

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: April 17, 2009

Date of decision: May 19, 2009

CRL. REV. P. No. 218 of 2008

DR. GANESH MANI Petitioner
Through: Mr. Siddharth Aggarwal with
Mr. Simon Benjamin, Advocates.

versus

SHIKHA SAINI Respondent
Through: Mr. P.K. Malik, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
19.05.2009

S. Muralidhar, J.

CRL. M.A. No. 4750 of 2008 (condonation of delay)

For the reasons stated in the application, the delay in filing the petition
is condoned.

The application is disposed of.

CRL. REV. P. No. 218 of 2008 & CRL. M.A. No. 4749 of 2008
(stay)

1. This revision petition is directed against an order dated 19th
December 2007 passed by the learned Metropolitan Magistrate

(‘MM’), New Delhi holding that there was material on record to charge the Petitioner and other accused for the offences under Sections 336/337/471 read with 34 IPC.

2. The case of the prosecution is that the complainant Satish Kumar Batra retired as Secretary, Social Welfare, Government of Delhi, in 1994. He had a cardiac problem and was admitted to the National Heart Institute (‘NHI’), East of Kailash, Delhi on 24th May 1998. He was advised a bypass surgery by the NHI. It was thought that the Apollo Hospital (A-2) which is run by the Indraprastha Medical Corporation Ltd. (A-1) would be a safer place. On 30th May 1998 the complainant the complainant was shifted to Apollo Hospital for his surgery. The Petitioner Dr. Ganesh Mani (A-3), along with Dr. S.K.Gupta, Senior Cardiologist (A-4) and Dr. A.M. Dua (A-5) decided that the bypass surgery would be done on 1st June 1998. The bypass surgery performed on that day resulted in the complainant having to spend an aggregate sum of Rs.2,22,123.03 as fees and Rs.36,750 for medicines. On 11th June 1998 the complainant was discharged having been found fit. The complainant alleges that the discharge report dated 11th June 1998 was false. Inter alia, it is alleged that there were 70 entries regarding blood pressure in the medical chart of the complainant for the period 8th to 11th June 1998 and the blood pressure touched 120/80 only once in the intervening night of 8th/9th June 1998. It was 110/70, 100/64 and 90/65 on 8th, 9th and 10th May 1998 respectively. According to the complainant the discharge report

nevertheless reflected his blood pressure to be 120/80 as if it was for a normal person. The other criticism of the discharge summary was that it failed to indicate the ejection fraction, the TLC (which was a measure of infection), information about sputum infection and was generally deficient in all vital signs including blood cholesterol. The allegation is that at the time of discharge the complainant had sputum infection and was suffering from fever. According to the complainant A 3 to A5, in failing to indicate the above factors in the discharge summary, acted in a rash and negligent manner as to endanger the life and personal safety of the Petitioner.

3. According to the complainant he suffered low-grade fever on 17th and 23rd June 1998 and consulted A-5. On the advice of A-3 and A-5 he was again admitted to Apollo Hospital on 29th June 1998 and was discharged on 30th June 1998. The complainant paid Rs.33,760 to A-2 but did not get any relief during this treatment. It is alleged that A-3 to A-5 were criminally negligent in discharging the complainant on 30th June 1998 without recording the sputum infection and another vital signs and suppressing the fact that TLC was about 15,000.

4. It is then claimed that from 30th July 1998 to 19th February 1999 the complainant had 16 consultations with A-3 to A-5 during which a number of investigations were got done. All these tests were negative for TB but A-5 falsely attributed the infection at the time of bypass surgery on 1st June 1998 to TB. Consequently they started the Anti

Tuberculosis Treatment ('ATT') which was unwarranted. This produced severe allergic reactions. On 23rd September 1998 A-5 noted chest inflammation and sought the opinion of A-3 who prescribed a certain course of antibiotics. Chest inflammation had by 5th October 1998 become a wound and A-3 dressed the wound and prescribed antibiotics. It is claimed that despite clear sign of sternum infection A-3 to A-5 wrongly continued with the ATT and ultimately this was discontinued only on 7th November 1998. It is alleged that there was persistent discharge from the place of sternum incision. Antibiotics continued to be prescribed. A-3 to A-5 instead of treating the root cause tried to suppress the infection with antibiotics. Ultimately on 19th February 1999 A-3 to A-5 diagnosed that the sternum wires were the cause of infection. They persuaded the complainant to get admitted for a third time to Apollo Hospital for another operation for removal of sternum wires. This was done on 20th February 1999 and complainant was informed by A-3 that all the sternum wires exposed and removed. The complainant was discharged on 29th March 1999 and a sum of Rs.30,242 was charged from him for removal of sternum wires. The operative and post-operative notes regarding the removal of sternum wires were written by A-3 himself.

5. It is alleged that despite the admission of the complainant for the third time to the Apollo Hospital the pus from the wound restarted and the complainant consulted A-3 and also met A-5. He was admitted for a fourth time to the Apollo Hospital between 22nd and 25th March 1999.

He was charged Rs.10,000. It was certified that all investigations were found to be normal. According to the complainant his discharge report was also “another piece of injurious falsehood and deceit by A-5.” There are several allegations against A-5 thereafter in the complaint.

6. It is stated that since the condition of the complainant did not improve and he was experiencing aggravated condition of weakness, loss of appetite, loss of weight, discharging sinus and low blood pressure. He was admitted to Ram Manohar Lohia Hospital (‘RML’) on 29th April 1999 and discharged on 18th May 1999. Thereafter he was admitted to the All India Institute of Medical Sciences. The ejection fraction in both the hospitals was noticed as 17 %. Before the surgery it was 40% and after the surgery it was 16%. According to the complainant the most grievous hurt caused to the complainant was that the heart of the complainant was crippled beyond repair and its ejection fraction was brought down from 40% to 16%. This was not mentioned in the discharge reports dated 24th February 1999 and 26th March 1999 or any of the prescriptions thereafter. It is further claimed that the statement in the discharge report that all sternum wires had been removed was false. In course of one of the dressings undergone by the complainant at the RML Dr. Panigarhi, a surgeon, had detected an end of one of the sternum wires which was ejecting out. This was in fact a five inches long wire. In the course of another dressing in May 2000 an end of another wire was detected. On pulling out, a part of it came out but the wire was knotted at the other end. Half an inch

of wire was seen ejecting out of the sternum in the middle of the discharging sinus. It is claimed that there was still some sternum wire and one of them was still visible. As per the MRI reports dated 31st July 2001 of the Institute of Nuclear Medicine & Allied Sciences ('INMAS'), two sternum wires which were ejected were found embedded.

7. The precise allegation in the complaint against A-3 to A-5 is that they had falsely pretended to have performed a surgery, which was consented to on their advice and for which they were paid a sum to which they were not entitled. It is alleged that A 3 to A 5 had knowledge that all sternum wires had not been removed and exposed but they intentionally induced the complainant to believe that all the sternum wires have been exposed and removed thereby deceiving him and causing damage to the body and property of the complainant.

8. It was further alleged that A 3 to A 5 wilfully misrepresented facts in the discharge summary, which was manipulated and fabricated with intention to defraud the complainant. It A-2 to A-5 had prepared false post operative notes and discharge notes for the purposes of cheating the complainant and leading him into believing that he was in a normal condition at the time of discharge when the correct results were actually suppressed. It is alleged that A-3 to A-5 had voluntarily caused grievous hurt to the complainant "for the purpose of making money from him to the tune of more than three and a half lakh rupees.

It is stated that the complaint filed by the complainant before the National Consumer Disputes Redressal Commission (NCDRC), New Delhi on 7th October 2002 was pending.

9. The complainant examined himself on 17th January 2003 before the learned MM at the pre-summoning stage as CW-1. His daughter Shikha Saini was examined as CW-2 on 5th May 2005. She stated that the complainant Shri S.K. Batra had expired on 25th September 2004 and that she had been authorised to continue the case. With the permission of the court this witness was cross-examined by the learned counsel for A-3. Although during her examination-in-chief CW 2 had spoken on several aspects of the treatment, in her cross-examination she admitted that she was not aware of the factors that went into conducting a CABG. She also stated that she had filed a complaint with the Medical Council of India ('MCI') apart from the one before the NCDRC.

10. Dr. Malika Batra, another daughter of the complainant was examined on 6th August 2005 as CW 3. She had completed MBBS in 1999 from Kasturba Medical College, Bangalore and her DNB in 2004 from the Ganga Ram Hospital, Delhi. At the cross-examination on 31st January 2007 CW-3 stated that the complaint filed before MCI which was in turn referred to the Delhi Medical Council (DMC) has been rejected by and the doctors involved, including A-3, had been held not to be negligent. The communication dated 4th August 2005 to this

effect from the DMC had been received by the family of the deceased complainant. No appeal had been filed against the said finding. This witness admitted that “we do not have any opinion of any body of medical expert to indicate that the Doctors accused are guilty of negligence.”

11. The learned MM heard the arguments on charge. It was argued on behalf of the accused that even if the allegations in the complaint were taken to be true it would only prove medical negligence. The failure to examine any doctor as an expert meant that the offence of criminal negligence was not even prima facie established. The learned MM negated this argument by referring to the testimony of Malika Batra. It was opined that “merely that she is the daughter of the deceased/complainant does not affect adversely her testimony which also touches prima facie the medical aspects related the present case.” After noticing that the complainant had been repeatedly admitted to the hospital for treatment within a span of one year, the learned MM held that this itself “reflects otherwise that complainant had never gained good health after each discharge so, prima facie it cannot be ruled out that the discharge summary was not manipulated.” It was further held that “no explanation has been forwarded why accused was treated for ATT despite no diagnosis for TB.” The conclusion reached by the learned MM was as under:

“I think there is sufficient material on record
which prima facie establishes the negligence

in the treatment of complainant done by accused no.3 to 5 on behalf of accused no.1. Further, whether the reports/discharge summary was that of a healthy person or the facts therein were manipulated to show an unhealthy person as a healthy person could only be established if the matter proceeds for trial.

In these circumstances accused no.1, 3, 4 and 5 are hereby charged for the offences u/s 336/337/471/ 34 IPC.”

12. This Court has heard the submissions of Mr. Siddarth Aggarwal, learned counsel for the Petitioner and Mr. P.K. Malik, learned counsel appearing for the Respondent. Learned counsel for the Petitioner referred to the report dated 4th August 2005 of the DMC which showed that the DMC heard Dr. Malika Batra (CW 3) and Shikha Batra nee Saini (CW 2), the daughters of the complainant. The DMC also heard A-3 to A-5. The DMC formed the opinion that “it was commendable on the part of the Apollo doctors to have taken a risk of operating him at a time when it was obvious that without surgery he would not have survived.” The conclusion was that the subsequent complications are known to occur in such situations and do not amount to medical negligence. It is submitted that this report of the DMC was placed before the learned MM and even admitted by CW-3 Dr. Malika Batra herself. However, the learned MM made no reference whatsoever to the DMC’s report. The learned MM therefore erred in directing the

framing of charge by overlooking a relevant material. Reliance is also placed on the judgments in *Dr. G.S. Chandraker v. State* 145 (2007) DLT 262, *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1, *Dr. Suresh Gupta v. Govt. of NCT of Delhi* (2004) 6 SCC 422 and the recent decision of the Supreme Court in *Martin F.D'Souza v. Mohd. Ishfaq* (2009) 3 SCC 1 to urge that, in the absence of independent expert evidence by a competent medical professional to substantiate the allegations of criminal medical negligence, there was no case made out for even a suspicion, leave alone grave suspicion, against the petitioner for the offence in question.

13. It is further submitted that the facts alleged do not make out even a prima facie case against the petitioner for the offences under Sections 420 and 471 IPC. There was no dishonest intention on the part of the Petitioner right from the beginning to induce the complainant into parting with money for his treatment. Although the post-operative notes were in the handwriting of A 3, reflected the true state of affairs of the complainant at the time of his discharge. The sentence that “all sternum wires were removed” actually reflected the position that all sternum wires which were required to be removed had indeed been removed. In the absence of independent evidence of an expert, it would be unsafe to come to the conclusion that offence under Section 471 IPC was attracted on the facts and circumstances.

14. On behalf of the respondent Mr. Malik, learned counsel does not

dispute that the only medical evidence on record is that of CW 3 who is the daughter of the deceased. It is also not disputed that she could not be considered to be an expert to talk about heart bypass surgeries. Nevertheless, it is urged that this is sufficient material to form a grave suspicion against the petitioner. It was repeatedly urged by learned counsel for the respondent that the case was not so much about criminal medical negligence as of cheating and fabrication of records.

15. The submissions of counsel have been considered. The scope of the present proceedings is to determine if there exists material on record to form a grave suspicion against the petitioner for the commission of the aforementioned offences. The principal offence alleged is that of criminal medical negligence. Relevant to this, it is noticed that the DMC has by a detailed order dated 4th August 2005 come to the conclusion that there was no medical negligence in the case. A very detailed analysis has been done of what happened with the complainant at the Apollo Hospital. A reference has also been made to the removal of the sternum wires. The precise observations of the DMC are as under:

“Twenty three days after the surgery he developed mild breathlessness and low grade fever with normal counts for which short hospitalization was done. Mild grade fever continued for the next 2½ months and hence a trial of anti tubercular treatment was given which is an accepted professional practice in

any low grade fever when external source of infection is not visualized. 5 months after the operation first discharge was noted from the sternum for which multiple treatment options were tried including change of antibiotics, excision and curettage of infected sternal wires. It is observed that as per the discharge summary (Date of Discharge 24-02-99) of Indraprastha Apollo hospital only the infected sternal wires were removed “underwent excision & curettage of discharging sternal sinus with removal of sternal wires... The Council is of the opinion that it is a standard practice to remove only the infected sternal wires. The Council appreciates that patient was a high risk patient for cardiac surgery which was done successfully without any complications. He had preoperative significant infection in the body. A count of 18900 TLC indicates that infections had spread into the blood.”

16. On further analysis the following conclusions were arrived at by the DMC:

“The very fact the sternal wound did not heal in spite of treatments at multiple hospitals and by multiple specialists it indicated an unusual type of infection. Regarding echocardiography reports it is known that ejection fraction is not a standard criterion for judging the severity of illness. His preoperative ejection fraction was low and

remained low throughout his illness except for one report where the ejection fraction was labeled to be 40%. The reliability of that report is questionable as it had four different values of ejection fraction and did not have the required details of systolic and diastolic functions. The Council is of the opinion that it was commendable on the part of Apollo doctors to have taken a risk of operating him at a time when it was obvious that without surgery he would not have survived. He was operated even in the presence of infection, on balloon life support and knowing very well that patients who have suffered from pulmonary edema and has revived from serious ventricular tachycardia from electric shock and dependent on intra aortic balloon pump have a very high immediate mortality and late morbidity. **All his subsequent complications are known to occur in such situations and do not amount to any medical negligence on the part of Dr. S.K.Gupta, Dr. Ganesh K. Mani, Dr. J.M. Dua.”** (emphasis supplied)

17. In the face of the above expert opinion of the DMC, unless there was some strong evidence, the way of an independent medical expert it would be unsafe to straightway draw a conclusion that there is a case of grave suspicion against the Petitioner for committing the offence of criminal medical negligence. The law in this regard has been succinctly stated by the Supreme Court in *Jacob Mathew* in the

following words (SCC, p.35):

“A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. **The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion** applying the *Bolam test* [*Bolam v. Friern Hospital Management Committee (1957) 2 All ER 118 QBD*] to the facts collected in the investigation.” (emphasis supplied)

Further in *Jacob Mathew* the Supreme Court held:

“50. To fasten liability in criminal proceedings e.g. under Section 304A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.”

The Court went on to remind (SCC, p.33):

“(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of

negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word “gross” has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be “gross”. The expression “rash or negligent act” as occurring in Section 304-A IPC has to be read as qualified by the word “grossly”.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.”

18. In its recent judgment in *Martin D’Souza* after recapitulating the earlier law the Supreme Court observed as under:

“41. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

.....

43. It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.

.....

47. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.”
(emphasis supplied)

19. Applying the aforementioned law to the facts of the present case it is seen that the minimum requirement of the law as regards independent evidence of a competent medical expert has not been satisfied. In fact at one stage of the argument learned counsel for the complainant conceded that the complainant may not have been able to prove the medical negligence or criminal medical negligence against A-3. The reliance placed by learned MM on the evidence of Dr.

Malika Batra CW-3 was not appropriate. She admits that she completed her MBBS course only in 1999 so she had no knowledge of the procedures performed by A-3 to A-5 who are experts in their respective fields. For instance, the point made about there being a practice of allowing some sternum wires, not considered unsafe, to remain cannot be tested in the absence of a medical expert in that field. Considering the precise complaint made in the case about the alleged medical negligence of A-3 unless the complainant was able to bring on record the opinion of an expert in that particular branch it was unsafe, in the light of the law explained by the Supreme Court, for the learned MM to have placed reliance on the evidence of a general practitioner like CW 3 with no experience in the area of specialization.

20. For all the aforementioned reasons, this Court comes to the conclusion that there was no material to form a suspicion, much less a grave suspicion, against the Petitioner for the offence of criminal medical negligence.

21. As regards the offence of cheating under Section 420 IPC or of forgery under Section 471 IPC, this Court finds that the material on record does not make case against the Petitioner for these offences. The mere allegation of cheating without there being any evidence to show that the petitioner never intended treating the complainant for the ailment cannot be countenanced. As regards the discharge summaries

prior to the post-operative notes, these are contemporaneously recorded documents and in the absence of any independent evidence to doubt their veracity, it would be unsafe to go by the mere allegations of the complainant as to his actual condition at these stages.

22. For the aforementioned reasons, this petition is allowed. The Petitioner will stand discharged in Complaint Case CC No. 560/01/2002 pending in the court of learned MM and all proceedings consequent thereto.

23. A copy of this order be sent to the learned MM concerned forthwith.

S. MURALIDHAR, J.

MAY 19, 2009
dn