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

## CRIMINAL APPEAL NO. 858 OF 2007

The State of Maharashtra ….Appellant
(Orig. Complainant)

V/s.

1. Dr. Mahesh Avinash Joshi

2. Dr. Avinash Vishnupant Joshi
Both R/at : 666, "T" Ward,
Kolhapur.

3. Dr. Sharad Vishnu Pendharkar
R/at 2508 'E' Nagala Park,
Collector Office, Kolhapur. ….Respondents
(Orig. Accused)

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Ms. P.N. Dabholkar, APP for State.
Mr. Siddharth Jagushte for Respondents/Accused.

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CORAM : K.R.SHRIRAM, J.
DATED : 12th MARCH, 2021.

ORAL JUDGMENT :

1. This is an appeal impugning an order and judgment dated 22nd February, 2005 passed by the Chief Judicial Magistrate, Kolhapur acquitting the three respondents who are Medical Practitioners (hereinafter referred as accused) of offence punishable under Section 304-A (*Causing death by negligence*) r/w Section 34 of the Indian Penal Code.

2. A 14 year old girl Aparna Balasaheb Killedar was admitted in the clinic belonging to Accused No.1 on 30/04/2001 to get tonsillectomy performed on her. The operation was performed on 01/05/2001. It is

prosecution's case that due to gross negligence on the part of the doctors who were involved in the surgery, profuse bleeding was caused and Aparna died. Accused No.1 was assisting the main surgeon Accused No.2 and Accused No.3 was anaesthesiologist. The complaint was lodged and offence came to be registered. Three doctors accused were arrested and released on bail. Charges were framed and accused pleaded not guilty and claimed to be tried.

3. To drive home the charge, prosecution led evidence of 9 witnesses namely Balasaheb Shankar Killedar, Complainant – Father of deceased as P.W. 1 ; Shobha Balaso Killedar, Mother of deceased as P.W.2 ; Jayashree Shrikant Kadam, Panch/Relative of deceased as P.W. 3 ; Anil Shripati Patil, Relative of deceased as P.W. 4, Dr. Sambhaji Kallappa Parit Jadhav, Doctor who referred victim to accused as P.W. 5, Dr. Manisha Prashant Patil, Medical Officer, C.P.R. Hospital who conducted postmortem of deceased as P.W. 6, Hemchandra Annasaheb Kshirsagar, Investigating Officer as P.W. 7, Dr.Jayant Shamrao Patil, Medical Officer of C.P.R. Hospital as P.W. 8 and Saheblal Bandu Bandar, Police Officer who conducted Inquest Panchanama as P.W. 9.

4. Prosecution primarily relied on the evidence of Dr. Manisha Patil - P.W. 6 and Dr. Jayant Patil - P.W.8 and of course complainant P.W. 1. After considering the evidence, Trial Court acquitted the three accused and

that order of acquittal is what is impugned in this appeal. The Apex Court in ***Dr. Suresh Gupta V/s. Govt. of NCT of Delhi and Another***[1] has considered as to how high the standard of negligence is required to be proved for fixing criminal liability on a doctor or surgeon and it would be useful to reproduced paragraph nos. 20, 21, 22, 23, 25 and 26 of the said judgment. It reads as under :

> *20. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in R. Vs. Adomako (Supra) relied upon on behalf of the doctor elucidates the said legal position and contains following observations :-*
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> *"Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."*
>
> *21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.*
>
> *22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being*

1 (2004) 6 Supreme Court Cases 422

*exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence.*

*23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.*

*24. ……..*

*25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct.*

*26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.*

5. Therefore, what we have to consider is whether the prosecution has established gross negligence or recklessness on the part of accused. No doubt in the present case, deceased Aparna was only 14 years of age and her parents P.W.1 and P.W. 2 have lost the child. To convict the doctors, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care or precaution or attention or inadvertence may create civil liability but not a criminal liability.

6. P.W. 1 has stated that there was profuse bleeding from the mouth of Aparna and the same had dropped on the clothes of Aparna and on the bed sheet. Investigating Officer, however, has not seized Aparna's clothes or the bed sheet. So there is no corroborative evidence to the complaint that heavy bleeding or profuse bleeding from the mouth of Aparna happened immediately after the surgery. It is also suggested by P.W.1 that deceased got convulsion after regaining consciousness. At the same time, in the cross-examination P.W. 1 has fairly conceded that Accused No.1 immediately attended to Aparna and gave two life saving injections due to which Aparna slept. P.W. 1 has also admitted that prior to the surgery, doctor had given injections to Aparna to stabilise her condition. Post surgery doctor had also given her oxygen and started artificial breathing to Aparna. P.W. 1 has also stated in cross-examination that Accused No.1 had called specialist doctors to attend to Aparna and in particular Dr. Kulkarni a heart specialist. These indicate the doctors had

taken every precaution post operation and have given the best possible treatment. Even P.W. 4 - Anil Patil relative of complainant has said that even he had seen specialist doctors in the hospital attending to Aparna.

7. As regards Dr. Manisha Patil P.W. 6 who conducted postmortem, the prosecution has relied on her opinion that the death of Aparna was due to "haemorrhagic shock due to post tonsillectomy bleeding, however viscera preserved".

Ms. Dabholkar states what it means is due to heavy bleeding caused after operation of the tonsils of the patient. P.W. 6 was also supported by P.W. 8 - Dr. Jayant Patil who was member of the committee that was constituted to give opinion about the cause of death of Aparna. The other members included Civil Surgeon, Class I Surgeon, Class I E.N.T. Surgeon, Anesthesiologist, Pathologist and concerned Medical Officer. The report has been signed by all members of the committee and they have confirmed the conclusion drawn by P.W. 6 Dr. Manisha Patil.

But P.W. 6 has stated in her cross-examination that she cannot tell whether the blood mentioned in buccal cavity was of post operation bleeding or after death passive bleeding. According to P.W. 6 blood had got mixed with gastric juices and hence become coffee coloured but she has not found any internal haemorrhage in the deceased. Interestingly P.W. 6 also says that bleeding is common post operation when surgery is performed on tonsil.

8. P.W. 8 Dr. Jayant Patil has clearly stated in his cross-examination that the questionnaire that has been answered by the committee was prepared by presuming that the death was due to heavy bleeding. He has admitted that committee was not asked whether death was caused by haemorrhage shock or some other reason. P.W. 8 also states that death of patient may be caused due to haemorrhagic shock or may be caused due to laryngeal spasm. P.W. 8 also admits that when the patient is operated for removal of tonsils there is every possibility of profuse bleeding if the patient may cough while coming out of anaesthesia before cough reflex is fully established. He also said that aspiration of blood may take place while coming out of anaesthesia or blood clots may result in laryngeal spasm which means involuntary contractions of laryenx. The Trial Court, hence came to the conclusion that even evidence of these two witnesses who were doctors does not point to any gross negligence or recklessness on the part of accused. Therefore, the Trial Court rightly concluded that these do not indicate any gross negligence or recklessness on the part of accused.

9. The Apex Court in ***Ghurey Lal V/s. State of U.P.***[2] has formulated the factors to be kept in mind by the Appellate Court while hearing an appeal against acquittal. Paragraph Nos.72 and 73 of the said judgment read as under:

> *72. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against*

2 (2008) 10 SCC 450

*acquittal under Section 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*

*2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

*3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.*

*73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:*

*1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:*

*i) The trial court's conclusion with regard to the facts is palpably wrong;*

*ii) The trial court's decision was based on an erroneous view of law;*

*iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*

*iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*

*v) The trial court's judgment was manifestly unjust and unreasonable;*

*vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.*

*vii) This list is intended to be illustrative, not exhaustive.*

*2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.*

*3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.*

10. The Apex Court in many other judgments including ***Murlidhar & Ors. V/s. State of Karnataka***[3] has held that unless the conclusions reached by the trial court are found to be palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand they are likely to result in grave injustice Appellate Court should not interfere with the conclusions of the Trial Court. Apex Court also held that merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.

We must also keep in mind that there is a presumption of innocence in favour of respondent and such presumption is strengthened by the order of acquittal passed in his favour by the Trial Court.

11. The Apex Court in ***Ramesh Babulal Doshi V/s. State of Gujarat***[4] has held that if the Appellate Court holds, for reasons to be recorded that the order of acquittal cannot at all be sustained because Appellate Court finds the order to be palpably wrong, manifestly erroneous or demonstrably unsustainable, Appellate Court can reappraise the evidence to arrive at its own conclusions. In other words, if Appellate Court finds that there was nothing wrong or manifestly erroneous with the order of the Trial Court, the Appeal Court need not even re-appraise the evidence and arrive at its own conclusions.

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3 (2014) 5 SCC 730
4 1996 SCC (Cri) 972

12. I have perused the impugned judgment, considered the evidence and also heard Ms. P.N. Dabholkar, learned APP. I do not find anything palpably wrong, manifestly erroneous or demonstrably unsustainable in the impugned judgment. From the evidence available on record, there is nothing to substantiate the charge leveled against accused.

13. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court rightly observed that the prosecution had failed to prove its case.

14. In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

15. Appeal dismissed.

(K.R. SHRIRAM, J.)

Purti Parab