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Original Article

Absence from Duty Without Sanctioned Leave, Leading to Death of Patient: Not a Case of Criminal Medical Negligence: Bombay High Court

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ABSTRACT

Division Bench of Bombay High Court relying a case pronounced by Hon'ble SC, and observed that this would enable us to hold that on the three parameters of Jacob Mathews vs. State of Punjab and another, 2005 ALL MR (Cri) 2567 (SC) namely: duty to take care, breach of duty and consequential damage, this case fails to attract any criminal offence, much less offence of culpable homicide not amounting to murder. Division Bench of Bombay High Court clarified that in recording such a finding, we have only considered the criminal dimension of the case insofar as it relates to the petitioner and we have not dealt with civil dimension of the case involving such issues as of damages, civil liability, departmental action and so on, in any manner. Bench further observed that it is, thus, apparent that there is absolutely no material available on record showing, prima facie, that offence of culpable homicide not amounting to murder punishable under Section 304 of I.P.C. is constituted against the present petitioner. Continuation of these proceedings against the present petitioner, in the present circumstances, would clearly be an abuse of process of law, which cannot be permitted. In the instant case, considering the allegations as levelled against the petitioner, of his absence in the NICU at the relevant time, would, even if everything as mentioned in the charge-sheet was presumed to be true, at the most, may lay a blame of dereliction of duty at his doorstep, for which Departmental action can always be taken by the authorities, as has been reported to have been done in the case of Professor and Head of Department of Paediatrics, who was absent without sanctioned leave on the fateful day. The Division Bench of Bombay High Court concluded that the material in the charge-sheet was certainly not indicative of the petitioner having prima facie committed an offence under Section 304 of I.P.C. Bench, thus, of the view that continuation of the proceedings against the petitioner would clearly be an abuse of the process of law, which would always be unsustainable in law. In the circumstances, the charge-sheet No.278/2017 for the offence under Section 304 read with Section 34 of IPC as against the present petitioner is quashed and set aside. This Research Paper deals with critical appraisal of a case of alleged criminal medical negligence, insight into criminal and civil dimensions of the case and duty of nurse-in-charge of NICU, duty of doctors and need for protocol, SOP in preventing such unfortunate incident in future.

Keywords: Breach of duty, Culpable homicide, Civil dimension, Criminal dimension

BACKGROUND OF THE CASE

The present petition challenges the final report/charge-sheet No.278 of 2017, for the offence under Section 304 read with Section 34 of IPC, filed by the Police Inspector, Police Station Gadge Nagar, Amravati, in which the present

petitioner has been made an accused.

Issue of FIR /Charge Sheet: Duty of Nursing Staff

The F.I.R. leading to the charge-sheet was lodged on the report of the Civil Surgeon, General Hospital, Amravati, on the allegation that between the night of 28/5/2017 and early morning of 29/5/2017, between 10:30 p.m. to 3:50 a.m. (3:50 a.m. of 29/5/2017 as per the post mortem report), there occurred unfortunate demise of four babies, who were admitted in the Neonatal Intensive Care Unit (“the NICU”), Department of Paediatrics at Dr. Punjabrao Deshmukh Medical College, Amravati, due to wrong administration of an injection by the nursing staff on duty, namely, sister Vidya Thorat, who administered the drug “Potassium Chloride” instead of injection “Calcium Gluconate”, as prescribed.

Issue of Junior Resident Doctor

The complaint also named the present petitioner, who was occupying the post of Junior Resident Doctor at the relevant time and was stated to be absent and was arrayed as an accused on the ground that he had not taken proper care, due to which the unfortunate incident happened.

That filing of the F.I.R. as well as the chargesheet against the petitioner under Section 304 read with Section 34 of I.P.C. is clearly not justified on the face of it. He submits that it was an admitted position that the petitioner, though on duty, was not present at the time of administration of the injection, and was somewhere else at the relevant time. What was prescribed was the injection “Calcium Gluconate” to be administered to the babies, instead of which, what was administered was the injection “Potassium Chloride” (Kesol).

He submitted that the injection “Potassium Chloride” (Kesol) was never prescribed by the petitioner, as would be indicated from the clinical notes on record at page 211 and onwards. Staff nurse on duty admitted her mistake in administering the injection “Potassium Chloride” (Kesol) instead of “Calcium Gluconate”, which is on record at page 57.

Report of the Committee

Fact-finding Committee constituted for this purpose, dated 31/5/2017 found that death of the four new borne was possible by injection Kesol (Potassium Chloride) 2 CC IV, which is corroborated by the post mortem finding.

Issue of Culpable Homicide

He, therefore, submits a perusal of the entire charge-sheet and the material along with it as placed on record, would indicate, that no case is made out against the petitioner under Section 304 of I.P.C.

The Ld. Counsel said that the definition of “culpable homicide: as contained in Section 299 and the Exceptions – 1 to 3 of Section 300 of the IPC and submitted that the ingredients necessary for invoking the said section are not made out against the petitioner. There was no intention, or knowledge on part of the petitioner as is necessary to attract Section 299 of I.P.C. and, therefore, no offence, even if the entire charge-sheet is taken to be proved, can be made out against the petitioner. At the most, a departmental action can be taken for his absence in the NICU at the particular time on the given day; but in any case, the petitioner cannot be charged with the offence under Section 304 of I.P.C.

Ld. Additional Public Prosecutor for the R.No.1 supported the prosecution and opposed the prayer. High Court was not satisfied with the reply of the State in this matter, therefore, by an order dated 01.12.2020, it directed the filing of a proper reply, which was reiterated in the order dated 08.01.2021, in pursuance to which, additional reply has been filed on record on 20.01.2021. Ld. A.P.P. submitted that there is no dispute that the petitioner was duty officer in the NICU, in which capacity, it was the duty of the petitioner, to ensure that proper drugs were administered, in which petitioner failed. Ld. A.P.P. said that the fact finding committee also recommended the action against the petitioner.

He submitted that the entire record of the charge-sheet indicates a criminal negligence on part of the petitioner and, therefore, he is being correctly prosecuted for the

offence punishable under Section 304 of I.P.C. Therefore petition is clearly misconceived and is liable to be dismissed.

Important Observations of Bombay High Court

It was not disputed that, on the fateful day, the petitioner though on duty as a Junior Resident Doctor, was not present in the NICU at around 10:30 p.m. It was also not disputed that it is the staff nurse Vidya Bhanudas Thorat, who had administered the injection Kesol (Potassium Chloride) (IV), which resulted in the fatality of the four new borns. A perusal of the OPD case papers and the continuing sheets dated 28.05.2017 (page 214) points out that what was prescribed to be administered was an injection of “**Calcium Gluconate**”, as is indicated from the entry dated 28.05.2017.

Issue of Duty of Sister-in-Charge, Duty Doctor/JR, Senior Doctor

The reply of the R. No. 1 does not dispute this position. The reply at page 299 categorically states that Dr. Kaustubh Deshmukh and Dr. Rushikesh Ghatol had prescribed the “**Calcium Gluconate**” injection. It is, thus, clear that the petitioner was not the person who had prescribed the injection “**Calcium Gluconate**”, which is to be administered muscularly. It is further apparent from the reply that the injection “**Potassium Chloride**” is not administered muscularly, i.e., through an injection, but through IV saline after diluting it not less than 50 times its volume with Sodium Chloride Intravenous Infusion (0.9% w/v).

It is further an admitted position that “**Potassium Chloride**” is an emergency drug injection and is kept in the emergency kit, whose custody is with the in-charge sister of the NICU.

The procedure, as stated in the reply for receiving drugs, was that the drug was prescribed by the on-duty doctor, after which, the on-duty nurses used to give the medicines as per the prescription after taking entry in the general order book, which injections were to be given under the observation of on-duty doctor of the NICU. In the instant matter, on a query being made as to how did the injection

“**Potassium Chloride**” came to be taken out, the position is clarified by letter dated 16.07.2017 (Annexure–R-5) by the Head of Paediatric Department, Dr. Punjabrao Deshmukh Hospital and Research Centre, Amravati, which states that, in the NICU, the injections “**Potassium Chloride**” were kept for patients admitted on an earlier point of time and the one used by the nurse Vidya Thorat, was a leftover injection.

It is further stated therein that the leftover injections are to be used in the event of emergency. The above position would, therefore, indicate that the petitioner had no role to play in the entire matter, either of prescribing the drug, storing the same or of administering the same.

A perusal of the CCTV footage visualization panchanama dated 30.05.2017 (record page 133) indicates that, on 28/5/2017, between 8:00 p.m. to 9:30 p.m., in the night, a lady doctor had checked the newborn babies. At 9:38 p.m., the doctor and nurse were looking over the newborn babies and nurse Vidya Thorat was seen filling up the syringe from the medicine bottle and thereafter, administering the injection to the newborns. From 9:42 to 9:46 p.m., the CCTV footage shows the nurses taking care of the newborns. The CCTV footage further shows, the petitioner, coming to the NICU at 11:47 p.m. of 29.05.2017, and having checked the newborns. There was some commotion noticed between the doctors and nurses at that time.

It is the statement of the present petitioner that, on 28.05.2017, when he was present in the ward during night time, around 10:30 p.m., the duty nurse came to him in the ward and informed about deteriorating conditions of the newborns, whereupon he reached immediately in the NICU and started resuscitation, however, the condition deteriorated. His co-junior resident also came and started resuscitation of the other newborn. The seniors were informed. At around 12:00 noon, he got a call from the Gynaecology ward for an LSCS, due to which he was required to go there.

Injection “**Calcium Gluconate**” is required to be administered muscularly by an injection, as against which, the injection “**Potassium Chloride**” is to be administered

Intravenously, after diluting it in the proportion as stated above. The nurse on duty, namely Vidya Bhushan Thorat, however, appears to have directly administered the injection “Potassium Chloride” muscularly, which was the cause of the untimely and unfortunate demise of the newborns.

Enquiry Report

An enquiry initiated by constitution of an enquiry Committee headed by the Professor and Head of Department of FMI, G.M.C, Akola, upon the orders of the Directorate of Medical Education and Research (DMER), comprising of four doctors, all from G.M.C, Akola, gave its report on 31.05.2017. The conclusion is rendered by the Committee that although Doctors should be available for 24 hours in the NICU, still the petitioner, who was an on-duty doctor, was absent at the time of the incident. The Committee further found that the four newborn babies that succumbed in the incidents had been prescribed injection “Calcium Gluconate” and three other newborns that were not affected were not on injection “Calcium Gluconate” (Kesol). Therefore the Committee recommended action against the petitioner also, as a result of which, the F.I.R, was lodged, which included the name of the petitioner.

What is considered as culpable homicide in the Indian Penal Code?

In fact, the crime so registered in the matter does not reveal incorporation of any other offence, except for the one under Section 304 of the I.P.C., as provided in the Indian Penal Code. The offence punishable under Section 304 of the I.P.C. is an offence of culpable homicide not amounting to murder and culpable homicide is defined Section 299 of the Indian Penal Code and it reads thus:

“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.

Explanation 1: A person, who causes bodily injury to

another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2: Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3: The causing of the death of child in the mother’s womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

A bare perusal of the above referred definition would indicate that heart of an offence of causing death lies in **doing an act intentionally or with knowledge**. If the act done is coupled with intention, the intention must be of either causing death or causing such bodily injury as is likely to cause death. But, if the facts and circumstances of a given case show that the act has been done with the knowledge then the knowledge must be of **the character and degree** that the person doing the act knows that by such an act, he is likely to cause death.

Since possession of the knowledge of the nature explained in Section 299 of the I.P.C. can also lead to constituting the act of culpable homicide, in a given case, even an omission to do an act, which if done would prevent the death, would amount to culpable homicide, if the omission of such nature leads to death. The concept could be explained further, but, in the context of the factual setting here, it is not required and therefore, we would avoid it to restrict the length of the Judgment.

Whether it amounts to murder as defined under Section 300?

If there is no offence of culpable homicide, further questions as to **whether it amounts to murder as defined under Section 300 or it does not amount to**

murder as envisaged in Section 304 of the I.P.C. would not arise. [Para 13]

Applicability on Present Case

In the present case, at the relevant time, the petitioner was not at all present in the NICU and so, there is no question of the petitioner doing any act with the requisite intention or knowledge. There would also not be any question of the petitioner omitting to do any act with such intention or knowledge as is required under Section 299 of the I.P.C., unless, of course, the facts and circumstances had shown that the petitioner had deliberately avoided his presence in the NICU with the intention that death of the infants had thereby been facilitated or with the knowledge that such death had likely to be facilitated.

In this case, there is neither any allegation made against the petitioner on these lines nor is there present any material collected during the course of investigation, from which such an inference in a prima facie manner could be drawn.

Alleged Medical Negligence: Lack of Medical Literature / Expert Opinion?

All that is alleged in the present case is that though the petitioner was on duty, he was not physically present in the NICU at the fateful moment. No material has been placed before us that whenever an injection has to be administered, it must be done under the supervision of the doctor on duty at the NICU.

There is no allegation made against the petitioner that the nurse who administered the fatal doses of injection to the infants, had informed the petitioner that she was going to administer the injections and had requested the petitioner to remain personally present near the beds of the infants so that administration of those doses could be monitored by the petitioner, but the petitioner refused to pay heed to such request.

Issue of SOP/Protocol/Rules /Regulations

In fact, repeated requests of High Court to Investigating Officer regarding the rules or regulations or Standard

Operating Procedure or protocol, if any, regarding the procedure to be adopted for administration of injections to the infants admitted in the ICU with a view to know about the nature of duty of the doctor in the NICU as regards administration of injections by the staff nurses, nothing was placed before HC.

This must have been owing to the fact that no such protocol or S.O.P. exists and that personal supervision and monitoring by a doctor may not have been envisaged in any rule or S.O.P. where trained nurses are employed, they having the competence and authority to administer injections without the supervision of any doctor.

It then follows that this is a case wherein apart from absence of any blameworthy act, there being no act whatsoever done by the petitioner, there is also missing the element of culpable omission on the part of the petitioner, there being no duty in him to personally monitor the administration of injection by a trained nurse which absence of duty led to no breach of duty by the petitioner.

Case Law Referred

This would enable us to hold that on the three parameters of **Jacob Mathews vs. State of Punjab and another, 2005 ALL MR (Cri) 2567 (SC)** namely: duty to take care, breach of duty and consequential damage, this case fails to attract any criminal offence, much less offence of culpable homicide not amounting to murder.

Clarification be Bombay High Court regarding Civil Dimension

HC made it clear here that in recording such a finding, we have only considered the criminal dimension of the case insofar as it relates to the petitioner and we have not dealt with civil dimension of the case involving such issues as of damages, civil liability, departmental action and so on, in any manner.

It is, thus, apparent that there is absolutely no material available on record showing, prima facie, that offence of culpable homicide not amounting to murder punishable under Section 304 of I.P.C. is constituted against the present petitioner. Continuation of these proceedings

against the present petitioner, in the present circumstances, would clearly be an abuse of process of law, which cannot be permitted.

HC is mindful of the guidelines laid down in **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335**, in para 102 thereof relating to quashing of F.I.R.

SUMMARY AND CONCLUSIONS

In the instant case, considering the allegations as levelled against the petitioner, of his absence in the NICU at the relevant time, would, even if everything as mentioned in the charge-sheet was presumed to be true, at the most, may lay a blame of dereliction of duty at his doorstep, for which departmental action can always be taken by the authorities, as has been reported to have been done in the case of Dr. Nistane, Professor and Head of Department of Paediatrics, who was absent without sanctioned leave on the fateful day. The material in the charge-sheet is certainly not indicative of the petitioner having prima facie committed an offence under Section 304 of I.P.C.

HC is, thus, of the view that continuation of the proceedings against the petitioner would clearly be an abuse of the process of law, which would always be unsustainable in law. The petition is, therefore, liable to be allowed. In the circumstances, the charge-sheet No. 278/2017 for the offence under Section 304 read with Section 34 of IPC as against the present petitioner is quashed and set aside. The writ petition is allowed and disposed of accordingly. [Para 18] Rule is made absolute in the aforesaid terms.

REFERENCES

- [1] State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335.
- [2] Dr. Bhushan vs. State of Maharashtra and Anr., CrI.W.P. No.225 of 2018, Date of Judgment: 09.03.2021. Bombay High Court. (Nagpur Bench).
- [3] Jacob Mathews vs. State of Punjab and another, 2005 ALL MR (Cri) 2567 (SC).

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