**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**NAGPUR BENCH AT NAGPUR**

**CRIMINAL WRIT PETITION NO.225 of 2018**

**PETITIONER :** Dr. Bhushan s/o Brijmohan Katta,
aged about 30 years, Occ : Resident Doctor,
R/o Asaid Colony, Amravati,
Tq. and District : Armavati.

**...VERSUS....**

**RESPONDENTS :**

1. State of Maharashtra,
through its Police Station Officer,
Gadge Nagar Police Station,
District : Amravati.

2. Dr. Arun s/o Ambadas Raut,
aged 59 years, Occ : Medical Officer,
[Civil Surgeon], Government Hospital
Amravati, r/o Amravati,
Tq. and District : Amravati.

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Mr. Anil Mardikar, Sr. Advocate with Shri S.G. Joshi, Advocate for petitioner
Mr. S.M. Ghodeswar, Addl. P.P. for respondent no.1
None for respondent no.2, though served

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**CORAM : SUNIL B. SHUKRE AND**
**AVINASH G. GHAROTE, JJ.**

**Judgment reserved on : 17/02/2021**
**Judgment pronounced on : 09/03/2021**

**J U D G M E N T : (PER : AVINASH G. GHAROTE, J.)**

1. Heard. **Rule**. Rule made returnable forthwith.

2. The present petition challenges the final report/charge-sheet No.278 of 2017, for the offence under Section 304 read with Section 34 of IPC, filed by the Police Inspector, Police Station Gadge Nagar, Amravati, in which the present petitioner has been made an accused. The F.I.R. leading to the charge-sheet was lodged on the report of the Civil Surgeon, General Hospital, Amravati, on the allegation that between the night of 28/5/2017 and early morning of 29/5/2017, between 10:30 p.m. to 3:50 a.m. (3:50 a.m. of 29/5/2017 as per the post mortem report), there occurred unfortunate demise of four babies, who were admitted in the Neonatal Intensive Care Unit (hereinafter referred to as ***"the NICU"***), Department of Paediatrics at Dr. Punjabrao Deshmukh Medical College, Amravati, due to wrong administration of an injection by the nursing staff on duty, namely, sister Vidya Thorat, who administered the drug "Potassium Chloride" instead of injection "Calcium Gluconate", as prescribed. The complaint also named the present petitioner, who was occupying the post of Junior Resident Doctor at the relevant time and was stated to be absent and was arrayed as an accused on the ground that he had not taken proper care, due to which the unfortunate incident happened.

3. Mr. Anil Mardikar, learned Senior Counsel, for the petitioner, submits, that filing of the F.I.R. as well as the charge-sheet against the petitioner under Section 304 read with Section 34 of I.P.C. is clearly not justified on the face of it. He submits that it was an admitted position that the petitioner though on duty, was not present at the time of administration of the injection, and was somewhere else at the relevant time. That what was prescribed was the injection “Calcium Gluconate” to be administered to the babies, instead of which, what was administered was the injection “Potassium Chloride” (Kesol). He submits that the injection “Potassium Chloride” (Kesol) was never prescribed by the petitioner, as would be indicated from the clinical notes on record at page 211 and onwards. He invites our attention to the admission given by the staff nurse, who was on duty at that time, namely, Vidya Bhanudas Thorat, who had admitted her mistake in administering the injection “Potassium Chloride” (Kesol) instead of “Calcium Gluconate”, which is on record at page 57. He further invites our attention to the report of the fact finding Committee constituted for this purpose, dated 31/5/2017, which also found that death of the four newborns was possible by injection Kesol (Potassium Chloride) 2 CC IV, which

is corroborated by the post mortem finding. He further invites our attention to the CCTV footage visualization panchanama dated 30/5/2017, to submit that the admission as given by the on-duty staff nurse is borne out therefrom. He, therefore, submits a perusal of the entire charge-sheet and the material along with it as placed on record, would indicate, that no case is made out against the petitioner under Section 304 of I.P.C. The learned Counsel invites our attention to the definition of "culpable homicide: as contained in Section 299 and the Exceptions – 1 to 3 of Section 300 of the IPC and submits, that the ingredients necessary for invoking the said section are not made out against the petitioner. He submits that there was no intention, or knowledge on part of the petitioner as is necessary to attract Section 299 of I.P.C. and, therefore, no offence, even if the entire charge-sheet is taken to be proved, can be made out against the petitioner. He submits that, at the most, a departmental action can be taken for his absence in the NICU at the particular time on the given day; but in any case, the petitioner cannot be charged with the offence under Section 304 of I.P.C.

4. Learned Additional Public Prosecutor Mr. S.M. Ghodeswar for the respondent no.1 supports the prosecution and opposes the prayer. As we were not satisfied with the reply of the State in this matter, therefore, by an order dated 1/12/2020, we had directed the filing of a proper reply, which was reiterated in the order dated 8/1/2021, in pursuance to which, additional reply has been filed on record on 20/1/2021.

5. Mr. S.M. Ghodeswar, learned A.P.P. submits that there is no dispute that the petitioner was duty officer in the NICU, in which capacity, it was the duty of the petitioner, to ensure that proper drugs were administered, in which he submits the petitioner failed. Learned A.P.P. further invites our attention to the report of the Committee, dated 31/5/2017, which recommended the action against the petitioner. He submits that the entire record of the charge-sheet indicates a criminal negligence on part of the petitioner and, therefore, he is being correctly prosecuted for the offence punishable under Section 304 of I.P.C. He, thus, submits that the petition is clearly misconceived and is liable to be dismissed.

6. With the help of learned Senior Counsel Mr. Anil Mardikar and Mr. S.M. Ghodeswar, learned A.P.P, we have gone through the charge-sheet as placed on record.

7. It is not disputed that, on the fateful day, the petitioner though on duty as a Junior Resident Doctor, was not present in the NICU at around 10:30 p.m. It is also not disputed that it is the staff nurse Vidya Bhanudas Thorat, who had administered the injection Kesol (Potassium Chloride) (IV), which resulted in the fatality of the four newborns. A perusal of the OPD case papers and the continuing sheets dated 28/5/2017 (page 214) points out that what was prescribed to be administered was an injection of “Calcium Gluconate”, as is indicated from the entry dated 28/5/2017. The reply of the respondent no.1 does not dispute this position. The reply at page 299 categorically states that Dr. Kaustubh Deshmukh and Dr. Rushikesh Ghatol had prescribed the “Calcium Gluconate” injection. It is, thus, clear that the petitioner was not the person who had prescribed the injection “Calcium Gluconate”, which is to be administered muscularly. It is further apparent from the reply that the injection “Potassium Chloride” is not administered muscularly,

i.e., through an injection, but through IV saline after diluting it not less than 50 times its volume with Sodium Chloride Intravenous Infusion (0.9% w/v). It is further an admitted position that "Potassium Chloride" is an emergency drug injection and is kept in the emergency kit, whose custody is with the in-charge sister of the NICU. The procedure, as stated in the reply for receiving drugs, was that the drug was prescribed by the on-duty doctor, after which, the on-duty nurses used to give the medicines as per the prescription after taking entry in the general order book, which injections were to be given under the observation of on-duty doctor of the NICU. In the instant matter, on a query being made as to how did the injection "Potassium Chloride" came to be taken out, the position is clarified by letter dated 16/7/2017 (Annexure – R-5) by the Head of Paediatric Department, Dr. Punjabrao Deshmukh Hospital and Research Centre, Amravati, which states that, in the NICU, the injections "Potassium Chloride" were kept for patients admitted on an earlier point of time and the one used by the nurse Vidya Thorat, was a leftover injection. It is further stated therein that the leftover injections are to be used in the event of emergency. The above position would, therefore, indicate that the petitioner had no role to

play in the entire matter, either of prescribing the drug, storing the same or of administering the same.

8. A perusal of the CCTV footage visualization panchanama dated 30/5/2017 (record page 133) indicates that, on 28/5/2017, between 8:00 p.m. to 9:30 p.m., in the night, a lady doctor had checked the newborn babies. At 9:38 p.m., the doctor and nurse were looking over the newborn babies and nurse Vidya Thorat was seen filling up the syringe from the medicine bottle and thereafter, administering the injection to the newborns. From 9:42 to 9:46 p.m., the CCTV footage shows the nurses taking care of the newborns. The CCTV footage further shows, the petitioner, coming to the NICU at 11:47 p.m. of 29/5/2017, and having checked the newborns. There was some commotion noticed between the doctors and nurses at that time.

9. It is the statement of the present petitioner that ,on 28/5/2017, when he was present in the ward during night time, around 10:30 p.m., the duty nurse came to him in the ward and informed about deteriorating conditions of the newborns,

whereupon he reached immediately in the NICU and started resuscitation, however, the condition deteriorated. His co-junior resident also came and started resuscitation of the other newborn. The seniors were informed. At around 12:00 noon, he got a call from the Gynaecology ward for an LSCS, due to which he was required to go there.

10. What is further material to note is that the injection "Calcium Gluconate" is required to be administered muscularly by an injection, as against which, the injection "Potassium Chloride"is to be administered Intravenously, after diluting it in the proportion as stated above. The nurse on duty, namely Vidya Bhushan Thorat, however, appears to have directly administered the injection "Potassium Chloride" muscularly, which was the cause of the untimely and unfortunate demise of the newborns.

11. An enquiry initiated by constitution of an enquiry Committee headed by the Professor and Head of Department of FMI, G.M.C, Akola, upon the orders of the Directorate of Medical Education and Research (DMER), comprising of four doctors, all

from G.M.C, Akola, gave its report on 31/5/2017. The conclusion is rendered by the Committee in its report dated 31/5/2017. It is worthwhile to note that the Committee observed that, although Doctors should be available for 24 hours in the NICU, still the petitioner, who was an on-duty doctor, was absent at the time of the incident. The Committee further found that the four newborn babies that succumbed in the incidents had been prescribed injection "Calcium Gluconate" and three other newborns who were not affected were not on injection "Calcium Gluconate" (Kesol). In view of the fact that the petitioner, being an on-duty Junior Resident Doctor, was not present in the NICU at the fateful time, the Committee recommended action against the petitioner also, as a result of which, the F.I.R, was lodged, which included the name of the petitioner.

12. Now if we consider the offence registered against the petitioner and others vide Crime No.346 of 2017 at Police Station, Gadge Nagar, Amravati, we would find that even though the petitioner was not present in the NICU at the relevant time, an offence punishable under Section 304 r/w. 34 of I.P.C. has been

registered against him. In fact, the crime so registered in the matter does not reveal incorporation of any other offence, except for the one under Section 304 of the I.P.C., as provided in the Indian Penal Code. The offence punishable under Section 304 of the I.P.C. is an offence of culpable homicide not amounting to murder and so, if we are to examine the correctness or otherwise of registering this offence against the petitioner, we have to make a beginning with what is considered as culpable homicide in the Indian Penal Code. It is defined in Section 299 of the Indian Penal Code and it reads thus :

Section 299 of the I.P.C. defines culpable homicide as under :-

> *"**299. Culpable homicide.** - Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*
>
> ***Explanation 1**. - A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.*
>
> ***Explanation 2**. - Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting*

*to proper remedies and skilful treatment the death might have been prevented.*

***Explanation 3****. - The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."*

13. A bare perusal of the above referred definition would indicate that heart of an offence of causing death lies in doing an act intentionally or with knowledge. If the act done is coupled with intention, the intention must be of either causing death or causing such bodily injury as is likely to cause death. But, if the facts and circumstances of a given case show that the act has been done with the knowledge then the knowledge must be of the character and degree that the person doing the act knows that by such an act, he is likely to cause death. Thus, the culpable homicide would require doing of an act either with the intention or the knowledge as elaborated just now. Since possession of the knowledge of the nature explained in Section 299 of the I.P.C. can also lead to constituting the act of culpable homicide, in a given case, even an omission to do an act, which if done would prevent the death, would amount to culpable homicide, if the omission of such nature

leads to death. The concept could be explained further, but, in the context of the factual setting here, it is not required and therefore, we would avoid it to restrict the length of the Judgment. But, at the cost of repetition, we would say that the proposition that we are putting forward here is that, for something to be regarded as culpable homicide as contemplated under Section 299 of the Indian Penal Code, there must be an act or omission coupled with the intention or knowledge as contemplated in Section 299 of the I.P.C. on the part of the person and if there is no such act or omission, there would be no offence of culpable homicide. If there is no offence of culpable homicide, further questions as to whether it amounts to murder as defined under Section 300 or it does not amount to murder as envisaged in Section 304 of the I.P.C. would not arise.

14. In the present case, as could be seen from the facts discussed earlier that, at the relevant time, the petitioner was not at all present in the NICU and so, there is no question of the petitioner doing any act with the requisite intention or knowledge. There would also not be any question of the petitioner omitting to do any

act with such intention or knowledge as is required under Section 299 of the I.P.C., unless, ofcourse, the facts and circumstances had shown that the petitioner had deliberately avoided his presence in the NICU with the intention that death of the infants had thereby been facilitated or with the knowledge that such death had likely to be facilitated. In this case, there is neither any allegation made against the petitioner on these lines nor is there present any material collected during the course of investigation, from which such an inference in a prima facie manner could be drawn.

15. All that is alleged in the present case is that though the petitioner was on duty, he was not physically present in the NICU at the fateful moment. No material has been placed before us that whenever an injection has to be administered, it must be done under the supervision of the doctor on duty at the NICU. There is no allegation made against the petitioner that the nurse who administered the fatal doses of injection to the infants, had informed the petitioner that she was going to administer the injections and had requested the petitioner to remain personally present near the beds of the infants so that administration of those doses could be

monitored by the petitioner, but the petitioner refused to pay heed to such request. In fact, we must put it on record here that in spite of our repeated requests to the Investigating Officer to place before us the rules or regulations or Standard Operating Procedure or protocol, if any, regarding the procedure to be adopted for administration of injections to the infants admitted in the ICU with a view to know about the nature of duty of the doctor in the NICU as regards administration of injections by the staff nurses, nothing was placed before us. This must have been owing to the fact that no such protocol or S.O.P. exists and that personal supervision and monitoring by a doctor may not have been envisaged in any rule or S.O.P. where trained nurses are employed, they having the competence and authority to administer injections without the supervision of any doctor. It then follows that this is a case wherein apart from absence of any blameworthy act, there being no act whatsoever done by the petitioner, there is also missing the element of culpable omission on the part of the petitioner, there being no duty in him to personally monitor the administration of injection by a trained nurse which absence of duty led to no breach of duty by the petitioner. This would enable us to hold that on the three

parameters of ***Jacob Mathews vs. State of Punjab and another***, ***2005 ALL MR (Cri) 2567 (SC)*** namely : (i) duty to take care, (ii) breach of duty and (iii) consequential damage, this case fails to attract any criminal offence, much less offence of culpable homicide not amounting to murder. We make it clear here that in recording such a finding, we have only considered the criminal dimension of the case insofar as it relates to the petitioner and we have not dealt with civil dimension of the case involving such issues as of damages, civil liability, departmental action and so on, in any manner.

16. It is, thus, apparent that there is absolutely no material available on record showing, prima facie, that offence of culpable homicide not amounting to murder punishable under Section 304 of I.P.C. is constituted against the present petitioner. Continuation of these proceedings against the present petitioner, in the present circumstances, would clearly be an abuse of process of law, which cannot be permitted.

17. We are mindful of the guidelines laid down in ***State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) SCC***

***335***, in para 102 thereof relating to quashing of F.I.R. In the instant case, considering the allegations as leveled against the petitioner, of his absence in the NICU at the relevant time, would, even if everything as mentioned in the charge-sheet was presumed to be true, at the most, may lay a blame of dereliction of duty at his doorstep, for which Departmental action can always be taken by the authorities, as has been reported to have been done in the case of Dr. Nistane, Professor and Head of Department of Paediatrics, who was absent without sanctioned leave on the fateful day. The material in the charge-sheet is certainly not indicative of the petitioner having prima facie committed an offence under Section 304 of I.P.C. We are, thus, of the view that continuation of the proceedings against the petitioner would clearly be an abuse of the process of law, which would always be unsustainable in law.

18. The petition is, therefore, liable to be allowed. In the circumstances, the charge-sheet No.278/2017 for the offence under Section 304 read with Section 34 of IPC as against the present petitioner is quashed and set aside. The writ petition is allowed and disposed of accordingly.

Rule is made absolute in the aforesaid terms.

(AVINASH G. GHAROTE, J.) (SUNIL B. SHUKRE, J.)

Wadkar

Shailendra Wadkar
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