

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 1 -

Indore, dated 01/05/2018

Shri Sanjay Sharma, learned counsel for the applicants.

Shri Kamal Kumar Tiwari, learned Government Advocate for the respondent/State.

Shri Vivek Sharan with Akash Sharma, learned counsel for the objector.

The applicants before this Court are aggrieved by order dated 25/01/2018 passed in Criminal Revision No.52/2017 by I Additional Sessions Judge, Indore as well as order dated 03/08/2017 passed by Judicial Magistrate First Clas, Mhow Distt. Indore in Criminal Case No.704/2017.

02- The facts of the case reveal that an unfortunate incident took place on 16/06/2017 and a young child aged about seven years died by drowning in a swimming pool. As per the prosecution case, the applicants were instructors in respect of the swimming pool in question and their duty was to teach swimming to young children.

03- The First Information Report and the documents on record reveals that after drowning of the child, he was taken to Choithram Hospital by another employee of the School namely Dinesh and in turn Choithram School has informed the police station and thereafter, a criminal case was registered at Crime

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018
(Vishal & Anr. Vs. State of M. P.)

- 2 -

No.315/2017. After investigating the entire crime, a charge sheet under Section 304-A of the Indian Penal Code, 1860 was filed by the police.

04- The trial Court has taken cognizance for offence under Section 304(II) instead of Section 304-A of the IPC *vide* order dated 03/08/2017 and thereafter, the present applicants being aggrieved by the order passed by the trial Court dated 03/08/2017 have preferred a revision and by an order dated 25/01/2018, the revisional Court has dismissed the revision.

05- Shri Sanjay Sharma has argued before this Court that that by no stretch of imagination offence under Section 304(II) is made out based upon the statement of witnesses and the material available on record and at the best a case is made out under Section 304-A of the IPC. He has stated that there is no *mens rea* on the part of the applicants and there was no intention to cause death or causing such bodily injury as is likely to cause death nor any act was done with the knowledge that it is likely to cause death.

06- On the other hand, learned government advocate has argued before this Court that a young child has lost his life and the present applicants were swimming instructors in respect of School and they have failed in performing their duty and were negligent and therefore, as they were aware that child will die on account of

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 3 -

drowning, they have certainly committed offence under Section 304(II) of the IPC.

07- Shri Vivek Sharan, learned counsel appearing on behalf of the objector has argued before this Court that an offence under Section 304(II) is made out in the matter. It is not a case which will fall under Section 304-A of the IPC and the revision deserves to be dismissed.

08- Heard learned counsel for the parties at length and perused the record and the matter is being decided at motion hearing stage itself with the consent of the parties.

09- This Court has carefully gone through the arguments canvassed by learned counsel for the parties and the final report which is on record submitted by the police under Section 173 of the Code of Criminal Procedure, 1973. There are as many as 25 witnesses listed at serial No.13 of the final report. The statement of the witnesses reveal that child in question did went to the swimming pool and the swimming instructor Nadeem Khan and his Assistant Vishal were the people used to teach swimming to the children. Based upon the statement of witnesses, the police has submitted a final report for offence under Section 304-A/34 of the IPC.

10- The relevant statutory provision which are necessary for deciding the matter as contained under Section 304, 304-A and

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 4 -

Section 34 of the Indian Penal Code, 1860 reads as under:-

“304. Punishment for culpable homicide not amounting to murder.— Whoever commits culpable homicide not amounting to murder shall be punished with ¹[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.

304A. Causing death by negligence.— 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 extend to two years, or with fine, or with both.

34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

11- In the present case, undisputedly the applicants were swimming pool instructors / coaches and the material available before this Court does not establish that there was any intention or *mens rea* on the part of the applicants in respect of crime in question. It is really unfortunate that death has taken place and at the best it can be said that applicants were negligent in performing their duty and the case would fall under Section 304-A of the IPC.

12- In a case decided by this Court, i.e. **Ram Kishore Vs. State of M. P.** reported in **2010 ILR 1836**, a death has taken place on account of omission on the part of applicant in leaving the tank

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 5 -

uncovered and unsafe for small children. Three children aged about five, three and five years fell down in about four feet deep tank and death has taken place. This Court in the aforesaid case, in paragraphs No.3 to 8 has held as under:-

“3. Background facts may be summarized as under:-

(i) On 05.10.2008 at about 5.30 p.m., three children namely Nagendra, Swapnil and Krishna Kumar, respectively aged about 5, 3 and 5 years, fell down in about 4-feet deep tank meant for collection of water at the site for construction of school building in village Bhatgawan and died due to drowning. Accordingly, morgue (death) cases were registered at P.S. Umariya Pan. After due inquiry, the SHO registered a case under Section 304 read with Section 34 of the IPC against the Petitioner to whom contract for construction of building was awarded by the Gram Panchayat.

(ii) Upon completion of the investigation, the charge sheet was submitted against the Petitioner and co-accused Ramkishore Barman and Uday Kumar, respectively Sarpanch and Secretary of the Gram Panchayat, before the CJM, Katni who committed the case to the Court of Session for trial. However, by virtue of the order-dated 17.04.2009 passed by a co-ordinate Bench of this Court in MCrC No.1835/2009, the petition filed by the Petitioner and the co-accused Ramkishore, under Section 482 of the Code, was allowed and their prosecution for the offence under Section 304 of the IPC was quashed. But, the trial Judge was directed to frame necessary charges against the Petitioners. Accordingly, learned First ASJ, Katni vide order-dated 08.05.2009 framed charge under Section 304A of the IPC and transferred the case, under Section 228(1)(a) of the Code, to the CJM for trial.

4. Learned Counsel for the Petitioner has strenuously contended that in absence of allegations as to any positive act of criminal negligence, the offence punishable under Section 304A of the IPC would not be made out. However, the contention is apparently misconceived as, under Section 32 of the IPC, the term 'act' includes 'illegal omission'.

5. The word 'illegal' is defined in Section 43 of the IPC and as already explained in Ganeshgir v. State of M.P. 1966 CRI. L.J. 1273, omission is not like an act, a real event, but is merely an artificial conception, consisting of the negation of a particular act. Moreover, in the words of Straight J., criminal negligence is the gross and culpable neglect or failure to exercise reasonable care and precaution to guard against injury either to public generally

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018
(Vishal & Anr. Vs. State of M. P.)

- 6 -

or to an individual in particular (Empress v. Idu Beg ILR (1881) All 776 quoted with approval in Mahadev Prasad Kaushik v. State of U.P. AIR 2009 SC 125).

6. In this view of the matter, the omission on the part of the Petitioner in leaving the tank uncovered and unsafe for the small children prima facie amounted to criminal negligence.

7. This apart, the inherent powers, under Section of the Code, are to be exercised debito justitiae prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, cannot be decided without sufficient material. Accordingly, it is not a fit case for interference under the inherent powers.

8. The petition, therefore, stands dismissed.”

In the aforesaid case it has been held that at the best it can be said that based upon material available on record the conduct of the applicant there in amounted to criminal negligence.

13- The apex Court in the case of of **Mahadev Prasad Kaushik Vs. State of U.P. & Anr.** passed in Criminal Appeal No.1625/2008 decided on 17/10/2008 was dealing with a case of a Doctor who allegedly gave an injection to one Buddha Ram and within half an hour Buddha Ram died. Paragraphs No.22 to 28, 32 and 47 of the aforesaid judgment reads as under:-

“22. The question then is as regards issuance of summons under Section 304, IPC. Section 304 reads thus;

304. 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

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 7 -

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.

23. Plain reading of the above section makes it clear that it is in two parts. The first part of the section is generally referred to as "Section 304 Part I", whereas the second part as "Section 304, Part II". The first part applies where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause such bodily injury as is likely to cause death. Part II, on the other hand, comes into play when death is caused by doing an act with 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.

24. The Makers of the Code observed;

"The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed".

25. The Makers further stated;

"It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observation and experience enable us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion".

26. Before Section 304 can be invoked, the following ingredients must be satisfied;

- (i) the death of the person must have been caused;
- (ii) such death must have been caused by the act of the accused by causing bodily injury;
- (iii) there must be an intention on the part of the accused
 - (a) to cause death; or

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 8 -

- (b) to cause such bodily injury which is likely to cause death; (Part I) or
- (iv) there must be knowledge on the part of the accused that the bodily injury is such that it is likely to cause death (Part II).

27. Section 304A was inserted by the Indian Penal Code (Amendment) Act, 1870 (Act XXVII of 1870) and reads thus;

304A. Causing death by negligence 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 extend to two years, or with fine, or with both.

28. The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Section 299 and 300, IPC and covers those cases where death has been caused without 'intention' or 'knowledge'. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are rash or negligent and are directly the cause of death of another person.

32. The learned counsel for the appellant- accused submitted that by no stretch of imagination, it can be said that the appellant while administering injections to deceased Buddha Ram said to have committed an offence punishable under Section 304, IPC. It can never be said that the death of Buddha Ram had been caused by the appellant by doing the act of giving injections with intention to cause his death or to cause such bodily injury as is likely to cause death. Likewise, it is impossible to think that the purported act has been done by the appellant-accused with the knowledge that in all probability, it would result into the death of Buddha Ram.

47. For the foregoing reasons, in our judgment, the appeal deserves to be partly allowed. So far as issuance of process for offences punishable under Section 504 and 506, IPC is concerned, it is liable to be quashed and is hereby quashed. Likewise, process for an offence punishable under Section 304, IPC is ill-conceived on the facts of the case and the process could only be issued by the learned Magistrate to the appellant-accused for an offence punishable under Section 304A, IPC. The appeal is accordingly allowed to the extent indicated above."

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018
(Vishal & Anr. Vs. State of M. P.)

- 9 -

In light of the aforesaid, as there was no intention (*mens rea*) or knowledge on the part of the applicants in the matter, no case is made out under Section 304(II) of the IPC and the negligence will be covered under Section 304-A of the IPC.

14- A similar view has been taken by Madras High Court in the case of **ATB Bose Vs. State by Inspector of Police** in Cri.OP. No.4518/2007 decided on 10/10/2014. Paragraph No.17 of the aforesaid judgment reads as under:-

“17. A reading of the above judgment would make it clear that unless, it is shown that there is proximity between the death of the deceased and the alleged rash or negligent act, or atleast there is some proximity between these two it is not possible even to hold prima facie that the individual has committed an offence under Section 304(A) I.P.C.”

15- The coordinate bench of this Court in M.Cr.C.No.9067/2016 decided on 31/10/2017 (R. K. Mittal Vs. The State of Madhya Pradesh) decided on 31/10/2017 was dealing with an incident wherein a bus fell down from a culvert and has held that no case is made out even under Section 304-A of the IPC and the FIR was quashed by the High Court.

16- In light of the aforesaid, as there was no intention or knowledge of causing death and the conduct of the applicants is mere negligence, this Court is of the opinion that the impugned order dated 03/08/2017 passed by Judicial Magistrate First Class, Indore and the order passed by the revisional Court dated

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Criminal Revision No.985/2018

(Vishal & Anr. Vs. State of M. P.)

- 10 -

25/01/2018 in Criminal Revision No.52/2017 deserves to be set aside and are accordingly set aside.

17- The petitioner shall be prosecuted for offence under Section 304-A read with Section 34 of the Indian Penal Code, 1860. The trial Court shall be free to proceed ahead in accordance with law. It is made clear that the observation made by this Court are confined only in respect of the order passed by this Court and will not come in way of the learned Judge in deciding the matter on merits while proceeding ahead against the present applicants under Section 304-A of the IPC.

18- With the aforesaid, revision stands allowed.

Certified copy as per rules.

(S. C. SHARMA)
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