CASE NO.:
Appeal (crl.) 778 of 2004

PETITIONER:
Dr. Suresh Gupta

RESPONDENT:
Govt. of N.C.T. of Delhi & Anr.

DATE OF JUDGMENT: 04/08/2004

BENCH:
Y. K. Sabharwal & D. M. Dharmadhikari

JUDGMENT:
J U D G M E N T

(Arising out of SLP(Crl.) No. 2931 of 2003)

Dharmadhikari J.

Leave to appeal is granted.

The appellant who is a Doctor (Plastic Surgeon) is in the dock as an accused on the charge under Section 304 A of the Indian Penal Code [for short the 'IPC'] for causing death of his patient on 18.4.1994. The patient was operated by him for removing his nasal deformity. It may be mentioned at the outset, that the Anesthetist who was assisting the surgeon in the operation was also made co-accused but it is reported that he died pending the trial. The proceedings, therefore, stand abated against him.

The appellant urged before the Magistrate that the medical evidence produced by the prosecution, does not make out any case against him to proceed with the trial. The learned magistrate in deciding to proceed with the trial recorded following reasons in the impugned order dated 28.11.1998 passed by him :-

"Postmortem report is very categorical and very clear and it has been clearly mentioned therein that death was due to the complication arising out of the operation. That operation was conducted by both the accused persons. It is also clear from the material on record that deceased was young man of 38 years having no cardiac problem at all and because of the negligence of the doctors while conducting minor operation for removing nasal deformity, gave incision at wrong part due to that blood seeped into the respiratory passage and because of that patient immediately collapsed and died and it was also attempted to show by the accused persons that he was alive at that time and was taken to Ganga Ram Hospital for further medical attention.

It is clear from the record that patient had actually died at the clinic of the accused and therefore, I am of the opinion that there are sufficient grounds on record to make out a prima facie case against both the accused for commission of offence under Section 304A IPC. Let notice be served accordingly."

[Emphasis supplied]

As the Magistrate decided to proceed with the trial, the doctor approached the High Court by petition under Section 482 of the Code of Criminal Procedure. The High Court refused to quash the criminal proceedings and upheld the order of the Magistrate, although it records that the Metropolitan Magistrate was obviously wrong, in the absence of any medical opinion, in coming to a conclusion that the surgeon had given a cut at wrong place of the body of the patient at the time of operation leading to

blood seeping into the respiratory passage and blocking it resulting in his death. The High Court, however, declined to quash the proceedings against the doctor for the alleged criminal liability. In the impugned order dated 1.4.2003, it recorded its reasons thus :-

"In the present case two doctors who conducted the post-mortem examination have taken an emphatic stand which they have reiterated even after the Special Medical Board opinion, that death in this case was due to 'asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum.' This indicates that adequate care was not taken to prevent seepage of blood down the respiratory passage which resulted in asphyxia. The opinion of the Special Medical Board is not free from ambiguity for the reasons already given. Such ambiguity can be explained by the concerned doctors when they are examined during the trial."

Learned senior counsel Shri Ashok Desai appearing for the doctor, has taken us through the contents of the medical opinions produced by the prosecution with the complaint and some medical books and decided cases to submit that accepting the entire case of the prosecution, as has been laid before the trial magistrate, to be true, no case for convicting the doctor for criminal negligence under section 304A IPC has been made out. He submits that in the larger interest of medical profession, the criminal proceedings instituted against his client deserve to be quashed.

Reliance is placed on the House of Lords decision in the case of R. vs. Adomako [1994 (3) All E. R. 79]; Suleman Rehman Mulani vs. State of Maharashtra [1968 (2) SCR 515] and Laxman Balkrishna Joshi vs. Trimbak Bapu Godbole [1969 (1) SCR 206].

We have also heard learned senior counsel Shri Harish Chandra for the prosecution, who supported the view taken by the Magistrate and the High Court that the surgeon was guilty of gross negligence in giving an incision at the wrong place and did not take necessary precautions in the course of surgical operation to prevent seepage of blood down the respiratory passage of the patient and the resultant death by asphyxia.

It is settled position in law that the inherent power of the High Court under section 482 Criminal Procedure Code for quashing criminal proceedings can be invoked only in cases where on the face of the complaint or the papers accompanying the same no offence is made out for proceeding with the trial. In other words, the test is that taking the allegations and the complaint, as they are, without adding or subtracting anything, if no offence is made out, the High Court will be justified in quashing the proceedings [See Municipal Corporation of Delhi vs. Ram Kishan Rohtagi (AIR 1983 SC 67); and Durgs Inspector vs. B.K. Krishnaiah (AIR 1981 SC 1164)]

To decide whether on the basis of the complaint and the medical opinion produced along with it, any offence is made out or not, it is necessary to examine the papers produced with the complaint. The patient died in the course of surgical operation on 18.4.1994, but the post-mortem was conducted on 21.4.1994. By that time rigor mortis had almost passed off. The post-mortem report gave opinion on the cause of death by recording thus :-

"Asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum. The cause of death to the best of my knowledge and answers to the question put by IO."

A Special Medical Board of four eminent doctors was constituted by the investigating agency out of which three recorded their unanimous

opinion as under :-

After the perusal of all the documents produced before the Committee, we are of the view that the death of Mr. Siavash Karim Arbab, occurred due to sudden cardiac arrest, the direct cause of which (Cardiac Arrest) cannot be ascertained. However, possible cause leading to cardiac arrest can be as follows :-

1. Hypotension due Head-up-Position
2. Adverse drug reaction
3. Hypoxia

Death due to Asphyxia resulting from blockage of air passage secondary to ante-mortem aspiration of blood from the wound is not likely in the presence of cuffed endo-tracheal tube of proper size (8.5), which was introduced before the operation and remained in position till the patient was declared dead in Sir Ganga Ram Hospital, as per statements of members of the operating team and available records. In the post-mortem report there is presence of clotted fluid blood in respiratory passage, which invariably occurs ante-mortem due to aspiration from operation site. However, the presence of fluid and clotted blood in the respiratory passage, as noted in the post-mortem report, due to trickling of decomposition bloody fluid and some clot present in the nostril from the site of incision in the nose, cannot be ruled out after the tube is taken out. It is worth mentioning in the present case that the death occurred on 18.4.1994 at 2.30 p.m. and the post-mortem was conducted on 21.4.1994 at 12.20 p.m. when sufficient degree of decomposition had started.

Sd/- Dr. Bharat Singh Sd/- Dr. Rizvi Sd/- P.L. Dhingra
Chairman Member Member
[Emphasis supplied]

One of the members of the doctors team Prof. Jagannatham gave a separate report which reads as under :-
"After going through he relevant papers/documents and surgery and anaesthesia notes, it was observed that, what medical care was actually extended to the patient from 5 a.m. to 8.30 a.m. on 18.4.1994 at Delhi Plastic Surgery Clinic. It is surprising that the patient's physical status belonged to ASA Grade-I. The actual cause of cardiac arrest on the table noticed immediately after the start of operation, was not clear and it still stands as enigmas whether the surgeon had given any adrenaline infiltration to the patient or originally planned to do the surgery under local anaesthesia could not be decided. There is no mention about the use of inhalation anaesthesia during the surgical procedure under the general anaesthesia.

However, both anaesthetics and the surgeon immediately noticed the cardiac arrest and started resuscitative measures well-in time to save the patient's life. With all good intentions and team spirit, they transported the patient under manual ventilation (supporting respirations) and shifted the patient to Ganga Ram Hospital's ICU.

Sd/-
(Dr. Jagannatham)
15.11.1995"

It is on these medical papers produced by the prosecution, we have to decide whether the High Court was right in holding that criminal liability prima facie has arisen against the surgeon and he must face the trial. The legal position is almost firmly established that where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made

liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under section 304A of IPC.

Section 304A of IPC reads thus :-

"304A. Causing death by negligence. \026 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 extent to two years, or with fine, or with both."

On behalf of the doctor learned counsel referred to section 80 and section 88 of the IPC to contend that in various kinds of medical treatment and surgical operation, likelihood of an accident or misfortune leading to death cannot be ruled out. A patient willingly takes such a risk. This is part of doctor patient relationship and mutual trust between them.

Section 80 and 88 read as under :-

"80. Accident in doing a lawful act. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

88. Act not intended to cause death, done by consent in good faith for person's benefit. Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm."

Applying the laid down test for quashing or refusing to quash the criminal proceedings under section 482 of the Criminal Procedure Code, we have to find out whether from the complaint and the accompanying medical papers and by accepting the entire case alleged by the prosecution to be true, an order of conviction of the doctor for offence under section 304A of IPC can be passed.

The operation was performed on 18.4.1994 and the patient is alleged to have died on the same day. The post-mortem was performed after three days i.e. on 21.4.1994. According to the post-mortem report, the cause of death was : "blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum."

The medical experts constituting the Special Medical Board set up by the investigation have opined that "the blockage of air passage was due to aspiration of blood from the wound and it was not likely in the presence of cuffed endo-tracheal tube of proper size being introduced before the operation and remained in position." The team of experts also opined that 'presence of fluid and clotted blood in respiratory passage is likely, as it invariably occurs ante-mortem due to aspiration from operation site.' But they also opined that 'presence of fluid and clotted blood in the respiratory passage, as noted in the post-mortem report, due to trickling of decomposition bloody fluid and some clot present in the nostril from the site of incision in the nose, cannot be ruled out after the tube is taken out.'

Dr. Jagannatham, one of the members of the Special Medical Team constituted during investigation has, however, given separate opinion, the details of which we have quoted above. It seems to be to some extent in

favour of the accused surgeon. From the post-mortem report and the opinion of the three medical experts of the medical team specially constituted, the case of the prosecution laid against the surgeon is that there was negligence in 'not putting a cuffed endo-tracheal tube of proper size' and in a manner so as to prevent aspiration of blood blocking respiratory passage.

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 :-

"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."

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.

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 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.

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.

No doubt in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be 'not introducing a cuffed endo-tracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage'. This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

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.

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.

See the following concluding observations of the learned authors in their book on medical negligence under the title 'Errors, Medicine and the Law' [by Alan Merry and Alexander McCall Smith at pg. 247-248]. The observations are apt on the subject and a useful guide to the courts in dealing with the doctors guilty of negligence leading to death of their patients :-

"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence.

Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis."

After examining all the medical papers accompanying the complaint, we find that no case of recklessness or gross negligence has been made out against the doctor to compel him to face the trial for offence under section 304A of the IPC. As a result of the discussion aforesaid on the factual and legal aspect, we allow this appeal and by setting aside the impugned orders of the Magistrate and of the High Court, quash the criminal proceedings pending against the present doctor who is accused and appellant before us.