

IN THE HIGH COURT OF TRIPURA
AGARTALA

Crl. Petn. No. 09 of 2013

- 1. Dr. Ajit Kumar Roy,**
son of late Pulin Bihari Roy
resident of Badurtali,
Krishnanagar, P.S. West Agartala,
District - West Tripura

- 2. Dr. Biswaraj Sarkar@ Bappa,**
son of late B.R. Sarkar,
resident of 46, H.G. Basak Road, P.S.
West Agartala, P.O. Agartala,
District - West Tripura

..... Petitioners

- V e r s u s -

The State of Tripura,
represented by the Secretary-cum-
Commissioner, Department of
Home, Govt. of Tripura,
District - West Tripura

..... Respondent

BEFORE
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioners	: Mr. H.K. Bhowmik, Advocate. Mr. S. Saha, Advocate. Mr. B. Deb, Advocate.
For the respondent	: Mr. R.C. Debnath, Addl. P.P.
Date of hearing	: 11.12.2015
Date of delivery of Judgment & Order	: 16.12.2015
Whether fit for reporting	: YES

JUDGMENT & ORDER

The order dated 03.11.2012, delivered in case No.
G.R. 454 of 2007 by the Judicial Magistrate, 1st Class, Agartala,

West Tripura, is challenged in this petition filed under Section 397 read with Section 401 of the Cr.P.C.

[2] The essential facts which provide the perspective for the challenge may briefly be noted at the outset. One Sukhen Patari lodged a written ejahar in the West Agartala Police Station on 15.06.2005 stating that on 17.06.2005 at about 5 to 5-30 am his wife Nabanita Sarkar(Patari) was admitted in the Sarkar Nursing Home & Clinic for delivery. At about 9 am, Dr. A.K. Roy, the petitioner No.1 caused the delivery by caesarean section and at about 10-30 am his wife was taken out from the operation theatre. The petitioner No.1 reported the informant that his wife was fine. Thereafter, the petitioner No.1 pushed one injection and left the said Nursing Home for breakfast without any discussion with the informant. After sometime a staff of the Nursing Home reported the informant that his wife had expired. As he believed that it was for the rash and negligent act of the petitioner No.1 and the assisting Surgeon, his wife died, he lodged the written ejahar. On completing the investigation, the police filed the final police report chargesheeting the petitioners for committing the offences punishable under Section 304 A of the IPC. The petitioners are on bail. The statement of accusation was proposed to be read to the petitioners under Section 251 of the Cr.P.C. At that point of time, the petitioners by filing an application before the trial court on 12.10.2010 claimed their

discharge from the accusation. By the impugned order dated 03.11.2012, the said prayer was rejected by the trial court.

[3] Mr. H.K. Bhowmik, learned counsel appearing for the petitioner has fairly submitted that there is no provision akin to Section 239 of the Cr.P.C. in the trial of summon cases by the Magistrate. Section 239 of the Cr.P.C. categorically provides that if, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considered the charge against the accused to be groundless, he shall discharge the accused and record his reasons for doing so.

[4] Provisions of Section 239 of the Cr.P.C. as laid under Chapter XIX of the Cr.P.C. are specific to the trial of warrant cases by the Magistrate. As such, the said provisions have no manner of application in the trial of summons cases by the Magistrate. Section 251 of the Cr.P.C. clearly provides that when in a summon case the accused appears or is brought before the Magistrate the particulars of the offence of which he is accused, shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make but it shall not be necessary to frame a formal charge. One exception so far the trial of summon cases by Magistrate is concerned has been carved out in Section 256 of the Cr.P.C, which is entirely for a different

purpose. It provides that if the summons has been issued on the complaint and on the day appointed for the appearance of the accused, or any day subsequent to which the hearing may be adjourned, the complainant does not appear to the Magistrate shall notwithstanding anything contained in the Court acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day, provided that, where the complainant is represented by the pleader or by the officer conducting the prosecution where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense his attendance and proceed with the case therefor. Only in the event of non-appearance of the complainant on the appointed date, the Magistrate may discharge the accused and not in any other case.

[5] Mr. Bhowmik, learned counsel appearing for the petitioner has further submitted that the report of the Inquiry Committee of the Medical Officers does not indicate that the petitioners have committed any offence. According to Mr. Bhowmik, learned counsel that the degree of negligence is one of the important elements for commission of the offence. Negligence must be gross and reckless. From the Inquiry Report that will never surface. In the report it has been observed as under:

“It is likely that during the above said period, she might have shown some

signs of deterioration as an early warning signal. Probably the staff of the said Sarkar Nursing Home & Clinic attending the patient during that period has failed to assess the condition of the patient”.

[6] Mr. Bhowmik, learned counsel submits that the said report does not reflect the culpability of the petitioners. The report dated 03.08.2007 is available with this petition. He has emphatically submitted that the petitioners have not committed negligence while discharging their respective duties as the Surgeon and the assisting Surgeon and as such, the order dated 03.11.2012 is liable to be interfered with.

[7] A few decisions of the apex Court have been relied by Mr. Bhowmik, learned counsel. In **Malay Kr. Ganguli vs. Dr. Sukumar Mukherjee and others**, reported in **(2009) 9 SCC 221**, where the apex Court has enunciated the criminal negligence which has been described as the failure to exercise the duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is however, well settled that so far the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or error of judgment is not sufficient but negligence must be of a gross and very high degree to amount to the criminal negligence.

[8] The apex Court in **Malay Kr. Ganguly vs. Dr. Sukumar Mukherjee** has also held as under:

“178. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to criminal negligence.

179. Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only the existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

180. 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 (*sic of a*) much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.

189. We furthermore in a case of this nature do not intend to exercise our discretionary jurisdiction under Article 136 of the Constitution of India having regard to the fact that a judgment of acquittal has been recorded by the Calcutta High Court.”

[Emphasis supplied]

[9] In Kusum Sharma and other vs. Batra Hospital And Medical Research Centre and others, reported in 2010 AIR SCW 1315, the apex Court has held that in a matter of common knowledge that after happening of some unfortunate event, there is a market tendency to look for human factor to blame for an untoward event, a tendency which is closely linked

with the desire to punish. Things have gone wrong and therefore, somebody must be found to answer for it. A professional deserves total protection. The Indian Penal Code has taken care to ensure that the people who act in good faith should not be punished. Sections 88, 92 and 370 of the Indian Penal Code give adequate protection to the professional and particularly the medical professional. In **Kusum Sharma and other vs. Batra Hospital And Medical Research Centre and others**, the apex court has culled out the law as to the medical negligence and made a comparative study between the leading cases of our country and of the United Kingdom and held as under :

“94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest

nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

96. When we apply well settled principles enumerated in the preceding paragraphs in dealing with cases of medical negligence, the conclusion becomes irresistible that the appellants have failed to make out any case of medical negligence against the respondents."

[10] Mr. Bhowmik, learned counsel appearing for the petitioner has also referred a decision of this Court in **Dr. Pratap Sanyal vs. State of Tripura and another**, reported in (2014) 2 TLR 6 75, where this Court has relied on **Jacob Mathew vs. State of Punjab and another**, reported in (2005) 6 SCC 1 to hold that indiscriminate prosecution of medical professionals for criminal negligence is

counterproductive and does no service or good to society. In **Jacob Mathew vs. State of Punjab and another**, the apex Court held that before initiating process in the Criminal Proceedings, the court should be satisfied that the case is one of gross negligence that is negligence which is writ large and the accused, the medical professional, is guilty of doing or omitting to do something which no prudent person would do.

[11] In **Bolam vs. Friern Hospital Management Committee**, reported in (1957) 1 WLR 582, which has been generously relied by the apex court in **Jacob Mathew vs. State of Punjab and another** has held that the two things are very pertinent to be noted. Firstly, the standard of care, while assessing a practice as adopted, is judged in the light of knowledge available at the time, and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some of the particular equipment, the charge would be failed if the equipment was not generally available at the time on which it is suggested as should have been done.

[12] For negligence, the apex Court in **Jacob Mathew vs State of Punjab** has prescribed certain tests. One of such tests is that negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one, he would not be liable in the course if the action chosen by him was acceptable to the medical

profession. Prima facie from the report it transpires that there is no record in the patient-ticket. The Inquiry Committee in their report has stated that there might have been some signs of rapid deterioration of the health and those were not registered. Whether that is acceptable or not, is a matter of evidence as what happened during that time after the operation till the death of the wife of the complainant shall be allowed to put together.

[13] Mr. Bhowmik, learned counsel appearing for the petitioner submits that there was no material for filing the final police report against the petitioners. When the charge-sheet has been filed and the process has been issued against the petitioners, the Court can exercise its inherent power to decide whether to proceed or discharge the petitioners. Else, there would be failure of justice. The petitioners who were conducting the surgery whether exercised the required care, skill and competence or not, is again a matter of evidence. Even the petitioners may be asked to lay their special knowledge about the death of the complainant's wife.

[14] From the other side, Mr. R.C. Debnath, learned Addl. P.P. appearing for the State has submitted that there is no infirmity in the impugned order. He has raised a question that the scope of Section 397 or Section 401 of the Cr.P.C. is circumspect. In view of the decision of the apex Court in

Subramaniam Sethuraman vs. State of Maharashtra and

Anr., reported in **AIR 2004 SC 4711**, he has submitted that once the plea is recorded in a summons case, then it is not open to the accused person to seek a discharge, even if, such plea is advanced that cannot be accepted. Therefore, the apex court has culled out the law that once the plea of accused is recorded under Section 251 of the Code of Criminal Procedure, there is no escape from the trial. The trial is taken to its logical conclusion. This Court has also verified the record and found that the cognizance of the police report has been taken but no statement under Section 251 of the Cr.P.C. has been recorded as the applications seeking discharge as filed by the petitioners has been rejected, when the petitioners informed the court that they would challenge that order dated 03.11.2012. This Court is of the firm view that **Subramaniam Sethuraman vs. State of Maharashtra and Anr.** does not have any application in the context, but after going through the records, this Court is of the considered opinion that there are prima facie materials to proceed with the trial and as there is no provision under Section 251 of the Cr.P.C, the petitioners cannot be discharged.

[15] In the result, this petition stands dismissed directing the trial court to the state the accusation against the petitioners, to record their response and to carry forward the trial to its logical end.

Send down the LCRs forthwith.

JUDGE

Sabyasachi Ghosh