IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Crl. Misc. No. M-1105 of 2013 (O&M)
Date of Decision: 06.01.2015.

Dr. Ishwar Singh .....Petitioner

Vs.

State of Haryana and others .....Respondents

CORAM: HON'BLE MRS. JUSTICE SABINA

Present: Mr. Ankur Lal, Advocate for
Mr. Ravi Pratap Singh, Advocate
for the petitioner.

Ms. Dimple Jain, AAG, Haryana.

Mr. N.S.Shekhawat, Advocate
for respondent No. 4.

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SABINA, J.

Petitioner has filed this petition under Section 482 of the Code of Criminal Procedure, 1973 for quashing of FIR No. 377 dated 9.9.2011, under Section 304-A, 201, 467, 471 of the Indian Penal Code, 1860 ('*IPC*' for short), registered at Police Station City Mahendergarh, Haryana and all the subsequent proceedings arising therefrom.

Learned counsel for the petitioner has submitted that petitioner was a doctor/surgeon in Jeewan Anand Nursing Home and had operated Sushila Devi (since deceased) on 8.5.2011. Patient was discharged on 11.5.2011 in a stable condition. On 13.5.2011, patient complained of pain in her stomach and was again hospitalized. Petitioner recommended for an ultrasound examination of the abdomen of the patient. Since the patient

was not satisfied, she was referred to another hospital. On 14.5.2011, patient was admitted in Santokba Durlabhji Memorial Hospital cum Medical Research Institute, Jaipur and was again operated and during her treatment, she died on 17.5.2011. During investigation, statement of Doctor Nandini Sahni was recorded on 26.9.2011 and she reported that petitioner was innocent. On 8.6.2011, complainant moved a representation to Superintendent of Police, Narnaul. Action was advised to be taken against the petitioner and Doctor Sunil Kumar Yadav by Assistant District Attorney. Chief Medical Officer constituted a team of two doctors who gave their opinion on 8.8.2011 that petitioner was not negligent. However, FIR in question was registered against the petitioner and Doctor Sunil Kumar Yadav. Thereafter, Director General, Health Services, Haryana ordered the State level enquiry and Dr. Renu Pehal Malik conducted the enquiry and submitted report Annexure P-4 that petitioner was innocent. Learned counsel has further submitted that in view of the report of the medical experts, FIR in question was liable to be quashed. In support of his arguments, learned counsel has placed reliance on '***Jacob Mathew Vs. State of Punjab and another' AIR 2005 Supreme Court 3180 (1),*** wherein it was held as under:-

> *We sum up our conclusions as under:-*
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> *"Negligence is the breach of a duty caused 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.*

The definition of negligence as given in Law of Torts, Ratanlal and Dhirailal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular

happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

The test for determining medical negligence as laid down in Bolam's case (1957) 1 WLR 582, 586 holds

good in its applicability in India.

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 decree. 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.

The word 'gross' has not bee used in Section 304-A of 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 of the IPC has to be read as qualified by the word 'grossly'.

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 such a nature that the injury which resulted was most likely imminent.

Res ipso loquitur is only rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in

actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law, Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

Learned counsel has further placed reliance on '**Martin F. D'Souza Vs. Mohd. Ishfaq**' ***AIR 2005 SC 2049,*** wherein it was held as under:-

"We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer for a (whether District, State of National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action."

Learned State counsel as well as counsel for respondent No. 4, on the other hand, have opposed the petition.

Learned counsel for respondent No. 4 has submitted that the surgeon while conducting the operation had made a hole on the Terminal Helium which had resulted in the collection of fluid in the stomach of the wife of the complainant and later she had died on this account. Learned counsel has further submitted that there were two conflicting medical opinions on record. Therefore, FIR in question was not liable to be quashed. In support of his argument, learned counsel has placed reliance on '***B. Jagdish and another versus State of A.P. and another***' ***2009(1) R.C.R (Criminal) 447***, where it was held that where two views of medical experts were on record, then criminal case was liable to continue.

Admittedly, Sushila Devi was operated by the petitioner on 8.5.2011 and vaginal hysterectomy was done. The question that requires consideration is as to whether petitioner could be said to have committed medical negligence. In *Martin F. D'Souza*'s case (supra), the Apex Court has held that in a complaint against a doctor qua medical negligence, report of the committee of doctors or a competent doctor specialized in the field relating to which the medical negligence was attributed, must be called for to avoid any harassment to the doctor. In the present case, the case of the complainant is that his wife Sushila Devi has died on account of medical negligence on the part of the petitioner at the time of operation. It is also the case of the petitioner that in order to cover up the negligence, false report had been prepared by the petitioner in connivance with his co-accused. However, the matter was examined by medical experts. Annexure P-2 is the opinion of Doctor M.R.Makkar, Surgeon,

Civil Hospital, Narnaul and Doctor Jyoti Yadav, Gynaecologist, Civil Hospital, Narnaul. A perusal of the enquiry report reveals that the doctors found that there was no negligence on the part of the surgeon during or after the operation. The doctors opined that in vaginal hysterectomy operation, there were very less chances of making a hole on the Terminal Helium. It was also opined that there was no connivance between the petitioner and Doctor Sunil who had conducted the ultrasound of the patient on 13.5.2011.

The matter was again enquired by Dr. Renu Pehal Malik who was appointed as an Enquiry Officer by Director General, Health Services, Haryana. The enquiry report dated 23.12.2011 by the said doctor is Annexure P-4. Para 10 of the said report reads as under:-

> *"Moreover the Postmortem of the patient was neither advised nor done by Durlabh Ji Hospital to find the exact cause of death and even not requested by attendants of the patient. Without Postmortem exact cause of death can not be made out. The complications can occur in any case however it should be timely diagnosed and referred to a proper centre for the right management. However vaginal Hysterectomy is quite safe procedure if without adhesions as stated by Dr. Ishwar Singh in his statement. The gut injury is quite rare in vaginal Hysterectomy without adhesions but still the possibility is always there and is to be kept in mind while getting abnormal Ultrasound report related to gut. But Dr. Ishwar Singh did not think about the diagnosis*

of gut injury even after the Ultrasonography because the patient was passing stools and accepting orally without vomiting with slight distention abdomen till 13.5.2011. Patient complained of vomiting at 3.00 P.M. with pain abdomen. She was kept on IV Line and antibiotics and was referred to the higher centre for further management at 5.30 P.M. on 13.5.2011 (the very same day) without delay in the benefit of the patient to save the life of the patient.

In my opinion, in view of the above facts all allegations proved wrong against Dr. Ishwar Anand of Jeevan Anand Nursing Home, Mohindergarh and Dr. Sunil Kumar Yadav of Shri Krishana Colour Ultra Sound and Eco Centre, Rao Tularam Chowk, Mohindergarh."

Thus, as per two enquiries conducted by the doctors, it was found that petitioner was not guilty of medical negligence. There is no contrary opinion of the experts on record Although, learned counsel for respondent No. 4 has placed reliance on the medical report prepared by Santokba Durlabhji Memorial Hospital cum Medical Research Institute, Jaipur wherein it was opined that the patient/deceased was having perforation in terminal ileal region but there is no contrary medical opinion on record that the said perforation was on account of medical negligence on the part of the petitioner. Since as per the experts/medical opinion, petitioner was not held to be guilty of medical negligence, continuation of criminal proceedings against the petitioner would be nothing but abuse of process of law.

There is also no material on record to substantiate the allegations levelled by the complainant that the petitioner had prepared any false report.

Accordingly, this petition is allowed. FIR No. 377 dated 9.9.2011, under Section 304-A, 201, 467, 471 IPC, registered at Police Station City Mahendergarh, Haryana and all the consequential proceedings, arising therefrom, are quashed.

(SABINA)
JUDGE

January 06, 2015
Gurpreet