

Radha Sasidharan Vs. State of Kerala

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Court : Kerala

Decided On : Jun-08-2006

Reported in : 2006CriLJ4702; 2007(4)KLT268

Judge : K.A. Abdul Gafoor, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 304, 328, 415, 416, 419, 420, 468 and 471; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 214, 215, 222, 222(1) and 222(2)

Appeal No. : Crl. A. No. 208 of 2000

Appellant : Radha Sasidharan

Respondent : State of Kerala

Advocate for Def. : C.P. Saji, P.P. and; Mathew John, Amicus Curiae

Advocate for Pet/Ap. : C.V. Vasudevan and V. Sujatha, Advs.

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. The first accused, in S.C. No. 45/97 on the file of the II Additional Sessions Judge, Kollam, is the appellant. She, along with the 2nd accused, was tried for

offences punishable under Sections 419, 420, 468, 471 and 304 of the IPC, read with Section 34 thereof. The second accused was acquitted and the appellant/first accused was convicted of offences punishable under Sections 419 and 304, Indian Penal Code. She is sentenced to undergo rigorous imprisonment for two years under the first count and for another term of 3 years and to pay a fine of Rs. 30,000/- in default whereof, to undergo rigorous imprisonment for a term of six months under the second count. The sentences were directed to run concurrently. On all other counts, she also was acquitted.

2. The allegation against the appellant was that she cheated by personation exhibiting the board 'S.N. Hospital and Maternity Home' in building No. TP/415 and by deception making others believe that she was a qualified registered medical practitioner, competent to treat with Allopathic medicines and dishonestly cheated the patients and that she treated the patients including the deceased Sheeja, daughter of PW. 2, without taking precaution against drug reaction and that she later succumbed to the injuries arising out of such drug reaction. Therefore, she committed cheating by personation and culpable homicide not amounting to murder.

3. Challenging the conviction and sentence, for the offence under Sections 419 and 304, I.P.C., this appeal is preferred by the first accused.

4. Section 419, Indian Penal Code reads as under:

Punishment for cheating by personation-Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating by personation is defined in Section 416, which reads as follows:

Cheating by personation - A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he, or any other person is a person other than he or such other person really is.

Explanation - The offence is committed whether the individual personated is a real or imaginary person.

5. In this case, the prosecution does not have a case that the first accused Radha Sasidharan pretended to be any other person - existing or fictitious. She was, all the way, during the alleged transaction, acting in her own name, Radha Sasidharan. Though only a nurse, she had styled herself as a 'doctor' competent to treat patients. Even if she had pretended to be a doctor, though not really a doctor, she cannot be convicted for cheating by personation under Section 419, Indian Penal Code. Necessarily, she cannot be convicted on that score.

6. The Public Prosecutor contends that, in such situation, she can be convicted for the offence of cheating, ingredients of which have been proved in this case. If she herself pretended to be a doctor which she really was not, that will amount to cheating as mentioned in Section 415, which provides that:

Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Going by the prosecution case, as rightly pointed out by the Public Prosecutor, had the appellant not pretended herself as a doctor, PW 2 would not have taken the deceased to the appellant for treatment or admitted her in the hospital run by the appellant. Thus, the deceased would not have undergone treatment by the appellant, while she was alive. But she underwent treatment as a patient under the appellant, which finally resulted in damage and harm to the person and body of the deceased, as alleged by the prosecution. Therefore, she had really cheated the deceased as well as PW. 2.

7. The Court below had, rightly framed a charge under Section 420, Indian Penal Code. But she was acquitted, on that count. Unfortunately, there is no appeal by the State on that count.

8. The Public Prosecutor submits that offence under Section 420 is a minor offence as compared to Section 419 and therefore she can be convicted under that count as the ingredients thereof have been proved in respect of the conviction under Section 419 entered into by the Court below. I will deal with this contention later, as this aspect has to be considered in connection with the other offence under Section 304 as well.

9. Now, I will consider the contentions against the conviction under Section 304, IPC. A person committing culpable homicide not amounting to murder shall be convicted under Section 304 Part I. It reads:

Punishment for culpable homicide not amounting to murder - Whoever commits culpable homicide not amounting to murder shall be punished with (imprisonment for life), or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

10. The prosecution case is that the deceased was admitted in the hospital run by the appellant for treatment on 24-5-1992. PW. 2 brought her with the ailment of fever and conjunctivitis, as is revealed by Ext. P6.

11. It is in evidence of PW 2, mother of the deceased, that in spite of administering medicines, including injection on the day and night of 24-5-1992, the condition of the patient became worse. Her eyes were bulged and she showed complete restlessness and the appellant had directed PW. 2 to take her to another hospital. Accordingly, she took her to another hospital named Aradhana Hospital, on 25-5-1992. PW 7 treated her there. The deceased had 'Stevens Johnsons Syndrome', according to PW. 7, at that time. As her condition was not improving, PW.7 referred the patient on 27-5-1992 to the Medical College Hospital at

Thiruvananthapuram. She was treated there for some long time until 22-6-1992, when she was discharged, as is seen from Ext. P 12. Her condition on discharge on 22-6-1992 was 'patient better'. Thereafter, for more than three weeks, she did not have any complaint. Later she developed bronchial trouble and again she was admitted to the Medical College, Thiruvananthapuram on 15-7-1992. This is revealed from Ext. P 20. She was treated for about two weeks in the Medical College Hospital and was later referred to 'Chest Sanatorium' on 29-7-1992 and she died in that Sanatorium on the midnight of 30-7-1992 i.e. at 1.30 a.m. on 31-7-1992.

12. From these facts duly borne out by the evidence on record, the death of the deceased cannot, in any way, be linked to the act of the appellant/accused. The condition of the patient, when she was discharged from the hospital run by the appellant, was worse, perhaps because of drug reaction. But the discharge was not because of any bronchial decease. Such a disease was not there when she had been discharged from the Medical College Hospital on 22-6-1992. At that time, her condition was 'patient better' as per Ext. P 12. She had not been in any difficult condition until she was admitted again in the Medical College Hospital on 15-7-1992. The deceased was also treated there until 29-7-1992 when she was referred to Chest Sanatorium, a Specialised Hospital, for treatment of chest related diseases. She died there. There is no evidence that death was connected in any way due to the negligent act of the accused. Unless the death is connected to the act of the accused, she cannot be convicted under Section 304, Indian Penal Code. Therefore, that conviction shall have to be reversed.

13. But the Public Prosecutor points out that the evidence on record reveals that the appellant was not a doctor. She was only a nurse. She was running the hospital. PW. 2 deposed that her daughter deceased Sheeja, when she was suffering from fever, wanted to consult the appellant, who was known as Dr. Radha PW.2 further says that when her daughter was taken to the hospital run by the appellant, the appellant examined her, prescribed the medicines and even administered injections, not only immediately after the admission, but later also, on 2 or 3 occasions, including during night when there was complaint that the patient was not getting any relief. Ext. P6 is the prescription card of the hospital run by the

appellant. It reveals that the medicines prescribed for the deceased were : 'injection paracetamol - a medicine normally given to a patient suffering from fever, injection polybion, a multivitamin, injection PP4, 1/4. ATDX 2; meaning thereby paracetamol and some other oral drugs. On her admission in the Medical College Hospital, the doctor there called for the details of the treatment in S.N. Hospital run by the appellant. The details were called for as per Ext. P7 letter. The reply received is Ext. P8. That is also in the 'letter head of the hospital' run by the appellant. It also reveals that the prescription included injection paracetamol, injection Dexna Dexua, a steroid and injection polybion and injection PP4, the same as in Ext. P 6. The evidence given by PW. 2, mother of the deceased, is that her daughter had been, while admitted in the hospital run by the appellant, treated by none other than the appellant and injections were prescribed and administered by none other than the appellant. It is her further case that after her daughter had been admitted in that hospital, her condition became worse by showing restlessness, bulging of her eyes and other severe discomfort. PW. 6, a Professor in Forensic Medicines, who tendered medico-legal opinion in Ext. P 4, says that the deceased had reaction to the medicines administered.

14. It is submitted by the Public Prosecutor that, this bundle of evidence on record reveals the offence punishable under Section 328 I.P.C. It is a minor offence as compared to that under Section 304 I.P.C. Therefore, this Court shall invoking Section 222 of the Code of Criminal Procedure, 1973 convict the appellant on that count. As it was felt by the Court that there is evidence for punishing the appellant under Section 328, the counsel for the appellant was asked why she shall not be punished under the said provision and was given time to argue on this point. At that point of time, Sri Mathew John, advocate, was also requested to assist the Court.

15. Advocate Sri Mathew John, whom this Court requested on last hearing date to render assistance in the peculiar facts and circumstances to find out whether the appellant could be convicted for the offence under Section 328 Indian Penal Code, submitted after study, that PP 4, an injection administered by the appellant as revealed by Exts. P 6 and P 8, is nothing other than penicillin, for which a test dose had to be given. The evidence given by PW. 6, the expert in Forensic

Medicines, reveals that there was drug reaction. Penicillin can cause drug reaction.

16. In this background, the Public Prosecutor submits that admittedly, the appellant did not have the expertise to prescribe medicine, being only qualified to be a nurse. PW 2 had categorically spoken to before the Court that the injections were administered by none other than the appellant. Therefore, the appellant had prescribed and administered the medicine, which caused reaction. She was not a doctor. Necessarily, this action on the part of the accused will come within the ambit of Section 328 Indian Penal Code, which reads as follows:

Causing hurt by means of poison, etc. with intent to commit an offence - Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other things with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

17. The evidence given by PW. 2 reveals, as already mentioned above, that the patient had been treated by the appellant, who was admittedly not a doctor and had prescribed and administered injections, which include penicillin and that the patient's condition became worse, on complaint of which further injection was administered by her. This will prove the ingredients of the offence punishable under Section 328 IPC, the Public Prosecutor points out.

18. It was thereupon submitted by the counsel for the appellant that, on admission in Aradhana Hospital, immediately after discharge from her hospital, the symptom shown by the patient was found to be Stevens Johnson Syndrome. This can be due to drug reaction. It will come out in a patient only after 48 hours from administration of the drug. The admission in Aradhana Hospital was within 48 hours, from the time of admission of the patient in her hospital. It is submitted, referring to the evidence of PW. 7, that the patient had been, before being admitted to her hospital, admitted in another hospital. Necessarily, if at all there had been any drug reaction, it can only be from that hospital. This contention

cannot be accepted because the evidence of PW. 2, the mother of the patient, is categorical that the patient had developed trouble during night between 23rd and 24th of May, 1992 and she was taken to the hospital of the appellant at 9.30 a.m. on 24-5-1992, as the patient herself told her to take her to that hospital, where the appellant was the doctor. Nothing had been brought out from PW.2 or even PW. 1, the brother of the deceased, as to whether she had been treated, immediately before she was taken to the hospital run by the appellant, in any other hospital. Therefore, this contention cannot be accepted. No scientific basis is also pointed out from the part of the appellant to show that Stevens Johnson, Syndrome, a medicine reaction, could occur only beyond 48 hours.

19. The medicines administered by the appellant to the patient were prescribed by herself, as spoken to by PW. 2, though she was not a doctor. The injections were also administered by the appellant herself, which included, as already mentioned above, penicillin, for which the mandatory test dose had to be given. The appellant does not have a case that she had given such test dose, obviously because, she completely denied the allegation that the patient was treated by her. When penicillin injection was given, as is revealed by Exts. P 6 and P 8. As per the oral evidence of PW 2, the condition of the patient became worse during the treatment, including bulging of eyes and she showed restlessness.

20. Administration of penicillin injection by a nurse, without prescription by a doctor and without test dose shall be taken as administration of an 'unwholesome drug'. 'Unwholesome' as per the dictionary meaning, 'is harm to health or to moral well-being'. 'Unwholesome drug' therefore, means a drug which harm physical well-being. Penicillin, which is susceptible to reaction, as universally known, therefore, can be taken as an unwholesome drug, when it is administered without giving a test dose. It ultimately resulted in drug reaction, as per the symptoms described by PW. 2 - the mother of the deceased and the scientific opinion given by PW. 6, a Forensic Expert.

21. At this point of time, a question arose as to whether, without framing a charge containing the allegations forming basis for the offence punishable under Section 328, can she be convicted for that offence; Sri Mathew John, advocate Invited my

attention to last among the charges framed by the Court below which reads as follows:

and lastly:- That you at the same time, place and during the course of the same transaction with the knowledge and intention, committed culpable homicide not amounting to murder to wit, on 24-5-92 at 9 a.m., A 1 treated Sheeja aged 18 with Allopathic Medicines injection and tablets having admitted her at the said hospital, without taking any precautions to drug reaction, and the said Sheeja succumbed to the drug reaction on 30-7-92 at 1.30 a.m. from Pulayanarkotta, T.B. Hospital, Thiruvananthapuram and thereby committed the offence punishable Under Section 304 I.P.C. and within my cognizance.

22. Thus, it is clear that the appellant was made known In the said charge to answer the allegation that she had administered allopathic injection to the deceased Sheeja after having admitted in her hospital, without taking a precaution to drug reaction and she succumbed to the drug reaction. Even though there is no evidence to show that she succumbed to the drug reaction, as already mentioned above, the evidence on record reveals that there was drug reaction and consequently she suffered hurt on account of that. As deposed by PW. 2, after administering (he injection to her daughter, she had shown restlessness and other serious discomfort including bulging of eyes. When, thus, she developed restlessness and there was bulging of her eyes, necessarily, it can be said that she suffered hurt on account of the administration of injection by the appellant. This is sufficient to constitute the offence under Section 328 I.P.C. Therefore, when she was thus made known about the ingredients of the offence punishable under Section 328 in the said charge framed by the Court below, it is submitted by the Public Prosecutor that this Court can definitely invoke the provisions of Sections 215 and 222 of the Code of Criminal Procedure, 1973.

23. It is submitted that mentioning of Section 304 Indian Penal Code in the said charge can, at the best, be taken only as an error and such an error in the charge or omission to state exactly the correct Section shall not be regarded as a material error, unless the accused was, in fact, misled by such error or omission resulting, in any failure of justice. 'As the entire aspects were known to her from the said

charge, including administration of the medicine and the drug reaction and the necessity to take precaution, necessarily, no prejudice will be caused to the accused as all the necessary ingredients of Section 328 had been charged against her, though a wrong punishing section had been mentioned.

24. It is further submitted that even otherwise, the offence punishable under Section 328, being only a minor offence, as compared to that under Section 304 this Court will have the power to convert the conviction to that section invoking Section 222(1) and (2) of the Code of Criminal Procedure, 1973, which reads as follows:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and Such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

25. In this regard, the decision reported in K. Prema Rao v. Yadla Srinivasa Rao : 2003 CriLJ69 was also relied on. The ingredients of Section 328, judicially considered as discernible from Joseph Kurian v. State of Kerala : 1995 CriLJ502 .

26. The medicine in question administered, as found already, was 'unwholesome drug'. The appellant had administered that substance. This resulted in hurt to the deceased discussed. The appellant thus caused 'hurt' on the patient/the deceased. The accused being a qualified nurse had the knowledge that it was likely to cause 'hurt'.

27. The punishment provided for that offence is imprisonment of either description, which may extend to 10 years and with fine, whereas that provided for Section 304 Part II viz., which may extend to 10 years. Going by the charge, it cannot be said that it comes within Part I of Section 304, because, the appellant did not have intention to cause the death of the deceased or causing such bodily injury as was

likely to cause death, but only did have knowledge that it was likely to cause death. In between two offences, one can be considered as minor to the other offence, if the former is punishable with lesser sentence than the latter. Considering the punishments for the said two offences, it cannot be taken that the offence punishable under Section 328 is a minor offence, as compared to that under Section 304 Part II. In this regard, it is profitable to refer to the decision reported in *Shamnsahab M. Multtani v. State of Karnataka* : 2001 CriLJ1075a . Paragraph 16 thereof reads as follows:

What is meant by 'a minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

This makes it clear that the minor offence shall be one punishable with a lesser sentence as compared to the one really charged.

28. The punishment for the offence under Section 328 is, in no way, lesser than the one provided under Section 304 Part II. Necessarily, even though, as rightly pointed out by the Public Prosecutor, the ingredients of the offence under Section 328 Indian Penal Code were found to be proved, it being not a minor offence, the accused cannot be found guilty under that provision.

29. This view is applicable squarely to the contentions of the Public Prosecutor regarding the offence punishable under Section 420 I.P.C., as well, as considered in paragraphs 6 to 8 supra. The appellant was charged with the offence under Section 420, but was acquitted. There is no appeal by the State on that count. The appellant was convicted under Section 419, but it has been found not sustainable as per findings in para 5 supra. The contention of the Public Prosecutor is that the conviction by the Court below under Section 419, as the evidence on record reveals the offence under Section 420, can be converted as that under the latter

provision invoking Section 222 Code of Criminal Procedure, 1973. Though the ingredients of the offence of cheating had been brought in, while proving the offence under Section 419, it will not lie against the appellant. The offence punishable under Section 420 Indian Penal Code for cheating is not a minor offence in terms of Section 222 of the Code of Criminal Procedure, 1973 for reasons already mentioned, to find the appellant guilty under that Section, instead of 419, Because, the punishment provided for that offence under Section 419 is imprisonment only for a term which may extend to three years while that for the offence under Section 420 may extend to imprisonment for seven years. I had already acquitted her for the offence under Section 419. When the State had not filed an appeal against the order of acquittal under Section 420, she cannot be convicted of that offence.

30. The contention that mentioning of Section 304 I.P.C. in the charge was only an error for Section 328 I.P.C., the ingredients of which have been brought in evidence, and therefore, the conviction can be confirmed as under Section 328 I.P.C. as the accused is in no way prejudiced by such error in stating the offence is not tenable. Effect of such error is dealt with in Section 215, Cr.P.C. It reads:

Effect of errors - No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

31. The charge under Section 304 framed against the appellant as extracted supra was with definite allegation of culpable homicide not amounting to murder by reason of administration of drug without taking precaution for reaction therefrom. This is totally different from causing hurt by means of administration of unwholesome drug. On no count a definite charge, of culpable homicide can be an error for causing hurt. Going by Section 214 Cr.P.C., in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable. Therefore; to construe the section relating to culpable homicide as only an error for causing hurt by unwholesome drug, will lead to misleading so far as the accused is concerned

resulting in failure of justice so far as his opportunity to defend is concerned. Therefore, this contention cannot be accepted.

32. Hence, the appeal is allowed and the conviction entered into by the Court¹ below is set aside and the appellant/1st accused is acquitted of the charges levelled against her. The bail bond executed by her shall stand cancelled.

I record with appreciation, the services rendered by Sri. Mathew John, Advocate, who assisted this Court at the request of the Court and also to Smt. P. Uma, counsel for the appellant and learned Public Prosecutor Sri. C.P. Saji for the effective and efficient service rendered.

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