

GAHC010009852011



2024:GAU-AS:12592

**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Crl.Rev.P./462/2011

DR MOHAN LAL GOENKA
S/O LT. NANAG RAM GOENKA, R/O ASSAM ISPAT COMPLEX FATASIL, P.S.
AMBARI, GHY-9, DIST. KAMRUP M, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR

2:SRI KHARGESWAR MEDHI
S/O BALI RAM MEDHI R/O DURGASOROVAR P.S. JALUKBARI
GHY
DIST. KAMRUP M
PIN- 781009

Advocate for the Petitioner : MR.B M CHOUDHURY, MR.U PATGIRI,MR.J M CHOUDHURY,MR.S BHARALI

Advocate for the Respondent : MS.R BEGUM, MRU SARMA, DR.G LAL, MS.M R DAS, PP,
ASSAM

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. S. Bharali, Advocate.

For the Respondents : Mr. P. Borthakur, APP.

Date of Hearing : 05.12.2024

Date of Judgment : 05.12.2024

JUDGMENT & ORDER (ORAL)

1. Heard Mr. S. Bharali, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State respondent.
2. The present application under Section 401 read with Section 397 and Section 482 of the Code of Criminal Procedure, 1973 is filed for setting aside and quashing the order dated 22.09.2011 passed by the learned Additional Sessions Judge, Kamrup, Guwahati in Sessions Case No. 185(K)/09, whereby charges under Section 304(A) has been framed against the accused petitioner. The further prayer made is to quash the proceeding of G.R. Case No. 857/2004 under Section 304 (A) of IPC pending in the Court of learned Sub Divisional Judicial Magistrate No. 1, Kamrup, Guwahati.
3. The brief facts leading to the present case are as follows:-
 - I. That one Sri Khargeswar Medhi, father of the deceased Babita Das lodged an F.I.R. on 15.03.2004 before the Officer-in-Charge, Bharalumukh Police Station, Bharalumukh, inter alia alleging that his daughter was admitted in the Institute of Human Reproduction, Bharalumukh on 08.03.2004 as per advice of the accused petitioner Dr. M. L. Goenka for delivery. Though the patient's condition was very normal but suddenly, after caesarean operation at 02:00 AM, the condition of the patient became serious due to negligent act of the

accused Dr. M. L. Goenka and ultimately, the patient expired on 09.03.2004 at 08:15 AM. On the basis of the said FIR, Bharalumukh P.S. Case No. 66/2004 under Section 304(A) IPC was registered.

II. After completion of the investigation, the Investigating Officer submitted the Final Report being F.R. No. 06/2007 dated 28.01.2007 for want of any evidence/material against the accused petitioner before the learned Court of Chief Judicial Magistrate, Kamrup, Guwahati. The relevant portion of the conclusion of the Investigating Officer as reflected in the Final Report are quoted herein below:-

"As per statement of witnesses no evidence was found regarding negligence of FIR named accused person, Dr. M. L. Goenka. On the other hand from the examination of medical records it was found that Babita Das was given treatment after every 5 minutes by doctor by examining her and by giving medicine etc. After admission of Babita Das in the hospital doctors tried very hard for a normal delivery but Babita Das was unable to deliver normally and there was chance for normal delivery and as she was shouting having suffering from delivery pain, as such with due consent of her husband, parents and brother she was operated and a baby boy was delivered at 2 A.M. It was found that at the time of operation Babita Das no blood was required to be given and she talked with everyone. After 7/8 hours of operation i.e. at about 5:30 AM on 09.03.2004 suddenly blood pressure of Babita Das fall and Dr. Utpal Baishya who was on duty at that time informed Dr. M. L. Goenka owner of nursing home about Babita Das over telephone. Then Dr. M. L. Goenka came immediately to the nursing home and after examining performed sonography and said that there is internal bleeding and to stop bleeding again operation is required. Husband and guardian of Babita Das were asked to bring 2 bottles of O+ ve blood from Ganga Labortory immediately. However, they are unwilling

to collect the blood and they wanted to give blood from themselves. At that time it was explained to the guardian of Babita Das that as per Supreme Court order and as per order of Directorate of Health Service, Hengarabari, they are incapable to collect blood. At last as 2 bottles of blood was essentially required to save Babita Das, Dr. M. L. Goenka from his own gave money and sent his son Dr. Deepak Goenka to Ganga Laboratory for collecting blood. However, before arrival of Dr. Deepak Goenka with 2 bottles of O+Ve blood from Ganga Laboratory, Babita Das expired at about 8:15 AM. After her death Dr. M. L. Goenka wanted to send the dead body for post mortem at GMC Hospital but her husband Damodar Das and parents of Babita Das and her brothers did not want to perform post-mortem and they took the dead body to their residence and cremated with out performing post-mortem. After 7 days of cremation of the dead body i.e. on 15.03.2004 at about 10 AM, FIR was lodged at the police station informing about the incident. After investigation, it was found that proprietor of Goenka Nursing Home, Dr. M. L. goenka was not negligent in providing treatment to deceased Babita Das. As post mortem was not done, exact cause of death was not known and in feature also there is no chance of getting any evidence, as such with out unnecessarily keeping the case pending final report of the case is submitted. It is prayed before the Hon'ble Court that FIR named accused Dr. M. L. Goenka may be discharged from the case. outcome of the case is informed in writing to the informant by giving notice. a copy of notice sent to the informant is annexed herewith. Medical reports of Babita das are enclosed with the diary".

- III. Thereafter, the learned Court of Chief Judicial Magistrate rejected to accept such F.R., and cognizance under Section 304 of IPC was taken and process was issued. The order passed by the Magistrate is quoted herein below:-

“Seen the F.R. submitted by I.O. the case is returned in F.R. as evidence insufficient against the accused person. Notice issued to informant. F.R. is rejected cognizance u/s 304 I.P.C. be taken against the accused person”.

- IV. The accused petitioner on receipt of summon appeared before the learned Magistrate Court below. Thereafter, on 08.05.2009, the learned Magistrate committed the matter to the Court of learned Sessions Judge, Kamrup, Guwahati as the offence under Section 304 IPC is exclusively triable by a Court of Sessions.
- V. Thereafter, by an order dated 22.09.2011, the learned Sessions Judge, Kamrup, Guwahati in Sessions Case No. 185(K)/2009, after dealing elaborately with the order passed by the learned committal Court and relying on the decision of the Hon’ble Apex Court in the case of **Martin F D’Souza –Vs- Mohd. Ishfaq** reported in **(2009) 3 SCC 1**, held that the learned Magistrate has not followed the mandate of **Martin E D’Souza** (Supra), however, as the said period to follow the mandate is already over, the learned Sessions Judge remanded the matter to the committal Court holding that though there is no material for charging the accused under Section 304 IPC, however, there are material to charge the accused under Section 304(A) IPC. The relevant portion of such order is quoted herein below:-

“Thus, from the fact of internal bleeding at the time of caesarean and non arrangement of blood for the caesarean operation, prima facie reveals some materials against the accused. But, I do not find these materials will attract allegation U/S 304 IPC but in my opinion it will attract the allegation U/S 304A IPC. Because, it prima facie appears from the aforesaid fact and circumstances that the death of Bobita Das was caused

due to negligence of the accused doctor. Hence, charge U/S 304A IPC is framed against the accused Dr. M. L. Goenka. Particulars of charge on being explained to the accused, he pleads not guilty and claimed to be tried”.

- VI. The aforesaid order as well as the proceeding pending before the learned Magistrate under Section 304(A) IPC is under challenge before this Court.
- VII. From the order passed by the learned Sessions Judge, it is seen that the learned Sessions Judge framed charges under Section 304(A) IPC on the ground that prima facie there are some materials against the accused and that the death was caused due to negligence of the accused Doctor.
4. Before proceeding further, let this Court record the principle enunciated by the Hon'ble Apex Court as regards the framing of charge by a trial Court. The law in this regard laid down by the Hon'ble Apex Court can be culled out in the following manner:-
- I. The purpose of framing a charge is to intimate to the accused clear, unambiguous and precise nature of accusation that the accused is called upon to meet in the course of trial.
- II. The prima-facie case must be made out before a charge can be framed.
- III. A court while exercising its power under Section 227 of the Code is having power to sift and weigh the evidence for the limited purpose of finding out, whether any prima-facie case against the

accused is made out.

- IV. Where grave suspicion exists against the accused, a court shall be justified in framing a charge.
 - V. When two views are equally possible and the material produced by the prosecution gives rise to some suspicion but not grave suspicion against the accused, the court shall be within its jurisdiction to discharge the accused.
 - VI. At the time of framing of charge, the probative value of the material produced by the investigating authority, though cannot be gone into but the court must apply its judicial mind on the material placed on record and must be satisfied that commission of offence by the accused is possible.
 - VII. A trial court, while exercising its power under Section 227/228 of the Code, is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record.
5. The Hon'ble Apex Court in a recent decision in **State of Gujarat –Vs- Dilipsinh Kishorsinh Rao** reported in **2023 SCC Online SC 1294**, after elaborately dealing with the earlier judgments in this regard, laid down the following propositions of law:-

I. At the stage of considering an application for discharge, the Court must proceed on an assumption that the material which has been brought on record by prosecution is true and evaluate the said material in order to determine whether the facts emerging from the material taken on its face value discloses the existence of the ingredients

necessary of the offence alleged;

- II. The primary consideration at the stage of framing of charge is the test of existence of a *prima facie* case and at this stage, probative value of material on record need not be gone into;*
- III. If the accused is able to demonstrate from the materials at the stage of framing charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the Court at the stage.*
- IV. The main intention of granting a chance to accused for making submission as envisaged under Section 227 of the Cr.P.C., is to assist the Court to determine whether it is required to proceed to conduct the trial.*

6. Now, in the backdrop of the aforesaid principles of law, let this Court consider the material available on record inasmuch as in this case, the investigating authority had opined that there is no material to send the accused for trial. At this stage, this Court could not resist to record that the learned Magistrate while rejecting the Final Report and taking cognizance of offence under Section 304 IPC, did not even discuss what are the materials on the basis of which, the learned Magistrate had rejected the Final Report submitted by the Investigating Officer and took cognizance of the offence under Section 304 IPC.
7. It is true that detailed and elaborate discussion may not be necessary on the availability of materials to reject a Final Report submitted by the Investigating Officer, however, reflection of application of mind to the materials available is a *sine-qua-non* for taking a cognizance. Unfortunately, in the case in hand, as recorded herein above, the learned Magistrate had

not at all applied its mind while taking cognizance of the offence under Section 304 IPC.

8. The decision of the learned Sessions Judge is also vitiated by non application of mind. If we go to the order of the learned Sessions Judge, it is found that the learned Sessions Judge though concluded that there is no material to frame charges under Section 304 IPC, however, presumed that there is some material to suggest that there was negligence. However, nothing beyond that has been disclosed by the learned Sessions Judge, which cannot be accepted in view of the settled propositions of law as recorded hereinabove.
9. Be that as it may, this Court would like to see and go through the materials collected by the Investigating Officer on the basis of which both the learned Court's below opined that there are materials to take cognizance of offence under Section 304 IPC/304(A) IPC, in the backdrop of challenge to the order of the learned Sessions Judge as well as challenge to the entire proceeding.
10. From the record it is seen that the informant namely Khargeswar Medhi, the father of the deceased stated before the Police that on 08.03.2004, his daughter was admitted in the Goenka Nursing Home for delivery and she gave birth a baby boy. On 09.03.2004 at around 08:30 AM, she expired in the aforesaid Nursing Home. He further expressed that he had suspicion regarding cause of death of his daughter and he suspected that due to wrong treatment of the doctor, his daughter died and as such he had lodged the FIR on suggestion of some other person.

11. It is also on record that the statement of the informant was recorded for the second time under Section 161 of Cr.P.C., and he stated before the Police that the son of the accused namely Dr. Deepak Goenka, on the fateful day, had already gone to Ganga Laboratory to collect 2 bottles of blood as required at that point of time. It is also stated by him that he had also sent his son Kishor Medhi to Ganga Laboratory, but prior to their arrival with blood, the patient expired. It is also stated that accused Dr. M. L. Goenka, asked them to perform post-mortem of the dead body, but they took the dead body saying to doctor that it is not necessary to send the body for post-mortem and it is not necessary to cut apart the body. Thereafter, some people suggested them to file a case in Police Station and as such he lodged an FIR against the accused Dr. M. L. Goenka on 15.03.2004.
12. The statement of Dr. Deepak Goenka who is the son of accused Dr. M. L. Goenka was also recorded under Section 161 of Cr.P.C., who went to Ganga Laboratory for collection of blood as disclosed in the statement of the informant. He deposed that the family of the deceased was not willing to collect blood from a Laboratory, rather they were willing to give blood from their family members. However, as per the mandate of the Hon'ble Supreme Court as well as order of the Directorate of Health Services, Assam, no nursing home can collect blood from any person and give it to patient, except collecting it from the Blood Bank recognized by the State.
13. Section 304 A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probabilities will cause death. Such offence is attracted only when such act is rash and negligent

resulting in death. Therefore, negligence and rashness are the essential ingredients of Section 304 A IPC. Any rash and negligent act whereby death of a person is caused becomes punishable under this provision. Error of judgment is excluded from such rash and negligence. To bring home the charges of criminal responsibility for the death of a patient upon a doctor, there must be some materials to show that there was negligence or incompetence on the doctor's part and such criminal liability would arise when the doctor acts in a manner dangerous to life and safety of patient resulting in death.

14. In the case in hand and as recorded hereinabove, no prosecution witness including the informant himself stated anything creating any suspicion as to any rash and negligence on the part of the Doctor resulting in the death of the daughter of the informant, rather, it is the suspicion of the informant that patient died due to wrong treatment. From his statement, it is also clear that the incident took place on 09.03.2004, body was taken back without post-mortem and FIR was lodged on 15.03.2004 as suggested by some other persons.
15. Even if the statement of Dr. Deepak Goenka, son of the accused Doctor who supported his father is ignored, there is nothing to suggest that there is any kind of negligence on the part of the Doctor and there is no any material to charge the accused under Section 304 IPC and/or 304(A) IPC, if the materials collected by the I.O., are accepted to be correct at its face value.
16. Admittedly, the informant lodged the FIR at the behest of some other person after 6 days of the incident; they refused to go for post-mortem as

they did not have any suspicion.

17. In the considered opinion of this Court, in the backdrop of aforesaid materials, no prima facie case under Section 304(A) IPC is made out. There is also no material seen to raise any suspicion in the mind of this Court as regards negligence on the part of the accused Doctor not to say existence of any grave suspicion.
18. Therefore, when the materials collected/produced by the prosecution did not even raise any suspicion, the courts below ought to have discharged the accused but both the learned Court's below, in the considered opinion of this Court and in the given facts of the present case, had failed to apply its judicial mind to the material placed on record to come into a satisfaction as regards commission of the offence by the accused. This court is of the view that court below had thus committed patent illegality firstly, by taking cognizance under Section 304 IPC and subsequently framing charge under Section 304(A) IPC.
19. Accordingly, the present criminal revision petition is allowed by setting aside and quashing the order dated 22.09.2011 passed by the learned Additional Sessions Judge, Kamrup, Guwahati in Sessions Case No. 185(K)/09, whereby charges under Section 304(A) has been framed against the accused petitioner and the proceeding of G.R. Case No. 857/2004 under Section 304 (A) of IPC pending in the Court of learned Sub Divisional Judicial Magistrate No. 1, Kamrup, Guwahati and the accused petitioner namely, Dr. M. L. Goenka, is hereby discharged from the charge under Section 304(A) IPC in Sessions Case No. 185(K)/09.

20. LCR be returned back.

JUDGE

Comparing Assistant