

(1)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 160 OF 2016

Lalasaheb S/o Namdevrao Shinde
Age: 42 Years, Occ.Agri,
R/o Hoal, Tq. Kaij. Dist. Beed

...Applicant

VERSUS

1. The State of Maharashtra
Through
Public Prosecutor High Court
Bench at Aurangabad
 2. Dr. Anil S/o Omprakash Bhutada
Age: 42 years, Occ:Medical Practitioner,
R/o Houshing Society, Prashant Nagar,
Ambajogai,
Tq. Ambajogai, Dist. Beed
 3. Manisha W/o Anil Bhutada
Age: 39 years, Occu: Medical Practitioner,
R/o Houshing Society, Prashant Nagar, Ambajogai,
Tq. Ambajogai, Dist. Beed
 4. Shrinivas S/o Marotrao Reddy,
Age: 43 years, Occu: Medical Practitioner,
R/o Housing Society, Prashant Nagar,
Ambajogai,
Tq. Ambajogai, Dist. Beed
- ..Respondents

Mr P.M. Shinde, Advocate for applicant;
Mrs G.L. Deshpande, A.P.P. for respondent no.1;
Mr K.C. Sant, Advocate for respondent No.2 & 3;
Mr S.V. Munde, Advocate for respondent no.4;

CORAM : PRASANNA B. VARALE,J.
DATE : 15th April, 2019

ORDER :

By the present revision application, the petitioner – original complainant challenges the correctness, legality and propriety of common judgment and order dated 5th May 2016, rendered by learned Additional Sessions Judge, Ambajogai, whereby –

- a) Criminal Appeal No.57 of 2014, preferred by respondent no.2 – original accused no.1 against conviction came to be allowed;
- b) Criminal Appeal No.58 of 2014 preferred by petitioner – original complainant against acquittal of respondent nos.3 and 4 – original accused came to be dismissed and
- (c) Criminal Appeal No.59 of 2014 preferred by petitioner – original complainant seeking enhancement of sentence imposed against respondent no.1 – original accused no.1 came to be dismissed.

2. Facts giving rise to the present revision application, in a nutshell, are as under :-

Smt. Latabai, wife of petitioner had been to the hospital run

(3)

by respondent nos.2 to 4 for treatment on 13th May 2006 and 15th May 2006, during her pregnancy. She was asked to re-visit the hospital on 22nd May, 2006. Respondent nos.2 to 4 had given 12th November 2006 to be the expected date of delivery. Sonography was carried out and Smt. Latabai was told that there was twins in her womb. She was assured by the accused that all facilities required pre and post pregnancy were available in the hospital. After carrying out sonography she was told that opening of womb was large and as such surgery was advised. On 9th September 2006 wife of the petitioner suffered non-stoppable bleeding and ultimately on the same day gave birth to twins. After her delivery, since some facilities were not available in the hospital run by the accused, newly born babies were required to be shifted to the hospital of Dr. Awad. On account of premature delivery the born twins were very weak. Female baby was kept in incubator and male baby could not survive. The female baby's condition being critical she was shifted to the hospital of Dr. Maindarkar at Latur, where she breathed last after 26 days. Respondents – accused had given false information to the petitioner and his wife that their hospital was well equipped. However, on account of inadequate facilities in the hospital of the respondents, the babies died. Even

(4)

the respondents-accused did not provide complete medical case papers to her. In such manner, the accused cheated the wife of the petitioner and thereby caused loss of Rs.1,50,000/- towards her treatment. The petitioner, husband of Smt. Latabai filed complaint to police alleging cheating by inducement to deliver the amount for treatment and negligence of the respondents – accused. However, it appears that since the police did not take cognizance of the said complaint, the petitioner filed complaint against respondent nos.2 to 4 – accused nos.1 to 3. Learned Magistrate ordered investigation under Section 156 (3) of the Code of Criminal Procedure. After completion of the investigation, charge-sheet came to be filed against respondents-accused. The charge was framed against the accused at Exh.23 for offence punishable under Sections 304 (A) and 420 read with Section 34 of the Indian Penal Code. The respondents – accused abjured the guilt and their defence was that the petitioner and his wife had tried to extract money from them and on their refusal to pay money, they have been involved falsely in the case.

3. At the trial, five witnesses came to be examined on behalf of the prosecution. After conclusion of the trial, learned Magistrate,

(5)

by judgment and order dated 19th November 2014 found respondent no.2 – accused no.1 guilty of the offence punishable under Sections 304 (A) and 420 of the Indian Penal Code. The learned Magistrate convicted accused no.1 for offence punishable under Section 304 (A) of the Indian Penal Code and sentenced him to undergo simple imprisonment for two years and to pay a fine of Rs.20,000/-, in default to suffer further simple imprisonment for six months. The learned Magistrate further convicted accused no.1 for offence punishable under Section 420 of the Indian Penal Code and sentenced him to undergo simple imprisonment for three years and to pay a fine of Rs.25,000/-, in default to suffer further simple imprisonment for six months. The substantive sentences were ordered to run concurrently. However, the learned Magistrate acquitted respondent nos.3 and 4 – accused nos.2 and 3 of the offences punishable under Sections 304 (A) and 420 read with Section 34 of the Indian Penal Code.

4. Aggrieved by the judgment and order of conviction rendered by the learned Magistrate, respondent no.2 – accused no.1 preferred Criminal Appeal No.57 of 2014, petitioner – original complainant filed Criminal Appeal No.59 of 2014 for

(6)

enhancement of sentence awarded to respondent no.2 – accused no.1 and Criminal Appeal No.58 of 2014 against acquittal of respondent nos.3 & 4 – accused nos.2 & 3 before learned Additional Sessions Judge, Ambajogai.

5. After hearing the parties, learned Additional Sessions Judge, Ambajogai decided aforesaid three appeals by common judgment and order dated 5th May 2016. Learned Additional Sessions Judge allowed Criminal Appeal No.57 of 2014 preferred by respondent no.2 – accused no.1 against conviction; set aside the conviction and sentence and acquitted him of the offences with which he was convicted and dismissed Criminal Appeal No.58 of 2014 against acquittal of respondent nos.3 & 4 and Criminal Appeal No.59 of 2014 seeking enhancement of sentence awarded to respondent no.2 – accused no.1. Thus, the present revision application by the petitioner-original complainant.

6. Mr Shinde, learned Counsel appearing on behalf of the petitioner urged that the learned Additional Sessions Judge failed to appreciate the evidence on record in its proper perspective. He further urged that the learned Additional Sessions Judge ought to

(7)

have considered that the prosecution has proved the offence against respondents – accused beyond reasonable doubt by adducing sufficient, cogent and convincing evidence of as many as five witnesses, who have corroborated testimonies of each other. The findings recorded by the learned Additional Sessions Judge for acquittal of respondent no.2 – accused no.1 are based on illegal presumptions, assumptions conjectures and surmises and as such, are perverse. On the contrary, the finding of conviction of accused no.1 recorded by learned Magistrate was based on evidence and, therefore, learned Additional Sessions Judge ought not to have interfered it with so lightly. He further urged that the learned Additional Sessions Judge wrongly allowed the appeal of respondent no.2 – accused no.1 on the ground that the Investigating Officer as well as learned Magistrate had not referred the matter to the expert Doctors or committee for seeking their expert opinion on the point of negligence, in the light of the decision rendered by the Honourable the Apex Court in the matter of Martin F. D'Souza vs. Mohd. Ishfaq, reported in AIR 2009 S.C. 2049. Thus, he prayed to allow the revision application and convict the respondents – accused for the offences with which they were charged and tried.

7. Mrs G.L. Deshpande, learned Addl. Public Prosecutor appearing on behalf of respondent no.1 – State argued in support of the revision application and prayed that the application may be allowed and the respondents – accused may be convicted.

8. Mr K.C. Sant, learned Counsel appearing on behalf of respondents no.2 & 3 – accused nos.1 & 2 vehemently urged that the appreciation of evidence as has been done by the learned Additional Sessions Judge is legal and proper. There is no perversity or infirmity in the findings arrived at by the learned Additional Sessions Judge. He further urged that the view taken by the learned Additional Sessions Judge is based on the evidence and other material on record. He urged that there was inordinate and unexplained gross delay of 8 to 9 months caused in filing the complaint and as such an adverse inference needs to be drawn. The evidence adduced on behalf of the prosecution is not consistent, cogent and reliable. He urged that the Investigating Officer as well as learned Magistrate had not referred the matter to the expert Doctors or committee for seeking their expert opinion on the point of negligence, in the light of the decision rendered by the

(9)

Honourable the Apex Court in the matter of Martin F. D'Souza vs. Mohd. Ishfaq, reported in AIR 2009 S.C. 2049. This is a glaring lacuna in the prosecution. The scope of revisional jurisdiction is very limited and it is not permissible to re-appreciate the evidence while exercising revisional jurisdiction. The findings recorded by the learned Additional Sessions Judge are legal, proper and based on evidence and thus do not warrant interference at the hands of this Court. He, therefore, prayed to dismiss the revision by confirming acquittal of respondent nos.2 & 3 – accused no.1 & 2.

9. Mr S.V. Munde, learned Counsel appearing on behalf of respondent no.4 – accused no.3 urged that the order of acquittal rendered by the learned Magistrate and confirmed by learned Additional Sessions Judge is legal, proper and sustainable. The acquittal of respondent no.4 rendered by the Courts below is based on proper appreciation of the evidence and thus needs no interference in exercise of revisional jurisdiction. The prosecution has utterly failed to prove the offence against respondent no.4 beyond reasonable doubt. There is no perversity in appreciation of the evidence by the Courts below. Thus, he prayed to dismiss the revision application and confirm the acquittal of respondent no.4 –

accused no.3.

10. Learned Counsel appearing on behalf of the respondents – accused placed heavy reliance on the following decisions rendered by the Honourable the Apex Court and this Court :-

- a) Dr. Suresh Gupta vs. Govt. of N.C.T. of Delhi and anr., AIR 2004 Supreme Court 4091;
- b) Jacob Mathew vs. State of Punjab and another, AIR 2005 Supreme Court 3180 (1);
- c) Martin F. D’Souza vs. Mohd. Ishfaq, AIR 2009 Supreme Court 2049;
- d) Prasanna Sudhakar Rao Deshmukh (Dr.) & ors. Vs. State of Maharashtra & anr., 2009 (3) Bom. C.R. (Cri.) 572.

11. Mr Munde, learned Counsel appearing on behalf of respondent no.4 has placed on record a copy of Government Resolution dated 26th March, 2010, issued by Public Health Department, which deals with constitution of a Committee to investigate whether during treatment there was negligence or not. In the said Government Resolution the observations and directions issued by the Honourable the Supreme Court in para 117 of the

decision in the matter of Martin F. D'Souza (supra) are reproduced.

12. Learned Counsel appearing on behalf of the respondents – accused urged that since there was failure of compliance of the directions issued in para 117 of the decision in the matter of Martin F. D'Souza (supra) by the investigating agency, the entire trial gets vitiated. The learned Counsel further urged that since there is no cogent and convincing evidence on record to connect the respondents – accused with the offences in question, the finding of acquittal rendered by the learned Additional Sessions Judge is legal, proper and sustainable in law. Thus, they prayed to dismiss the present revision application.

13. Upon hearing the learned Counsel for the respective parties and on perusal of the records it becomes clear that the petitioner has alleged that due to rash and negligent act of the respondents – accused his twins had died. Indisputably, respondents – accused are Medical Practitioners and run Reddy Hospital at Ambajogai. Before examining whether the appreciation of evidence as has been done by the Courts below is legal and proper or perverse, or there is infirmity in the appreciation, and keeping in mind the scope of

revisional jurisdiction, I feel it appropriate to refer to the observations/directions issued by the Honourable the Apex Court in the decision rendered in the matter of Martin F. D'Souza (supra) and the procedure laid down in the Government Resolution dated 26th March 2010, issued based on such directions. In para 117 of the said decision the Honourable the Apex Court has clearly observed that whenever a complaint is received against a doctor or hospital by the Consumer For a (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a *prima facie* case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. The Courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists. The police officials should not arrest or harass doctors unless the facts clearly come within the parameters laid down in 2005 AIR SCW

3685, otherwise the policemen will themselves have to face legal action.

It appears that based on the aforesaid directions of the Honourable the Apex Court, the Government of Maharashtra in Public Health Department has issued Resolution dated 26th March, 2010. Indisputably, in the instant case, the investigating officer has clearly admitted at the fag end of his cross-examination that he had not sought any expert's opinion in the present matter. In view of the aforesaid directions and the Government Resolution, expert's opinion was *sine qua non*. Thus, for failure of the investigating officer to comply with basic mandatory procedure, vitiated the entire trial against the respondents-accused. The learned Additional Sessions Judge, therefore, rightly arrived at conclusion at the end of para 11 of the judgment rendered by him that in absence of expert's opinion the learned Magistrate formed opinion about medical negligence on the part of convicted accused – respondent no.2 herein. In para 50 of the said decision, the Honourable the Apex Court has held that in a case of medical negligence the negligence of doctor must be gross negligence amounting to recklessness. Applying the ratio to the facts of the

case at the hand and analyzing the material on record does not prove that the negligence of respondents -accused was gross negligence amounting to recklessness. Thus, the respondents – accused cannot be held guilty of offence punishable under Section 304-A of the Indian Penal Code and the learned Additional Sessions Judge rightly acquitted respondent no.2 and maintained acquittal of respondent nos.3 and 4.

14. In the decision of Dr. Suresh Gupta (supra), the Honourable the Apex Court has held that when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as “criminal”. It can be termed “criminal” only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient’s safety and which is found to have arisen from gross ignorance or gross negligence. It is further held by the Honourable the Apex Court that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. In para 26 of the said decision the Honourable Apex Court has held that to convict a doctor the prosecution has to come

out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal case. It is thus held that the Courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

15. If the ratio laid down by the Honourable the Apex Court is applied to the facts of the case at hand and evidence and the said Government Resolution is read conjointly, I have no hesitation to hold that the prosecution has miserably failed to prove the offence punishable under Section 304 (A) of the Indian Penal Code against the respondents.

16. The finding arrived at para 18 of the decision rendered by the learned Additional Sessions Judge that it cannot be said that by not conducting pre-delivery cesarean respondents-accused have

(16)

acted rashly and negligently, is based on evidence. At para 19 of the judgment the learned Additional Sessions Judge rightly held that the learned Magistrate had shifted negative burden on accused persons holding that mode of treatment provided by them is not brought on record to prove that they had acted in good faith. In fact, when they were charge-sheeted by the prosecution for acting in rash and negligent manner and causing death of twins of Lata then burden lies on prosecution to prove its case beyond doubt and no such negative burden can be shifted on the accused. At the end of para 19 of the judgment the learned Additional Sessions Judge rightly held that the accused had given sufficient explanation to show their innocence but the learned Magistrate had not considered the same appropriately.

17. So far as the ground of delay in lodging the complaint is concerned, the learned Additional Sessions Judge has observed at para 20 of the judgment that the incident of delivery of babies of Lata had taken place in September, 2006 and complaint regarding rash and negligent act on the part of the accused is filed on 16th April 2007. So there is considerable delay caused in filing complaint and the same is not explained. Learned Additional

Sessions Judge, therefore, rightly observed that though it is true that Lata Shinde had delivered twins, which died subsequently and on account thereof she may be under shock, but the complaint is not filed by her but by her husband Lalasaheb who had not stepped into the witness box to substantiate the allegations of medical negligence levelled against accused persons. Therefore, possibility of filing complaint afterthought with a view to gain something improperly cannot be ruled out, as suggested to Lata Shinde during her cross-examination.

18. So far as offence punishable under Section 420 of the Indian Penal Code is concerned, the learned Additional Sessions Judge rightly observed at para 21 of the judgment that incurring expenses for medical treatment of Lata and her twins does not amount to cheating on the part of the accused persons. The accused are medical practitioners by profession and supposed to charge for treatment and facilities provided to Lata. Merely because her twins could not survive that does not mean accused cheated her and induced to bear the medical charges. Thus, the acquittal of respondents-accused rendered by learned Additional Sessions Judge for offence punishable under Section 420 of the Indian

Penal Code being justified is sustainable in law.

19. I have examined the correctness and legality of the findings arrived at and conclusions drawn by the learned Additional Sessions Judge keeping in mind the trite position of law that in a revision by complainant against acquittal interference is not permissible unless infirmity is found in the judgment. Having considered the position on record, I am of the view that this is not a fit case for causing interference in the well reasoned judgment of acquittal rendered by the learned Additional Sessions Judge.

20. In the light of what has been stated above, I am of the considered view that the appreciation of evidence as has been done by the Courts below for rendering acquittal of the respondents-accused is legal and proper. There is no perversity in the appreciation of evidence. The findings of acquittal arrived at by both the Courts below are based on the evidence and other material on record and thus are sustainable in law. The case law cited on behalf of the respondents, referred supra, applies on all fours to the case at hand. Thus, no interference is warranted in the judgment and order of acquittal of the respondents – accused

(19)

rendered by the learned Additional Sessions Judge.

21. In the result, Criminal Revision Application fails and accordingly stands dismissed.

(PRASANNA B. VARALE)
JUDGE

amj