



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 151 OF 2003

Dr. Sou. Sultana Md. Kamran Khan,
Age : 45 years, Occu. : Medical Practitioner,
R/o. Sambhajinagar, Khadgaon Road,
Latur.

... Appellant.
(Orig. Accused No.2)

Versus

1. The State of Maharashtra
2. Baburao Bhujangrao Kamble,
Age : 45 years, Occu. : Service,
R/o. Khadgaon Road, Latur,
Tq. and Dist. Latur.

... Respondents.
(Orig. Complainant)

...
Mr. P. R. Katneshwarkar, Senior Advocate i/b. Mr. G. R. Syed,
Advocate for Appellant.

Mr. K. K. Naik, APP for Respondent – State.

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 3rd SEPTEMBER, 2024

PRONOUNCED ON : 10th SEPTEMBER, 2024

JUDGMENT :

1. The correctness, legality and maintainability of judgment and order of conviction passed by learned IInd Additional Sessions Judge, Latur dated 31.01.2003 in Sessions Case No.76 of 2002, is under question in instant appeal.

FACTS GIVING RISE TO SESSION'S TRIAL ARE AS UNDER

2. Deceased Sumanbai wife of informant PW3 Babu and mother of PW2 Archana was said to be three months pregnant. On 30.05.1998, Sumanbai visited appellant's hospital i.e. while informant was on duty and PW2 Archana had been to school. After returning from school, PW2 Archana also went to the hospital of appellant and there she met her aunt Mangalbai Kamble and Swamibai a neighbour. According to prosecution, Sumanbai underwent medical termination of pregnancy and she was discharged, but even after returning home, her condition did not improve and therefore initially taken to Dr. Maya Kulkarni and from there referred to civil hospital, Latur where while undergoing treatment, she expired. Therefore, PW3 Babu lodged report at Exh.26 against present appellant.

3. On the strength of which, PW7 P.S.I. Juktse registered crime and investigation was carried out by PW8 P.I. Rupnar and finally appellants were charge-sheeted for commission of offence under sections 304-A, 314, 201 r/w section 34 of Indian Penal Code (IPC) and section 5 of the Medical Termination of Pregnancy Act, 1971 r/w section 34 of IPC.

4. At trial, prosecution in support of its charge and case,

examined as many as 8 witnesses and sought reliance of FIR and PM report etc. Defence denied to lead any evidence.

On appreciation of oral and documentary evidence, learned trial Judge reached to a finding that appellant no.2 was guilty of commission of offence under sections 304-A and 314 of IPC.

Feeling aggrieved by the above, instant appeal has been preferred.

SUM AND SUBSTANCE OF EVIDENCE ON RECORD

5. **PW1** Gunderao, pancha to inquest identified panchanama at Exh.23.

PW2 Archana, daughter of deceased Sumanbai, deposed that, when she returned from school, her mother was in the hospital and so she went there. She saw appellant and her husband wearing hand-gloves, entering the room and after one hour, her mother was brought out of the room in unconscious condition and after being brought home, she complained of stomach pain. On 01.06.1998, her mother was taken to Dr. Maya Kulkarni and thereafter to Government Hospital, Latur, where she was operated, but she died due to termination of pregnancy.

PW3 Babu, husband testified that, on 31.05.1998, his wife complained of stomach pain and informed him that she got pregnancy terminated. On 02.06.1998, when he returned from duty, he learnt that his wife was operated at Government Civil Hospital, Latur, but she expired.

PW4 Mangal, sister-in-law deposed that, pregnancy of deceased was terminated in the hospital of appellant. After reaching home, Sumanbai complained of stomach pain and therefore, again taken to appellant, where she was given injection. Thereafter, Sumanbai was taken to Government Hospital and was operated, but she died while undergoing treatment.

PW5 Dr. Shivaji Bhise is the Medical Officer, who operated Sumanbai on 02.06.1998. He deposed that, patient died due to perforation peritonitis with septicemic shock.

PW6 Bhanudas, cousin of deceased Sumanbai also stated that, deceased was taken to civil hospital, there she underwent surgery, but she succumbed to death on 02.06.1998.

PW7 Ashok and **PW8** Shivaji are the Investigating Officers.

SUBMISSIONS

On behalf of Appellant :-

6. Criticizing the findings and impugned judgment, learned Senior Counsel submitted that, here, prosecution had miserably failed to bring home the charges. According to him, none of the essential ingredients for attracting charge under sections 304-A or 314 of IPC were available in the prosecution evidence, but still learned trial court held the charges proved without assigning sound and legally acceptable reasons. He pointed out that, charge is of causing death by negligence in treatment, however, according to him, there is no iota of evidence or reliable piece of evidence to show that present appellant no.2, who is held guilty, to have provided any sort of treatment to deceased Sumanbai. He pointed out that, at the first count, there is no evidence on behalf of prosecution in support of conception of pregnancy of deceased Sumanbai so as to undergo MTP. He pointed out that, except oral evidence of daughter of deceased, there is no independent, cogent or reliable documentary evidence in support of case of prosecution that deceased Sumanbai was taken to the hospital of appellant for any treatment. According to him, there is nothing on behalf of prosecution to establish very pregnancy of Sumanbai and regarding she visiting appellant for getting abortion done. According to him, a neighbouring lady namely Swamibai, who

allegedly took her to the hospital, is not examined by prosecution. Thus, according to him, at the threshold, there is no foundation to the accusation about Sumanbai being brought to the appellant for any sort of treatment.

7. He further submitted that, on the contrary prosecution's own evidence suggest that Sumanbai was taken to a private female doctor and from there taken to civil hospital, Latur and there she was treated as well as operated and at such hospital Sumanbai breathed her last. Thus, according to him, with such evidence coming on record from prosecution evidence, impleading present appellant for any offence is a fallacy on the part of prosecution.

8. Inviting attention of the court through the testimonies of PW2 Archana daughter and PW3 Babu informant husband of deceased, he submitted that, they have mere hearsay information of deceased being taken to appellant, but no medical papers are gathered by investigating machinery in support of the prosecution case that Sumanbai was taken for any procedure to the appellants.

9. Learned Senior Counsel also took this court through the testimony of PW5 Dr. Shivaji Bhise and would submit that his evidence suggest that deceased was operated at civil hospital, but

for what purpose and on what complaint, is not demonstrated by placing any medical papers on record. Thus, according to him, except mere words of Medical Officer, there is nothing to show that pregnancy of Sumanbai was previously aborted by present appellant. He pointed out that, even cause of death is opined due to septicemic shock and that too while deceased was admitted and treated in civil hospital till she breathed her last. He also pointed out that, surprisingly, Government Medical Authorities have not issued any medical notes of alleged history at the time of admission or any clinical notes of post surgery at Government Hospital. He also questioned the credibility of PW5 Dr. Shivaji Bhise by posing a question that this medical expert was not only party to the treatment and operation of Sumanbai, but even he himself conducted autopsy, issued opinion and was also further party to the so called experts committee constituted by Civil Surgeon. He pointed out that, other treating doctors, who examined Sumanbai and Dr. Warade, who joined this witness in conducting surgery as well as in providing post operative care and treatment, are not examined. Therefore, he seriously questions the prosecution version blaming appellant for causing death due to medical negligence.

10. Resultantly, in the light of above material, learned Senior Counsel, criticized the findings as well as judgment to be

erroneous and in absence of legally acceptable evidence.

Finally in support of relief of allowing appeal, he seeks reliance on following rulings :-

- (i) State of Maharashtra v. Ghanshyam and Ors.,
2022 All.M.R.(Cri.) 718;
- (ii) State of Maharashtra v. Baban Lahanu Gangurde and Ors.,
2020 (4) Mh.L.J. (Cri.) 486.
- (iii) State of Maharashtra v. Shivaji Shankar Ghodekar and Anr.,
2018 All.M.R. (Cri.) 2784.
- (iv) Nanjundappa & Anr. v. State of Karnataka,
2022 AIR (SC) 2374.

On behalf of Prosecution :-

11. In answer to above, learned APP submitted that, there is overwhelming evidence that deceased Sumanbai was treated and operated by appellant. That, deceased herself reported her daughter and her husband regarding termination of pregnancy at appellant's hospital, but her condition never improved. That, there was medical negligence on their part, according to learned APP, appellant no.2 was not qualified to perform any procedure. That, daughter PW2 Archana had deposed about seeing appellant entering the room, wearing hand-gloves, which itself is indicative of the fact that pregnancy of Sumanbai was terminated. That, thereafter, Sumanbai's condition deteriorated and was required to be taken at higher center at Latur. That, PW5 Dr.Bhise, a Medical

Officer, who examined and operated Sumanbai, informed PW3 Babu that there were holes to the intestine. That, there was evidence of termination of medical pregnancy in the hospital of appellant. Only because of the same, condition of deceased deteriorated and she succumbed to the same. Appellant no.2 was solely proved to be responsible and was therefore, according to learned APP, rightly convicted by learned trial court and so he prays to dismiss the appeal for want of merits.

ANALYSIS

12. In nutshell, prosecution version is that, deceased Sumanbai visited hospital of appellant, situated in front of her house, for termination of pregnancy. On 30.05.1998, there was MTP by present appellant. According to prosecution, there was utter negligence in conducting the procedure, raising health complications and finally Sumanbai succumbed to the same. Hence, the charges.

13. Sifted the evidence meticulously. It is noticed that at the outset, there is no full-proof evidence in the form of any test reports either pathological or radiological suggesting Sumanbai to be pregnant. Daughter and husband of deceased Sumanbai i.e. PW2 Archana and PW3 Babu, both claimed to have learnt from deceased

that, she had been to the hospital and got her pregnancy terminated. The neighbour Swamibai, who allegedly took her to the hospital, is not examined for the best reasons known to the prosecution. No medical papers from the so called hospital of appellant are seized by investigating machinery to establish visit of Sumanbai to the appellant's hospital. Consequently, there is nothing to demonstrate that Sumanbai visited appellant's hospital and underwent any procedure on 30.05.1998.

14. It is further emerging from the testimony of PW2 Archana daughter that after returning from school, when she visited the hospital, she had merely seen both accused entering a room, wearing hand-gloves and her mother being brought out of the room after one and half hour, and thereafter, even discharged and brought home. According to daughter, her mother complained of pain in stomach. PW3 Babu informant husband also claims to have learnt about termination of pregnancy and merely speaks of asking his wife to take medicines. He left the house for work purpose on 01.06.1998 and returned on 02.06.1998 and on such day, he learnt that his wife was referred to Government Hospital, Latur and so he went there. There he claims that, he learnt from Medical Officer that his wife was operated. Even, PW5 Dr. Bhise Medical Officer, who conducted operation, has deposed that

Sumanbai was admitted and operated in Government Civil Hospital on 02.06.1998. Therefore, what is emanating is that there is alleged visit of Sumanbai to the hospital of appellant on 30.05.1998. Thereafter, operative procedure was done at Government civil hospital, Latur on 02.06.1998 i.e. after three to four days. Surprisingly, as pointed out by learned Senior Counsel neither case papers of civil hospital at the time of admission carrying any previous history nor the medical papers regarding treatment and surgery conducted at civil hospital, are finding place in the evidence of prosecution. Resultantly, there is force in the submission of learned Senior Counsel that there is no iota of evidence about any medical procedure done by appellant's hospital and even no case papers of even Government Hospital, Latur are on record to form any opinion or to fix any responsibility.

15. Here, crucial evidence is that of PW5 Dr. Bhise, who is examined at Exh.33. His testimony is that, Sumanbai was admitted in civil hospital, Latur on 01.06.1998 at 7:30 p.m. with history of MTP two days back at private hospital, but as stated above, noting to that extent in spite of it being Government Civil Hospital does not seem to have been drawn so as to accept above version of this Medical Officer. Further, according to him, there was pain in abdomen and complaint of not passing motion since two days, but

there is no supporting medical papers or noting to that extent also. According to this witness, patient was examined by Dr. Dhele and he gave her treatment, but neither Dr. Dhele is examined nor papers of treatment allegedly given by him, are gathered by investigating machinery. Though this witness claims that ultrasound examination was done by one Dr. Jadhav, neither said doctor Jadhav nor ultrasound reports and x-ray films are gathered and placed on record, which could have thrown light on the internal medical condition of Sumanbai at the time of her admission in civil hospital i.e. before she was operated at civil hospital on 02.06.1998. It is common knowledge that, prior to planned surgery, certain tests are required to be conducted to ascertain fitness of the patient to undergo surgery, but surprisingly papers or reports to that extent, are also not handed by civil hospital or by Investigating Officer. Such seems to be the sorry state of affairs at the District Civil Hospital. It is pertinent to note that, in the evidence of PW5 Dr. Bhise, more particularly in paragraph no.2 testified that, during initial examination, general condition of patient was moderate, mildly febrile, pulse was 100 and respiratory and cardiovascular systems were normal. His such testimony itself clearly indicates that, Sumanbai was under care and treatment of civil hospital, Latur, there were no serious complaint rather condition of Sumanbai was normal and moderate.

16. PW5 Dr. Bhise further deposed that, on examination of genitals, uterus was noticed to be bulky and therefore, with this finding the diagnosis of MTP with pelvic peritonitis was noted and necessary investigations were carried out, like ultrasonography or x-ray abdomen. But, even reports of such tests are not placed on record in support of such findings. Therefore, except oral evidence of PW5 Dr. Bhise, there is no supportive evidence. It is further surprising that Sumanbai was shown to be subjected to examination by even senior gynecologist, Civil Surgeon and R.M.O. and same diagnosis was claimed to be confirmed, but none of them are examined to corroborate testimony of PW5 Dr. Bhise. Consequently, here, there is no independent corroboration to the testimony of PW5 Dr. Bhise, who admittedly and apparently not only conducting surgery, but also proceeded to conduct post mortem and even acted as an expert in a committee constituted to answer the police queries. It is clearly emerging that, Sumanbai was operated in civil hospital, Latur on 02.06.1998 by PW5 Dr. Bhise and one Dr. Warad, who is also not examined and it is on that date in the night Sumanbai has succumbed.

17. It is also pertinent to note that, if at all deceased Sumanbai underwent any MTP as is claimed by the prosecution,

she has survived from 30.05.1998 till being treated and further operated at civil hospital.

18. Therefore, under such circumstances, present appellant cannot be solely held responsible for medical negligence, more particularly, when there is no foundation or supportive evidence about any procedure being conducted at the hospital of appellant.

19. Here, charge is for commission of offence under section 304-A of IPC, which is inserted by way of amendment to IPC in 1870 and the same reads as under :-

“304-A. Causing death by negligence -

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

20. The essential ingredients for attracting section 304-A of IPC could be summarized as under :-

*“Firstly, death of individual,
Secondly, death as a result of rash and negligent act.”*

21. Law is fairly settled that, in case of medical negligence, to attract section 304-A of IPC, it has to be established that there is gross negligence and such negligence is the probable consequence

resulting death, thereby inviting criminality. Error in judgment of doctor or minor negligence is not sufficient to attract criminality. There are catena of judgments on the point of medical negligence in the cases like *Bolam v. Friern Hospital Management Committee*; MANU/QB/0487/1957; *Dr. Suresh Gupta v. Govt. Of N.C.T. Of Delhi & Anr.* (2004) 6 SCC 422; *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1.

22. Here, at the cost of repetition, it is noticed that, there is no iota of evidence to show that, *firstly*, Sumanbai was at the outset pregnant; *secondly*, she had visited hospital of appellant; *thirdly*, she had undergone any medical procedure of termination of her pregnancy and any act on her part which consequently had sole nexus to death due to septicemic shock. Therefore, here, evidence of prosecution is apparently weak or falling short on the count of essential ingredients for attracting either the charge of 304-A or 314 of IPC.

23. Perused the impugned judgment under challenge. Learned trial Judge though tried husband and wife, on same set of evidence seems to have acquitted husband, but held wife guilty of above charge without assigning proper or sound reasons for holding her alone guilty, even when there was no reliable or legally

acceptable evidence that she was rash or medically negligent and solely responsible for death of Sumanbai. Therefore, it is a fit case for interference at the hands of this court. Resultantly, appellant succeeds and so I proceed to pass the following order :-

ORDER

- I) Criminal Appeal stands allowed.
- II) The conviction awarded to appellant - Dr. Sou. Sultana Md. Kamran Khan in Sessions Case No.76 of 2002 by learned IInd Additional Sessions Judge, on 31.01.2003 for the offence punishable under section 5 of the Medical Termination of Pregnancy Act, 1971 and sections 304-A and 314 of Indian Penal Code, stands quashed and set aside.
- III) The appellant stands acquitted of the offence punishable under section 5 of the Medical Termination of Pregnancy Act, 1971 and sections 304-A and 314 of Indian Penal Code.
- IV) The bail bonds of the appellant stands cancelled.
- V) The fine amount deposited, if any, be refunded to the appellants after the statutory period.

(ABHAY S. WAGHWASE, J.)