibit 29. He has further explained that the seized property/medicine bags are as per Articles "A", "B" and "C".

On careful perusal of the House/Property Search & Seizure Form Exhibit 29, I find reference to the seizure of cash amount of Rs.1,04,390/- and further there is a reference about four fertilizer bags. It has been mentioned in the panchanama that out of those four fertilizer bags, three bags are containing medicine packets and also the bottles and the remaining fertilizer bag is containing empty medicine packets and empty bottles. The spot panchanama Exhibit 30 also refers the same contents as per the seizure panchanama Exhibit 29. It appears that the said medicines have not been described in the panchanama Exhibit 29 and Exhibit 30 respectively. There is no reference in the seizure panchanama Exhibit 29 that the Investigating Officer has taken care to seal the said medicines. Even the panch witness PW 2 Gangadhar has also not stated about sealing of the said medicines. Though PW 1 Padminbai has not deposed that she had given certain medicines, as delivered to her by the applicant/accused at the time of her medical examination, to the police along with the complaint, even then, the panchanama Exhibit 43 is drawn to that effect. Even in the said panchanama Exhibit 43, there is no description of the medicines. It has been simply mentioned that ten tablets in one paper bag came to be seized.

7. PW 6 A.S.I. Shriram Rathod has carried out investigation in this crime. According to him, after registration of the crime, investigation has been handed over to him and accordingly he has visited the spot, drawn the spot panchanama and seized the cash amount and also four bags of medicines. He has deposed about the contents of panchanama Exhibit 29 and 30 respectively. He has further stated that PW 1 Padminbai had produced the medicines before him in police station which was given to her by the applicant/accused and the same has been seized by effecting seizure panchanama Exhibit 43. It has been suggested to him that he has prepared false panchanama Exhibits 29, 30 and 43.

8. I have carefully gone through the evidence of PW 7 Dr. Farookh Maniyar. It is pertinent that he has neither deposed about the description of medicines, nor mentioned in detail the aforesaid medicines in the certificate Exhibit 48. He has stated in cross examination that he can not take the name of the constable who has brought to him the medicines and the request letter. The said request letter has also not been produced before the court. He further admitted that the police did not provide him the medicine

list with letter. He has answered to a specific question that he cannot tell the name of medicine brought to him for examination. According to him, the police had brought the medicine in one bag. He cannot tell whether the bag was sealed or not. He has further admitted that the medicine was not examined with the help of instrument, equipment or any other process.

9. It thus appears that on the basis of the vague evidence about the said medicines, both the courts below have recorded conviction of the accused for the offence punishable under Section 33(2)(a) of the Act of 1961 and sentenced him to suffer two years rigorous imprisonment and pay fine of Rs.2,000/-, in default of payment of fine to suffer simple imprisonment for three months. The prosecution has utterly failed to prove that the medicines, as per the *panchnama*, came to be seized from the possession of the applicant/accused. Admittedly, the applicant/accused was doing his so-called activity in one Korde's mansion at village Pokharni. The applicant/accused was not the owner of the said house. It is not clear as to wherefrom those fertilizer bags came to be seized by the police during the house search/spot *panchnama*. The prosecution has not examined any single witness or independent

witness to substantiate the charge levelled against the accused under Section 33(2)(a) of the Act of 1961 to the effect that the applicant/accused has practiced allopathy and given medicines which can only be given by a registered medical practitioner to the patients to whom he has examined. The Investigation Officer has not sealed the said medicines. It is also not clear as to which medicine has been sent to PW 7 Dr. Farookh Maniyar. Even the list of medicines is not sent along with the letter. Even the letter issued by the Investigating Officer has also not been produced before the court. Consequently, nobody, including PW 7 Dr. Farookh Maniyar is knowing about the description of the said medicines and the brand names etc. of the said medicines. In the backdrop of such evidence, the impugned judgment and order of conviction passed by the courts below cannot be sustained. Though the applicant has preferred this Criminal Revision Application against the judgment and order of conviction passed by the courts below, this Court has declined to suspend the sentence and as a result thereof, the applicant is in jail. In view of the above, I proceed to pass the following order :

ORDER

- I. The Criminal Revision Application is hereby allowed.

II. The impugned judgment and order dated 15.05.2012 passed by the Judicial Magistrate, First Class, Court No.8, Parbhani in Regular Criminal Case No. 457 of 2008 is hereby quashed and set aside to the extent of conviction for the offence punishable under Section 33(2)(a) of the Maharashtra Medical Practitioners Act, 1961 and the sentence to suffer two years rigorous imprisonment and pay fine of Rs.2,000/-, in default of payment of fine to suffer simple imprisonment for three months.

III. The judgment and order dated 02.01.2018 passed by the Sessions Judge, Parbhani in Criminal Appeal No. 45 of 2012 confirming thereby the conviction under Section 33(2)(a) of the Maharashtra Medical Practitioners Act, 1961, is hereby quashed and set aside.

IV. The applicant/accused Yogeshwar s/o Jairam Kamble is hereby acquitted of the offence punishable under Section 33(2)(a) of the Maharashtra Medical Practitioners Act, 1961 vide Regular Criminal Case No. 457 of 2008.

V. The fine amount, if paid, shall be refunded to the applicant/accused forthwith.

VI. The applicant/accused, if in jail, shall be released forthwith.

VII. The Criminal Revision Application No. 12 of 2018 is accordingly disposed of.

VIII. In view of disposal of Criminal Revision Application, the Criminal Application No. 991 of 2018 also stands disposed of.

(V. K. JADHAV, J.)

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