



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 610 OF 2018

Dr. Miss Herat Ramsinh Parmar

Residing at Plot No. 34, Block No. 4,
Ramgiri, Opp.: Sanyas Ashram,
7th Road, Rajawadi,
Ghatkopar (E), Mumbai 400 077.

...Appellant

Vs.

1. **Dr. Bhaskar P. Shah**

Residing at 7-8, Parmanand
Bhavan, Navroji Lane,
3rd Floor, Ghatkopar (West),
Mumbai 400 086 and
Having his Nursing Home
known as Ashirwad Heart
Hospital (ICCU), 1, Vinay Vivek
67 Tilak Road, Ghatkopar (E),
Mumbai 400077.

2. **The State of Maharashtra**

...Respondents

Senior Advocate Aabad Ponda a/w Chittesh Dalmia	Advocate for the Appellant
Mr. Madhukar Dalvi	Advocate for the Respondent No. 1
Mr. A. S. Gawai	APP for Respondent-State

CORAM : S. M. MODAK, J.

DATE : 03rd JULY 2024

JUDGMENT :-

1. Heard learned Senior Advocate Shri Ponda for the Appellant-Complainant and learned Advocate Shri Dalvi for the Respondent No. 1-accused and learned APP for Respondent-State.

2. On 19/06/2024, I have heard learned Senior Advocate Shri Ponda and colleague of learned Advocate Mr. Dalvi. It is true that for some reason or other learned Advocate Mr. Dalvi for Respondent No. 1 was not present. However, this Court has recorded the submission on that date.

3. Today learned Senior Advocate Shri Ponda has invited my attention to the provisions of Section 386 of the Criminal Procedure Code. The relevant clause is clause 'a'. It gives broadly two options.

They are :-

a) either to dismiss the appeal or

b) to pass appropriate order depending upon nature of an appeal.

4. There are five contingencies provided in clause (a) to (e) of Section 386. In opening portion, there is reference of an appeal under Section 377 or Section 378 of the Criminal Procedure Code. It is in the context of "*only appearance of Parties*". Clause (a) is relevant for

our discussion. It reads thus :-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.

5. The following are the options :-

a) **reverse such order and then :-**

(i) direct further inquiry or

(ii) retrial can be ordered or

(iii) committed for trial or

(iv) found him guilty and sentence him

Present appeal is filed as per the provisions of sub-section (4) of Section 378 of the Criminal Procedure Code. The case was instituted on private complaint. Section 384 of the Code provide for summary dismissal of the appeal. However, the appeal is already admitted on 03/04/2018. That stage is already crossed. It is very well true that still appeal can be dismissed. **So now the issue is whether :-**

a) the appeal needs to be dismissed or

b) need to be allowed or

c) need to be remanded

6. Learned Advocate Shri Dalvi vehemently supported the judgment of the acquittal. He has taken me through the various observations in the judgment.

7. Whereas according to the learned Senior Advocate Shri Ponda, the learned Judge has not dealt with the evidence adduced on behalf of the Complainant and the necessary documents. The conclusion drawn by the trial Court is not after considering material. That is why initially he prayed for remanding the matter, though he is conscious that the Appellate Court can decide the appeal on the basis of the available evidence without remanding the matter. He is fully aware that if such exercise is done, either of the Parties may lose an opportunity to challenge the findings ought to have been given by the trial Court.

8. After hearing them and after perusing the judgment, I agree with the submission by learned Senior Advocate Shri Ponda. The matter needs to be remanded to the trial Court. I will give reasons for my opinion. The appeal cannot be dismissed because the trial Court has given a finding without discussing the evidence.

Facts

9. The private complaint is filed by the Complainant, who is

daughter of the deceased-Ramsinh Umedsinh Parmar. On 24/03/1993, the deceased has complained about burning right eye, weaknesses in both lower limbs, perspiration, difficulty in balancing himself and slurred speech. With the help of the relatives somehow he managed to return home. The Complainant is also Doctor by profession. She noticed that deceased was perspiring but not profusely. The deceased was known case of the diabetic. After initial treatment, there was no improvement. That is why she has contacted neurologist Dr. V. G. Panchal but, he was not available. Somehow contact was established with Dr. Jitesh Desai, who is Cardiologist. He examined the deceased at about 7.45 p.m.. In the meantime Dr. Panchal has also visited. Both the Doctors have diagnosed that the deceased has suffered from '*Transient Ischemic Attack (T.I.A.)*'. They have advised the patient for admission for ICU at least for 72 hours. The patient was taken to the Ashirward Heart Hospital run by the Respondent. In the hospital, the patient was kept in ICU.

10. Learned Judge has recorded that the patient was examined by various doctors including Dr. Keni, Dr. Patel, Dr. Panchal. Somehow the patient could not be recovered, and he died on 26/03/1993. The

Respondent gave intimation to Corporation in the prescribed format. “Cervical active cardiac respiratory attack” is cause of the death. He has also mentioned immediate cause as ‘*brain stem infarct*’ and antecedent caused as *hypertension and diabetes mellitus*.

11. Learned Judge has also recorded about collecting the papers by the Complainant and then taken advice of various Doctors including the Cardiologist, Neuro physician and physician. They are doctors namely, Dr. Yash Lokhandwala, Dr. Jitesh Desai, Dr. R. C. Hansoti, Dr. Pravina. Then complaint was filed. Process was issued under Section 304-A of the Indian Penal Code. Though it is summons trial case, the Court of the Metropolitan Magistrate, 49th Court, Vikhroli, Mumbai tried the case as warrant case.

12. The Complainant gave oral evidence and also relied upon documentary evidence. Whereas accused has also entered into witness box.

Findings

13. The observations made in the judgment are as follows:

- (i) The Court has noted that ‘*the deceased was diabetic patient since 1961 and suffering from hypertension since 1965. He was 82*

years old. (Para no. 9).

(ii) *'The Complainant is medical practitioner in the field of Gynecology and practicing since 1962. There are seven doctors in her family'*. (Para no. 10).

(iii) The trial Court has noted that *'evidence of the Complainant runs into 37 pages'*.

(iv) The trial Court considered what the Complainant has deposed in her evidence, in para no. 11. It is as follows:

(a) The Complainant has visited the hospital of the accused prior to the admitting her father.

(b) On 24/03/1993 at about 9 p.m., her father had suffered from stroke, but he was conscious and alert.

(c) Dr. Desai and Dr. Panchal informed her that her father is suffering from neurological problem, and they have advised admission in ICU Care at Ashirwad Heart hospital.

(d) After admission, the accused examined her father about Neurological and nervous problem. Accused has not noticed any other positive findings.

(v) The trial Court then discussed about what is complaint of the

Complainant. The accused has not given treatment in ICU. Even accused has not examined her father on 24/03/1993, 25/03/1993 and 26/03/1993. These observations can be considered to be a factual observation.

(vi) The trial Court has noted that he has examined the evidence of the Complainant in detail. The observations in para no. 12 are as follows:-

(i) Dr. Panchal examined her father on 25/03/1993 at about 8.30 p.m..

(ii) Dr. Patel examined the patient on 26/03/1993 at about 3 p.m..

(iii) The accused also examined the patient on 26/03/1993 at about 3.30 p.m..

(iv) Even there was examination by Dr. Keni till 9.30 p.m. on 26/03/1993.

14. The trial Court is fully conscious about the complaint made by the Complainant in her evidence. That is why the trial Court observed

a) “*accused has not given treatment to her father for the purpose for which her father was admitted in the hospital*”, is her evidence.

b) On 26/03/1993 at about 10.15 p.m., the Complainant came

out of the hospital because her father was serious. At 10.30 p.m., the process was started to the ventricular fibrillation and even shock treatment was given.

- c) In para no. 14, the trial Court observed that *‘expert medical officer is not examined by the Complainant’*.

15. According to learned Senior Advocate Shri Ponda the observations in case of *Jacob Mathew Vs. State of Punjab and Another*¹ were not in force when the complaint was filed. This is disputed by learned Advocate Shri Dalvi. Whether the evidence of the medical expert is required or not, this Court is not making any comments, because the matter is not decided on the merits. This issue can raise during the trial.

16. The trial Court further observed in para no. 14 is as follows:

“After receiving the papers, the Complainant had discussed with several expertise in medical fraternity. On the basis of the advice, then Complainant has filed complaint”.

17. The trial Court discussed about the defence of the accused in para no. 15. According to the accused, *‘there was no reason for hooking the patient on monitor till that time’*.

1 2005 Criminal Law Journal 3710

18. The trial Court discussed about the difference in between civil liability and criminal liability. The trial Court opined the doctrine of “Res Ispi Loquitor” is not applicable in the Criminal law. Learned Senior Advocate Mr. Ponda has disputed this proposition of the law.

19. It is true that in para no. 17, the trial Court has discussed about observations in case of *Dr. Suresh Gupta Vs. Govt. of N.C. Delhi and Another*² and observations in case of *Jacob Mathew (supra)*. It is true that the trial Court has discussed about the degree of the negligence required in the criminal trial, when the person from the medical fraternity is prosecuted.

20. Finally, trial Court concluded in para no. 19 that the Complainant does not disclose any negligence on the part of the accused. Furthermore, the trial Court observed there is no material on record to prove the negligence on the part of the accused. This finding is seriously challenged by learned Senior Advocate Shri Ponda.

Grievance of the Complainant

21. Learned Senior Advocate Shri Ponda invited my attention to the several acts of the omissions from page no. 93. It is part of the complaint. It is true that several complaints are made relating to the

² 2004 Cri. L.J. 3870

failure to hook up cardiac monitor in a known case of diabetes and high blood pressure, ignoring the history of the stroke and not stopping drugs which are harmful in heart attack patients. It further mentions about not diagnosing deteriorating conditions of the patient.

22. He also invited my attention to the answers given by the Respondent to question no. 36 put up during the statement recorded under Section 313 of the Criminal Procedure Code. It is true that the Respondent has admitted “if medicine stopped, the blood pressure will rise”. It is also true that the Respondent has given evidence, it is on page no. 153.

23. According to learned Senior Advocate Shri Ponda, the Respondent has also given several admissions during cross-examination and the learned Judge has even not cared to refer about the evidence of the accused and forget about discussing the same.

Conclusion

24. So if the entire judgment of the trial Court is perused, what I find is there is an emphasis on examining her father by various Doctors. There is an emphasis that the Complainant is from the medical fraternity. There is an emphasis on the advice taken by her from several

Doctors after her father has expired. There is an emphasis on the difference in liability in criminal prosecution and the civil prosecution.

25. The trial Court has also discussed about the judgment given by the National Consumer Disputes Redressal Commission, in para no. 20. At this stage, learned Advocate Shri Dalvi tendered a copy of the judgment delivered by National Consumer Dispute Redressal Commission in First Appeal no. 184 of 2015, in case of *Dr. Miss Herat Parmar Vs. Dr. Venilal G. Panchal and others*, decided on 12/01/2017.

The Commission has confirmed the order of the dismissal by State Consumer Dispute Redressal Commission.

26. According to learned Advocate Mr. Dalvi when the Consumer court has not concluded about negligence, the criminal prosecution will not be maintainable. Whereas learned Senior Advocate Mr. Ponda is disputing the proposition of the law and according to him this order was not there when the trial Court decided the matter.

27. There cannot be any dispute about preposition that there can be judgment of the acquittal or conviction, but issue is trial Court is bound to consider the evidence adduced by the Parties. No doubt that evidence is very much available before the trial Court, but it needs to

be dealt with in the judgment, because it gives an opportunity to the Appellate Court to ascertain the correctness of the findings. But in this case at no point of time trial court has dealt with evidence of the Complainant, the medical case papers produced by her and evidence of the accused. After dealing with them, the trial Court could have come to the conclusion that no case of negligence as contemplated under Section 304-A of the Indian Penal Code is made out. But it is lacking in this case.

28. Whatever references are there is about factual observations not a single incident of omission is referred by the trial court. The accused has cross-examined the Complainant but trial Court could have dealt with the answers given during cross-examination also. It is same for evidence of the accused also. The accused is not required to enter into witness box but if he has entered, then the trial Court is required to consider that evidence including answer given during cross-examination.

29. So I am inclined to remand the matter. There has to be finding by the trial Court after considering the materials and after giving reasoning. I find both are absent in this case. I thought it proper not to

give any findings on the basis of the available evidence, because the Parties will lose one opportunity to challenge those findings.

30. So best option available before me is to remand the matter. Hence, I am allowing the appeal partly. After the remand, the trial court is required to hear the arguments of both the sides. It is made clear that this Court has not given any liberty to both the Parties to adduce evidence. The trial Court has to start with the proceeding from the stage of hearing the argument. It is true that matter is old. So certain time limit needs to be fixed for those stages. There has to be some time limit for completing the arguments. In view of that following order is passed:

ORDER

- (i) Appeal is partly allowed.
- (ii) The judgment passed by the Court of the Metropolitan Magistrate, 49th Court, Vikhroli dated 14/05/2013 in Case No. 43/S/1994 is set aside.
- (iii) The matter is remanded to the said Court and let the trial Court start from the stage of hearing the arguments of the Parties.
- (iv) The trial Court and even Parties are directed to adhere the

following time limits:

- (a) First, let both the Parties to apprise the Court about the evidence that is opening of the case within time limit of 15 days.
 - (b) Let the Complainant finish his arguments within 15 days thereafter.
 - (c) Let the accused even finish his arguments within 15 days thereafter.
 - (d) The Complainant can give a reply to the arguments of the accused within seven days thereafter.
 - (e) After that, let the trial Court to deliver the judgment within a time limit permissible by law.
- (v) Both the Parties are directed to appear before the trial Court on 22/07/2024.
- (vi) Let the record and proceedings be sent immediately to the trial Court.
- (vii) The Court of the Metropolitan Magistrate is at liberty to fix the matter in pursuance to the provisions of the Section 309 of the Criminal Procedure Code.
- (viii) Learned Registrar (Judicial-I) is directed to see that record and proceedings will be sent in time and is further directed to

report the compliance within 15 days to this Court.

(ix) In case if the Record and proceedings is not received prior to the date of the appearance, the time limit given above will start from the date of the receipt of the record and proceedings.

31. Accordingly, appeal is disposed of.

[S. M. MODAK, J.]