

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY
CRIMINAL PETITION No.9648 OF 2010

ORDER:

1 This petition is filed under Section 482 Cr.P.C. to quash the proceedings against the petitioner/accused No.1 in C.C.No.146 of 2010 on the file of the Judicial First Class Magistrate, Tekkali, Srikakulam District.

2 The learned counsel for the petitioner submitted that even if the allegations made in the charge sheet are ex facie taken to be true and correct, no prima facie offence is made out against the petitioner so far as the medical negligence is concerned. He further submitted that even as per the opinion given by team of doctors, there was no medical negligence on the part of the petitioner. He further submitted that the learned Magistrate might not to have taken cognizance of the offence against the petitioner if he had meticulously scrutinised the contents of the complaint.

3 *Per contra*, the learned counsel for the second respondent submitted that the allegations made in the complaint prima facie constitute the alleged offence. Heard the learned Public Prosecutor.

4 To impose criminal liability under Section 304-A IPC, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non* (**Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra**^[1]).

5 Before advertng to the facts of the case on hand, it is apt to refer the case law to understand, in precise, what constitute "medical negligence".

i) In **John Oni Akerele v R**^[2], the Privy Council held as

follows:

(i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State. (AIR p.75a-b)

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. ... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime. (AIR p.75b-c)

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion. ... The most favourable view of the conduct of an accused medical man has to be taken, *for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.* (AIR p.75d-e)

ii) In **Bolam v Friern Hospital Management Committee**^[3], the

Queen's Bench Division held as follows:

"that a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique."

iii) In **Dr.Suresh Gupta v Government of NCT of Delhi**^[4], the

Supreme Court held as follows:

23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence

might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against the doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

iv) In **Jacob Mathew v Sate of Punjab**^[5], the Supreme Court held as follows:

48. We sum up our conclusions as under:

(1) 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 & Dhirajlal (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”.

(2) Negligence in the context of the 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.

(3) 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.

(4) The test for determining medical negligence as laid down in *Bolam case*, (1957) 1 WLR 582 at p. 586, holds good in its applicability in India.

(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.

(8) *Res ipsa loquitur* is only a 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.

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The

criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

- v) In **Martin F. D'Souza v Mohd. Ishfaq**^[6], the Supreme Court held as follows:

43. To fasten liability in criminal proceedings e.g. under Section 304-A 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.

65. From the aforementioned principles and decisions relating to medical negligence, with which we agree, it is evident that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions. *The law is a watchdog, and not a bloodhound*, and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20-A read with Section 3(m) of the Indian Medical Council Act, 1956.

- vi) In **Malay Kumar Ganguly v Sukumar Mukherjee**^[7], the Supreme Court held as follows:

133. It is noteworthy that standard of proof as also culpability requirements under Section 304-A of the Penal Code, 1860 stand on an altogether different footing. On comparison of the provisions of the Penal Code with the thresholds under the tort law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under civil and criminal branches of medical negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to the same under Section 304-A.

Individual liability of the doctors

157. There cannot be, however, any doubt or dispute that for establishing medical negligence or deficiency in service, the courts would determine the following:

- (i) No guarantee is given by any doctor or surgeon that the patient would be cured.

(ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.

(iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.

(iv) Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

(v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged.

vii) In **Kusum Sharma v Batra Hospital and Medical Research**

Centre ^[8], the Supreme Court held as follows:

89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the 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 unnecessarily 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 pressurising 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.

90. 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.

viii) In **A.S.V.Narayana Rao v Ratnamala**^[9], the Hon'ble Supreme Court reiterated the principle laid down in **Jacob Mathew** case.

ix) In **P.B.Desai Vs. State of Maharashtra**^[10], the Hon'ble Supreme Court observed as follows:

47. The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent. If, however, there is nothing to suggest that the doctor was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages.”

6 Let me consider the facts of the case on hand in the light of the above legal principle.

7 One Smt. Sangitha hereinafter referred to as ‘the deceased’ was admitted in Government Hospital, Tekkali on 17.10.2008. On 18.10.2008 she underwent caesarean and was blessed with a male child. The petitioner herein conducted operation on her. On the same day at about 2.00 PM, the deceased was vomiting due to stomach ache. Immediately, the petitioner herein examined the deceased and advised the parents of the deceased to take the deceased to RIMS hospital, Srikakulam. The parents of the deceased shifted the deceased in the hospital ambulance to RIMS hospital, Srikakulam. The duty doctor in RIMS informed to the parents of the deceased due to failure of operation, the condition of the deceased deteriorated apart from decrease of percentage of haemoglobin. The duty doctor advised the parents of the deceased to take her to Visakhapatnam within one hour. Later, they took the deceased to the hospital of Daneti Sridhar. After examination, the doctor told that five packets of blood is necessary in order to save her life. Due to non-availability of blood, the doctors advised to shift the deceased to Visakhapatnam. Unfortunately the deceased died at Thagarapuvalasa on the way to Visakhapatnam.

8 Basing on the complaint of the mother of the deceased, the Station House Officer, Tekkali registered a case in Cr.No.181 of 2004 for the offence punishable under Section 304-A of IPC. After completion of investigation, the investigating officer referred the case as false. Thereafter, the mother of the deceased filed a complaint against the

petitioner and another for the very same offence. The learned Magistrate, after following the procedure contemplated under Cr.P.C, has taken cognizance of the offence under Section 304-A of IPC against the petitioner and another.

9 A perusal of the record reveals that the petitioner conducted operation to the deceased. It is not the case of the second respondent that the petitioner has not conducted the operation to the deceased with due care. A perusal of the record reveals that the duty doctor advised the parents of the deceased to take the deceased to RIMS hospital, Srikakulam due to fall of level of haemoglobin in blood as the required group of blood was not available in Government Hospital, Tekkali. A perusal of the record further reveals that the Government Hospital, Tekkali provided ambulance to shift the deceased to RIMS hospital, Srikakulam. Even in RIMS hospital, Srikakulam also, the required group of blood was not made available. It is not the case of the second respondent that the required blood was very much available in Government Hospital, Tekkali. It may not be possible for the doctor to get five bottles of blood within a short span of time, more particularly, in Government Hospitals. A perusal of the referred charge sheet clearly reveals that the duty doctor promptly attended the deceased and advised the parents of the deceased to take her to RIMS hospital, Srikakulam in order to save her life. Absolutely, there is no material on record to establish any medical negligence on the part of the petitioner. If really the deceased died due to medical negligence, the same would have been reflected in the post-mortem certificate. Even as per the contents of the post-mortem certificate, there is no negligence on the part of the petitioner. While conducting investigation, the investigating officer addressed a letter dated 08.12.2008 to the team of doctors i.e. Dr.N. Nataraja and Dr. M. Prakash Kumar, Civil Assistant Surgeons, Community Health Centre, Palasa with a request to inform whether any negligence was there on the part of Dr. Rami Naidu, Superintendent of Government Hospital, Tekkali i.e. the petitioner herein. On 24.12.2008, the said team of doctors submitted report. For better

appreciation it is not out of place to extract hereunder the relevant portion of the opinion:

“Dr. Y. Rami Naidu and Dr. Harini are NOT NEGLIGENT in conducting the operation on the deceased Kadithi Sangeetha @ Devadi Sangeeth aged 27 years, basing on the following points on going through the Case-sheet Records.

1. The patient was fit clinically and also going by laboratory findings, fit to get a repeat LSCS surgery done upon her, (reference page No.1 of case sheet).
2. With reference to page Nos. 3, 4, and 5 of the case sheet, the case was posted on 18.10.2008 for repeat LSCS at about 9.00 a.m. baby was delivered at 10-16 a.m. and the patient was shifted to the ward after surgery.

In the post operative period at about 2.00 p.m. going by page No.5 of the case sheet, patient was in shock and the necessary resuscitation measures available at Area hospital, Tekkali were taken.

This time-span between the beginning of surgery and to the development of the shock could point towards post-mortem finding of a ‘Board Ligament Hacmatoma Rupture’ as already mentioned in their previous answer to the letter dt: 08.12.2008, basing on their post-mortem certificate.

3. With reference to page No.3 of the Case-sheet provided by you, the case was promptly referred after her general condition was improved by resuscitation measures, to DH, SKLM at about 2.40 p.m.

These above points show that they have taken all necessary resuscitation measures that could be taken which are available at Area Hospital, Tekkali.”

10 Even from the above opinion given by the team of doctors, there was no medical negligence on the part of the petitioner herein.

11 The various decisions referred supra provide guidance for the investigating officer as well as the Court to bear in mind before registration of criminal case or taking cognizance of offence against doctors on the ground of medical negligence. The various principles enunciated in the cases cited supra, have not been scrupulously followed in this case before or taking cognizance of the offence against the petitioner. The police registered the case basing on one sentence in the complaint that “the deceased died due to negligent act of the petitioner.” It is not mentioned in the complaint that in what manner the petitioner was directly responsible for the death of the deceased. The material placed before the Court falls short to establish that the death of the deceased is the direct result of the rash and negligent act of the petitioner leave apart

gross rash and negligent act.

12 The next question that falls for consideration is whether the Court can interfere under section 482 Cr.P.C. to quash the proceedings in this case or not.

13 In **State of Haryana v Bhajan Lal**^[11] the Apex Court after having surveyed the entire case law on the point has laid down certain indicia with reference to which, a High Court may in exercise of powers under Article 226 of the Constitution of India or under Section 482 Cr.P.C may interfere in proceedings relating to cognizable offences to prevent abuse of the process of any court or otherwise to secure the ends of justice.

14 Admittedly, in the case on hand, the second respondent is not a competent person to say that her daughter died due to the negligent act of the petitioner. Even if the allegations made in the complaint *ex facie* taken to be true and correct, no prima facie case is made out against the petitioner/accused for the offence punishable under section 304-A of IPC.

15 In this set of facts and circumstances of the case, relegating the petitioner to face rigour of trial would certainly amount to abuse of process of the Court.

16 Accordingly, the criminal petition is allowed quashing the proceedings against the petitioner/accused No.1 in C.C.No.146 of 2010 on the file of the Judicial First Class Magistrate, Tekkali, Srikakulam District. Miscellaneous petitions, if any, pending in this petition shall stand closed.

T.SUNIL CHOWDARY, J

Date: 16th March, 2016
Kvsn

^[1] AIR 1965 SC1616

^[2] AIR 1943 PC 72

- [\[3\]](#) (1957) 2 All ER 118 = (1957) 1 WLR 582
- [\[4\]](#) AIR 2004 SC 4091 = (2004) 6 SCC 422
- [\[5\]](#) (2005) 6 SCC 1 = AIR 2005 SC 3180
- [\[6\]](#) (2009) 3 SCC 1 = I (2009) CPJ 32 (SC)
- [\[7\]](#) (2009) 9 SCC 221 = AIR 2010 SC 1162
- [\[8\]](#) (2010) 3 SCC 480 = AIR 2010 SC 1050
- [\[9\]](#) (2013) 10 SCC 741
- [\[10\]](#) AIR 2014 SC 795
- [\[11\]](#) AIR 1992 SC 604