



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

3 CRIMINAL WRIT PETITION NO. 1801 OF 2024

Amar S/o Wamanrao Deshmukh
Age: 35 years, Occu. Business,
R/o. Civil Line, Washim,
Taluka and District Washim

... **PETITIONER**
(Ori. Complainant)

VERSUS

1. The State of Maharashtra,
2. Dr. Prasanna S/o Sudhakar Deshmukh,
Age : 48 years, Occu: Medical Practitioner,
R/o Chhatrapati Sambhajinagar
(Aurangabad), At present Medcover Hospital,
Near Chistiya Police Chowki,
N-6, Cidco, Chhatrapati Sambhaj inagar,
Taluka & Dist. Chhatrapati Sambhajinagar.
3. Madhav S/o Trimbak Chavan,
Age- 41 years, Occu: Service,
R/o Sai Hospital, Chh. Saurbhajinagar
At present C/o Dr. Prasanna Sudhakar
Deshmukh, Medcover Hospital,
Near Chistp Police Chowki,
N-6, Cidco, Chhatrapati Sambhajinagar,
Taluka & Dist. Chhatrapati Sambhajinagar.
4. Sunita Bansi Bhalerao,
Age 35 years, Occu: Service as Nurse,
R/o C/o Dr. Prasanna Sudhakar
Deshmukh, Medcover Hospital,
Near Chistiya Police Chowki,
N -6, Cidco, Chhatrapati Sambhajinagar,
Taluka & Dist. Chhatrapati Sambhajinagar. ... **RESPONDENTS**
(Resp. Nos. 2 to 4 are Orig. accused)

....
Mr. R. M. Deshmukh, Advocate for the Petitioner
Mr. V. M. Jaware, APP for Respondent No.1
Mr. R. R. Deshmukh and Mr. R. B. Deshmukh, Advocates for
Respondent Nos. 2 to 4

....

CORAM : Y. G. KHOBRAGADE, J.

DATE : 25.11.2024

ORAL JUDGMENT :-

1. Leave granted to invoke Section 482 of the Code of Criminal Procedure with Article 227 of the Constitution of India for challenging the impugned order dated 21.06.2024, passed by the learned Sessions Judge, Chhatrapati Sambhajinagar in Criminal Revision No. 88 of 2024, arising out of order dated 17.02.2024 passed below Exh.149 in Summary Criminal Case No. 543 of 2009 by the learned J.M.F.C., Court No.12, Aurangabad.

2. Rule. Rule made returnable forthwith. With the consent of the parties, the matter is heard finally at the stage of admission.

3. The learned Counsel for the Petitioner/informant canvassed in vehemence that the Petitioner lodged a report with Kranti Chowk Police Station on 05.12.2008 against Respondent No. 2

on the ground that Respondent No.2 is a medical practitioner running a private hospital with the help of his staff members including the staff nurse. On 13.09.2008, the informant was admitted his sister Shweta Wamanrao Deshmukh, who was suffering from Falciparum Malaria and her Paraside Index was -1. The Petitioner's sister was admitted in the hospital of Respondent No. 2 at about 9.45 p.m.. After medical examination, the Respondent No. 2 doctor prescribed injection Larinate, tablet Gopan, capsule Doxy drugs. However, the Petitioner's sister refused to consume the medicine. At about 10.45 p.m., the Respondent No. 2 Medical Practitioner, directed to give one DNS plus injection, Quinine 600 mg, to her. The Respondent No. 3, the Assistant Medical Practitioner to the Respondent No. 2 made entry to that effect in the treatment card. Thereafter, the Petitioner had brought all medicine from the Pharmacy and handed over to the Respondent No. 2. As per the directions of Respondent No. 2, the nurse i.e. Respondent No. 4 directly injected Quinine 600 m.g. injection in the vain of the patient Shweta in presence of the Petitioner. Subsequently, within a span of time, the condition of Shweta (patient) was deteriorated. Therefore, the Petitioner called the Respondent No. 2 Medical Officer, but he was reluctant to attend

the patient. Thereafter, the Petitioner informed the Respondent No.2 about critical condition of his sister and She died in the hospital at about 1.45 p.m..

4. The learned Counsel for the Petitioner further canvassed that the Petitioner and his grandfather was insisted the Respondent No. 2 for conducting Postmortem on dead body of the deceased Shweta, but the Respondent No. 2 refused the same on ground that he would issue the death certificate and there is no necessity for conducting the Postmortem. According to the Petitioner cause of death of his sister shown due to to Cerebral Malaria. Therefore, the Petitioner and his relatives took dead body of Shweta at their village and performed last ritual. Thereafter, the Petitioner asked the Respondent No. 2 for medical papers about the treatment given to the deceased Sheweta, but the Respondent No.2 declined to provide the same. However, lastly, the Respondent No. 2 handed over the medical papers and thereafter he lodged a report with the Kranti Chowk Police Station, on which basis Crime No. I-555 of 2008 registered against the respondent Nos. 2 to 4 for the offences punishable under Sections 304 A, 201 read with Section 34 of I.P.C.

5. After due investigation, the charge-sheet came to be filed as against Respondent Nos. 2 to 4. The learned trial Court framed the charge as against the Respondents Nos. 2 to 4, for the offence punishable under Sections 304 A 201 read with Section 34 of I.P.C.

6. The learned Counsel for the Petitioner canvassed that the prosecution examined 8 witnesses. However, as per the evidence of the prosecution witnesses it is sufficient to frame the charge for the offences punishable Section 304, 201 read with Section 34 of I.P.C.. Therefore, the Special Public Prosecutor submitted Exh. 149 an application for alteration and framing of charge for the offence punishable under Sections 304, 201 read with Section 34 of I.P.C.. However, on 08.12.2023, the learned J.M.F.C. passed an order below Exh. 149 and rejected said application without considering the evidence available on record, which constitute an offence under Section 304 of I.P.C. Therefore, the Petitioner challenged said order in Criminal Revision Application No. 88 of 2024 before the learned Sessions Court. However, on 21.06.2024, the learned Sessions Judge passed the impugned order without considering the evidence of the prosecution witnesses. Therefore, impugned order as well as the

order dated 08.12.2023 passed below Exh.149, are illegal and bad in law and liable to be quashed and set aside.

7. The learned counsel appearing for the petitioner further canvassed that the trial Court out to have hold that, the treatment card of the patient itself proves about negligence on the part of Respondent No. 2 while giving directions to his subordinate Respondent No. 4 Staff Nurse about administering injection Quinine 600 mg., stat and procedure adopted while administering injection of Quinine is fatal. The Expert Committee Members also confirmed about negligence on part of the Respondent no. 2. However, the learned trial Court fail to consider and passed the impugned order dated 17.02.2024 below Exh.149 only ground of application is vague and silent on material ingredient.

8. The learned Counsel for the Petitioner further canvassed that, on 18.10.2024, the Special Prosecutor filed Exh.173 an application for keeping the matter in abeyance because of pendency of present Petition, however, said application came to be rejected. Therefore, again on 18.10.2024, the Prosecutor filed an application for issuance of witness summons, namely, (i) Sugraji Deorao Jadhav

and (ii) Sanjay Pandurang Narwade, who are witness to the seizure panchanama of certain documents from the Hospital of Respondent No.2, but said application also rejected holding that seizure panchanamas dated 05.12.2018 and 06.12.2018 are already admitted by the defence and said panchanamas are exhibited at Exh.167 and 168.

9. The learned Counsel for the Petitioner placed reliance on the case of ***Alister Anthony Pareira Vs. State of Maharashtra, 2012 AIR SCW 930***, and referred paragraph No.39, which reads as under:-

“39. The scheme of Sections 279, 304A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life. The question is whether indictment of an accused under Section 304 Part II and Section 338 IPC can co-exist in a case of single rash or negligent act. We think it can. We do not think that two charges are mutually destructive. If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused then not only that the punishment is for the act but also for the resulting homicide and a case may fall within Section 299 or Section 300 depending upon the mental state of the accused viz., as to whether the act was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission

or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.”

10. He further relied on the case of ***Shahaja @ Shahajan Ismail Mohd. Shaikh, Vs. State of Maharashtra, The Hon'ble Supreme Court Criminal Appeal No.239 of 2017, decided on 14.07.2022.*** He referred paragraph 39 of the said judgment, which read as under:-

“39. From the aforesaid it is evident that the learned public prosecutor who conducted the prosecution before the trial court did not take the pains to bring on record the substantive evidence of the aforesaid two witnesses i.e. the PW-4 and PW-10 respdy, the fact of the accused having made a statement that he had concealed the hammer and he was inclined to show that spot, even though it has been recorded in the panchnama (Exh. 22) that the accused made such a statement. The learned public prosecutor does not appear to have realized that there should be substantive evidence on record in this regard and that the panchnama can be used only to corroborate the evidence of the panch and not as a substantive piece of evidence. It appears that the panchnamas (Exh.22 and 23 respdy) were shown to the panch (PW-4) and he admitted his signature and, therefore, it was exhibited at Exhs.22 and 23 respectively. The examination-in-chief of the PW-4 does not show that he was read over the panchnama before it was exhibited. This Court has time and again impressed upon the necessity of reading over the panchnama which can be used as a piece of corroborative evidence. In spite of this, it is regrettable that the learned trial judge did not take the pains to see that the panchnama was read over to the panch before it was exhibited. A panchnama which can be used only to

corroborate the panch has to be read over to the panch and only thereafter it can be exhibited. If the panch has omitted to state something which is found in the panchnama, then after reading over the panchnama the panch has to be asked whether that portion of the panchnama is correct or not and whatever reply he gives has to be recorded. If he replies in the affirmative, then only that portion of the panchnama can be read into evidence to corroborate the substantive evidence of the panch. If he replies in the negative, then that part of the panchnama cannot be read in evidence for want of substantive evidence on record. It is, therefore, necessary that care is taken by the public prosecutor who conducts the trial that such a procedure is followed while examining the panch at the trial. It is also necessary that the learned trial judge also sees that the panchnama is read over the panch and thereafter the panchnama is exhibited after following the procedure as indicated above.”

11. Per contra, the learned APP canvassed that the prosecution issued notice under Section 294 of Cr.P.C., the defence already admitted seizure panchanamas dated 05.12.2018 and 06.12.2018. However, for sake of brevity, the prosecution prayed for issuance of summons to prove seizure Panchnamas because other two witnesses are not traceable. Therefore, the learned trial Court could have issue the witness summons.

12. Per contra, the learned Counsel for Respondent Nos. 2 to 4 supported findings of both the Courts below while rejecting the application for alteration/modification of chart as well as rejection of

prayer for issuance of witness summons through the Police Commissioner, Aurangabad because the witnesses (i) Prasad Baburao Deshmukh and (ii) Ganesh Gangaram Choukekar were not found at their given addresses. However, the Respondents/accused admitted both the seizure panchanamas, therefore, there is no need to examine said witness.

13. It is further canvassed that, Section 304A of I.P.C., provides for offence for causing death by negligence. As contains of oral report death of petitioner's sister caused due to Medical negligence on the part of Respondent Nos. 2 to 4. Accordingly, the learned trial Court framed the charge and the prosecution examined in all total 8 witnesses. The evidence of prosecution witnesses does not appears that death of deceased Shweta is culpable homicide provided under Section 299 of I.P.C. Whereas the offence punishable under Section 304 provides punishment for causing death with an intention to cause death or causing such bodily injury which is likely to cause death. Therefore, evidence of the prosecution witnesses are not sufficient to prove essential ingredients to frame the charge punishable under Section 304 of I.P.C., hence, prayed for dismissal of the Petition.

14. On face of record, it *prima-facie* appears that on 13.09.2008 at about 9.45 p.m., the Petitioner admitted his sister Shweta Wamanrao Deshmukh in Hospital of the Respondent No.2 due to Falciparum Malaria. Her Paraside Index was -1. After medically examination, the Respondent No.2 prescribed Injection Larinate, Tablet Gopan, Capsule Doxy. But the patient refused to consume said medicine. Thereafter, at about 10.45 p.m., the Respondent No.2 Medical Practitioner, suggested to provide DNS plus injection, Quinine 600 mg.. The Respondent no. 3 taken entry in patient card on direction of the Respondent no. 2. No doubt, the Petitioner informant brought the medicine from the Pharmacy and handed over to Respondent No.2. Thereafter the Respondent No.4 Staff Nurse injected said injection on direction of Respondent No.2. However, physical health of the patient was deteriorated and she died during the hospitalization at about 1.45 p.m.

15. Needless to say that the Petitioner informant lodged a report, on which basis Crime No.555 of 2008 registered in Kranti Chowk Police Station, against the present Respondent Nos. 2 to 4 for the offence punishable under Sections 304A, 201 read with Section

34 of I.P.C. After due investigation, the Investigating Officer filed charge-sheet against Respondent Nos. 2 to 4. The learned trial Court framed the charge against Respondent Nos. 2 to 4 for the offence punishable under Section 304A, 201 read with Section 34 of I.P.C., which they pleaded not guilty and claimed for trial.

16. In order to prove the charge, the prosecution examined in all total 8 witnesses. Thereafter, the prosecution filed Exh.149 an application for framing of charge under Section 304, 201 read with 34 of I.P.C. On 17.02.2024, the learned J.M.F.C., passed an order and rejected said application. The learned trial court observed that the prosecution has not shown any evidence of the prosecution witnesses to constitution of offence punishable under Section 304 of I.P.C. The learned trial Court further observed that depositions of none of witness shows that act of the respondents/accused are intentional or they have done any such act with the knowndge which is main ingredient to attract the offence punishable under Section 304 of I.P.C.

17. It is not out of place to mention here that, the Petitioner approached before the Sessions Court under Section 397 of the

Cr.P.C., and challenged the order passed by the Trial Court. On 21.06.2024, the learned Sessions Court passed the impugned order and dismissed the Revision Petition holding that, PW1 to PW6 as well as documentary evidence i.e. Report submitted by the members of Highly Qualified Expert Committee appears about directly injecting Quinine injection in vein of the patient and that would be the negligence on the part of the Respondent No.4 Staff Nurse as well as the Respondent No.2 Medical Practitioner. However, evidence of the prosecution witness does reveals that the Respondent Nos. 2 and 4 injected said injection in vein of the deceased with an intention to cause her death. So also, the Respondent Nos. 2 and 4 were not having knowledge that due to injecting the injection of Quinine in vein, the life of the patient would be in dangerous. Therefore, the essential ingredients of Part-I and Part-II of Section 304 of I.P.C., does fulfilled.

18. In order to frame the charge punishable under Section 304 of I.P.C., the prosecution requires to led sufficient evidence to fulfill the essential criteria of "culpable homicide" provided under Section 299 of I.P.C, which reads as under:-

“299. Culpable homicide.— Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

19. In order to constitute an offence under Section 299 of I.P.C., there must be an act (A) with the intention of causing death, (B) with the intention of causing such bodily injury as is likely to cause death, (C) with the Knowledge that the said act is likely to cause death. "Intend" and "Knowledge" is the essential ingredients of an offence under Section 299, which postulates the existence of positive mental attitude and this mental condition is the special *mens rea* necessary for the offence. This view is supported by the ratio laid down by the Hon'ble Apex Court in the case of ***Jayaraj Vs. State of Tamil Nadu, AIR 1976 SC 1519.***

20. Section 304 I.P.C. provides punishment for culpable homicide not amounting to murder, which provides as under:-

“304. Punishment for culpable homicide not amounting to murder.— Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause

death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

21. On plain reading of Section 304, it clearly depicts that, if the death of deceased is caused and the case is covered by any of the five exceptions of Section 300 of I.P.C., then such culpable homicide is not amounting to murder. Five exceptions to Section 300 of I.P.C. provides as under:-

“Exception 1.— *When culpable homicide is not murder.— Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:—*

(First) — That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. (Secondly)— That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. (Thirdly)— That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Exception 2.— *Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any*

intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.— *Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*

Exception 4.— *Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.*

Exception 5.— *Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”*

22. I have gone through evidence of the prosecution witnesses PW 1 to 8 which have been produced by the Petitioner at page No.73 (Annexure E-collectively). However, the evidence of the none of the witnesses appears that the Respondent Nos. 2 to 4 knowingly and intentionally injected Quinine injection in vein of the patient or the accused Nos. 2 to 4 were having previous knowledge about causing of death of the patient, if the injection directly injected in veins of the patient.

23. Section 304A of I.P.C. provides as under:-

“304A. 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.”

24. Since evidence of the prosecution witnesses does not fulfill essential ingredients of culpable homicide provided under Section 299 of I.P.C., or five exceptions provided under Section 300 of I.P.C. Therefore, there is no necessity for modification or alteration of charge to the offence under Section 304 from charge framed u/s 304A of I.P.C.. Therefore, I do not find the the impugned order as well as order passed by the learned trial court is illegal, bad, in law. Therefore, present Petition is liable to be dismissed.

25. Second question arises about rejection of application for issuance of witness summons to the witnesses of panchanamas is illegal and bad in law. In this regard, needless to mention here that, the learned Counsel for the Petitioner and the learned Counsel for the Respondents accused Nos. 2 to 4 have not disputed about exhibition of seizure panchanama dated 05.12.2008 (Exh. 167 & 168) in respect

of seizure of documents from the hospital of Respondent No.2. On 18.10.2024, the learned trial Court passed an order below Exh.175 and held that both the panchanamas are already admitted in evidence and already exhibited at Exh.167 and 168 respectively as both seizure panchmanas are admitted by the defence counsel. Therefore, examination of hose witnesses is futile efforts and rejected the prayer for issuance of service summons. Not only this but the prosecution has again filed Exh.174 an application for issuance of witness summons, but the learned trial Court passed an order holding that those panchanamas for which Prasad Baburao Deshmukh and Ganesh Gangaram Choukekar are stood witnesses are already been exhibited. Therefore, there is no ground for re-issuance of witness summons through the Commissioner of Police as prayed by the prosecution.

26. Section 294 of Cr.P.C. provides as under:-

“294. No formal proof of certain documents.

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed :Provided that the Court may, in its discretion, require such signature to be proved.”

27. Section 58 of the Evidence Act provides that the fact need not to be proved, if the other side admitted the said fact.

28. In the case of ***Jacob Mathew Vs. State of Punjab, AIR 2005 SC 3180***, the Hon’ble Supreme Court in para 26, held thus:-

“26. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.”

29. In the case in hand, the prosecution already issued notice under Section 294 and called upon the Respondent Nos. 2 to 4/accused persons to admit or deny certain documents. During the course of trial, the Respondents 2 to 4 admitted both the panchanamas dated 05.12.2008 and 06.12.2008. It well settled principal of law that, admitted fact need not be proved under Section 58 of the Evidence Act. Since both seizure panchanamas are admitted by the Respondents 2 to 4 and already exhibited, therefore, examination witnesses and issuance of witness summons to other witnesses who are witnesses to the seizure panchanama is not necessary and proved documents during course of trial can read in evidence, which can be considered while passing the final order.

30. In view of above, I do not find any substance in the present Petition. Hence, it is dismissed. Accordingly, Rule discharged.

31. The prayer for further extension of interim relief is hereby rejected because trial of the matter will be halted and no fruitful purpose will be served.

[Y. G. KHOBRAGADE, J.]

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