

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.48738 of 2013

Arising Out of PS.Case No. -107 Year- 0 Thana -CHAPRA CITY District- SARAN

- =====
1. Dr. Deepa Sahai @ Deepa Kumari (Sahai) wife of Dr. Rai Kamleshwar Nath
Sahai, resident of Srinandan Road, Police Station- Chapra Town, District- Saran
at Chapra
2. Dr. Rai Kamleshwar Nath Sahai son of Late Narbadeshwar Nath Sahai, resident
of Srinandan Road, Police Station- Chapra Town, District- Saran at Chapra
- Petitioner/s

Versus

1. The State of Bihar
2. Krishna Kumar son of Ayodhya Sah, resident of village- Bikrampur, Police
Station- Marhaura, District- Saran at Chapra, at present residing at D-28, P.C.
Colony, Police Station- Kankarbagh, District- Patna
- Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr. Parijat Saurav, Advocate
: Mr. Vipin Kumar Singh, Advocate

For the Opposite Party/s : Mr. Avinash Kumar, Advocate

For the State : Mr. Suresh Prasad Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT
Date: 21-06-2017

This application under Section 482 of the Code of Criminal Procedure (for short 'the CrPC') has been filed by the petitioners for quashing of the order dated 23.06.2012/06.09.2012 passed in Trial No.3919 of 2013 arising out of Chapra Town P.S. Case No.107 of 2011 by the learned Chief Judicial Magistrate, Saran at Chapra whereby cognizance has been taken under Section 304-A of the Indian Penal Code against the petitioners and they have been summoned to



face trial.

2. The informant- opposite party no.2, Krishna Kumar filed a complaint on 25.05.2011 in the court of Chief Judicial Magistrate, Saran at Chapra, which was referred to the police by the Chief Judicial Magistrate for investigation under Section 156(3) of the CrPC pursuant to which Chapra Town P.S. Case No.107 of 2011 was registered under Section 304-A/34 of the Indian Penal Code against the petitioners and investigation was taken up.

3. According to the allegations made in the complaint, the informant got his wife Reena Kumari, who was pregnant, admitted at maternity centre of the petitioners for the delivery of child on 28.04.2011. The petitioners informed him that the delivery of child cannot be done normally and needed cesarean operation, to which the informant agreed after persuasion. After the cesarean operation, Reena Kumari gave birth to a child at 2.30 p.m. The mother and child were all right for the next 6-7 hours, after which the bandage of Reena Kumari at the spot of operation became red and blood was seen. The petitioners were informed but they did not come. The condition of Reena Kumari deteriorated and she had difficulties in breathing. On the intimation of the compounder, the petitioners came at 7-8 a.m. on 29.04.2011 and performed second operation and blood transfusion was done without cross matching and saline was constantly administered. Thereafter, the urine output of the patient stopped and



the petitioners did not use catheter to extract urine from the body of the patient. By afternoon, the patient had difficulties in breathing and her condition deteriorated, then the petitioners told the informant to take the patient to Patna. The patient was referred to Rajeshwar Hospital, Patna on 30.04.2011 at 4 a.m. The informant took the patient Reen Kumari to Rajeshwar Hospital, Patna. After diagnosis, the doctor informed that both the kidneys of the patient have failed and she is in need of CRRT. It is alleged that in spite of requisite treatments, the patient Reena Kumari went in coma and she finally died on 04.05.2011 at 11.40 a.m.

4. It is alleged that the doctors at Patna have told that due to excess saline and stoppage of urine output, the patient suffered kidney failure and she was operated in the state of deficiency of blood. It is alleged that the petitioners did not conduct the tests before operation. It is stated that the doctor at Rajeshwar Hospital, Patna detained some of the papers of the treatment of Reena Kumari. The treatment costed rupees three lacs, but still the patient could not be saved. It is alleged that Reen Kumari died due to negligence of the petitioners.

5. On completion of investigation, the police submitted charge-sheet under Section 304-A of the Indian Penal Code against the petitioners. After going through the contents of the police report and the materials collected in course of investigation, the learned Chief Judicial Magistrate by the impugned order dated 23.06.2012/



06.09.2012, took cognizance of the offence under Section 304-A of the Indian Penal Code against the petitioners.

6. I have heard Mr. Parijat Saurav, learned counsel for the petitioners, Mr. Avinash Kumar, learned counsel for the informant and Mr. Suresh Prasad Singh, learned counsel for the State and carefully perused the record.

7. Mr. Parijat Saurav, learned counsel for the petitioners submitted that the petitioners are duly qualified medical practitioners possessing requisite skills in their respective fields and are reputed members of their profession. There was no negligence on their part rather the treatment was performed with due care. He submitted that the learned Chief Judicial Magistrate erred in law in taking cognizance against the petitioners without any report or examination of an independent and competent medical expert, qualified in gynecology, as to whether prima facie a charge of a gross rashness or negligence is made out against them. He submitted that the petitioners cannot be charged criminally in view of the protections given under Sections 88, 92 and 93 of the Indian Penal Code, as the treatment given to the patient by the petitioners was in good faith for the benefit of the patient, with the express consent of her husband.

8. Mr. Parijat Saurav submitted that initially the patient was being treated by the local nurses in her village home at Marhaura. When local nurses were unsuccessful in delivery of child, she was



taken to Primary Health Centre, Marhaura and, thereafter, she was brought to the Maternity Centre of petitioner no.1 on 28.04.2011 in the afternoon with the “complaint of full term pregnancy with pain since three days”. He submitted that the condition of the patient was complicated from the very beginning and it appeared from her condition that she was mishandled and mistreated in the village. Looking into the complicated condition of the patient, the petitioner no.1 advised the informant for immediate cesarean operation clearly stating that any delay in the operation will risk the lives of the patient and the child. After taking consent from the informant for the same, the petitioner no.1 prepared for the cesarean operation and performed the operation properly with requisite skills and with utmost care and the baby was born at about 2.30 p.m. The baby was then referred to pediatrician and the patient was kept under strict observation of the petitioner no.1 and the para medical team and the requisite medicines were timely administered through saline and injections. As the condition of the patient was complicated from the beginning in the early morning on 29.04.2011 blood was seen at her operated parts and, therefore, laparotomy was done for haemostatic purpose at about 3 a.m. Blood was procured from the blood bank and the blood transfusion was also done on the same day after cross matching and proper medicines were administered to the patient. He submitted that the patient was kept under constant observation and to measure the



urine output of the patient, catheter was used. However, the complicated condition of the patient did not improve so the petitioner no.1 referred the patient, recommending either to Patna Medical College and Hospital, Patna or Advance Centre (Rajeshwar Hospital, Patna) or Magadh Hospital, Patna, according to the choice of the informant for better treatment of the patient on 30.04.2011 in early morning and copies of all the treatment papers were handed over to the informant.

9. He submitted that the informant out of his will and choice took the patient to Rajeshwar Hospital and was admitted there on 30.04.2011 in the morning, where the patient was treated and eventually passed away on 04.05.2011 and the cause of death was cardiopulmonary arrest.

10. Mr. Parijat Saurav, learned counsel submitted that after lapse of few days, the informant and his relatives started adopting extortionist approach, and when the petitioners did not oblige, the present complaint was lodged just to pressurize them for extorting unjust compensation.

11. He submitted that the allegations made in the instant FIR and the evidence collected in support of the same did not disclose commission of offence and make out a case against the petitioners under Section 304-A of the Indian Penal Code. He submitted that the order of cognizance is not sustainable in view of the ratio laid down



by the Supreme Court in **Jacob Mathew vs. State of Punjab and Another [(2005)6 SCC 1.**

12. Per contra, Mr. Suresh Prasad Singh, learned counsel for the State submitted that the allegations made in the complaint do attract ingredients of the offence punishable under Section 304-A of the Indian Penal Code. According to him, since allegations made in the complaint were found to be true during investigation by the police, no illegality can be found with the order passed by the learned Chief Judicial Magistrate whereby cognizance has been taken for the offence under Section 304-A of the Indian Penal Code against the petitioners.

13. Supporting the submissions made by the learned counsel for the State, Mr. Avinash Kumar, learned counsel for the informant, submitted that it is not the stage when the defence of the accused persons should be taken into consideration for the purpose of quashing of the entire prosecution. He submitted that the defence of the petitioners can only be considered during trial by the trial Magistrate and, at the stage of taking cognizance of the offence, the duty of the Magistrate is just to find out as to whether a prima facie case is made out or not. He submitted that due to negligence of the petitioners, the patient had to undergo surgery for the second time, which proved fatal. He contended that there are materials to suggest that excess saline was given to the patient and catheter was not used.



He submitted that the informant has stated that blood transfusion was performed without cross matching. According to him, such kind of allegations would certainly attract the necessary ingredients of Section 304-A of the Indian Penal Code. He submitted that there is no truth behind the allegation of putting any pressure upon the petitioners for compensation.

14. I have heard learned counsel for the parties and perused the record.

15. At the outset, certain dates and events are important to be noted in the present case. According to the case of the prosecution, the patient Reena Kumari was taken to the Maternity Centre of the petitioners on 28.04.2011 at 11 a.m. Thereafter, she was referred to Patna on 30th April, 2011. She was admitted in Rajeshwar Hospital at Patna in the morning on 30th April, 2011. While undergoing treatment, at Rajeshwar Hospital, she passed away on 04.05.2011, whereafter the present complaint has been filed on 25.05.2011, which was referred to the police for investigation under section 156(3) of the CrPC on 26.05.2011 pursuant to which the FIR has been instituted on 02.06.2011.

16. It is an admitted fact that no information was given to the police or to the court prior to cremation of the body of the deceased and no post mortem examination or medical test on the body of the deceased Reena Kumari was ever conducted. It would be



evident from perusal of the case diary and other materials on record that no expert opinion was obtained even on the prescriptions and medical reports of Reena Kumari in order to find out whether or not the procedure adopted by the petitioners in treatment of the patient was proper and acceptable.

17. In such background of the facts, when I consider the case of the petitioners in the light of the submissions made on behalf of the parties before this Court, I find it difficult to sustain the impugned order passed by the learned Chief Judicial Magistrate, Saran at Chapra.

18. In order to prosecute a medical professional for negligence under criminal law, the requirement of law is that the accused did something or failed to do something, which in the given facts and circumstances of the case, no medical professional in his ordinary senses and prudence would have done or failed to do. The medical professionals have invariably been placed on a pedestal different from other professions. In Jacob Mathew (supra), the Supreme Court observed that negligence in the context of medical profession necessarily called for a treatment with a difference and that the negligence attributed to the doctor must be gross in nature to make him liable for criminal prosecution.

19. It would also be evident from different provisions of the Indian Penal Code, as submitted by the learned counsel for the



petitioners that if the petitioners treated the patient in good faith with the consent of her husband (informant) for the benefit of the patient, they would be protected from being charged criminally.

20. Section 80 of the Indian Penal Code states that nothing is an offence, which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means and with proper care and caution. It protects a person from criminal liability, if the act, which killed the other person is done “with proper care and caution”, which can be expected of him by a prudent and reasonable man in the circumstances of a particular case.

21. Section 81 of the Indian Penal Code states that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith, for the purpose of preventing or avoiding other harm to person or property.

22. Hence, in view of the provisions of Sections 80 and 81 of the Indian Penal Code, a doctor cannot be held criminally responsible for a patient’s death unless it is shown that he/she was negligent or incompetent, with such disregard for the safety of patient that it amounted to a crime against the State.

23. Section 88 of the Indian Penal Code provides for exemption for acts not intended to cause death, done by consent in



good faith for person's benefit. The illustration given in section 88 of the Indian Penal Code is of great importance which reads as under:-

“A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence”.

24. From a bare perusal of the illustration given under Section 88 of the Indian Penal Code, it is manifest that a medical professional has been given total protection, if the action is taken in good faith for the person's benefit after taking his consent whether express or implied.

25. Section 92 of the Indian Penal Code provides for exemption of acts done in good faith for the benefit of a person without his consent though the acts cause harm to the person and that person has not consented to suffer such harm.

26. The illustration (c) of the proviso to Section 92 of the Indian Penal Code would be important for considering a case of medical negligence which reads as under:-

“92(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith,



the child's benefit. A has committed no offence."

27. Thus, it would be manifest that under certain circumstances, if an act is done by a medical professional for the benefit of a person in good faith even without his consent and some harm is caused to that person, that would not attract prosecution of the medical professional in a criminal case.

28. Section 93 of the Indian Penal Code gives protection to a person, who makes communication to another person in good faith for the benefit of that other person even if the same may cause harm to that other person. Sections 88, 89 and 92 of the Indian Penal Code deal with the acts done for the benefit of a person, but Section 93 of the Indian Penal Code, on the other hand, deals with communication made in good faith.

29. The illustration given in Section 93 of the Indian Penal Code is in respect of a surgeon who in good faith communicates to a patient his opinion. The illustration reads as under:-

"A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death".

30. The illustration under this Section shows that a



surgeon is not guilty of an offence, if he communicates to a patient in good faith for his benefit that he cannot live.

31. In Jacob Mathew v. State of Punjab (supra), the Supreme Court exhaustively considered various aspects of negligence on the part of a doctor and summed up its conclusions in para 48 as under:-

“ **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*, WLR 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.”

32. Following the ratio laid down in Jacob Mathew (supra) in **Martin F. D’Souza vs. Mohd. Ishfaq [(2009)3 SCC 1]**, the Supreme Court lucidly and elaborately explained the subject of medical negligence and in para 106 observed:-

“106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or 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 the 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 doctor/hospital concerned. 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 case [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1]*, otherwise the policemen will themselves have to face legal action.”

33. While applying the aforementioned ratio laid down by the Supreme Court, when I look to the facts of the present case, I find that the minimum requirement of the law, as regards evidence of a competent medical expert or committee of doctors specialized in the field relating to which the medical negligence is attributed has not been satisfied in the present case.

34. It would be manifest from the allegations made in the FIR that the patient was suffering from pregnancy and she was admitted at the maternity centre of the petitioners for delivery of child. She was advised for cesarean operation to which the informant agreed. After cesarean operation, the patient Reena Kumari gave birth to a child. However, subsequently, her condition deteriorated. It is also manifest from the FIR that she was attended by a doctor on 29.04.2011 in the maternity centre and second operation and blood



transfusion was done. As her condition did not improve, the petitioners advised the informant to take her to the Patna Medical College and Hospital, Patna or some other hospital for better treatment. It is also an admitted fact that the patient was, thereafter, taken to Patna and was admitted in Rajeshwar Hospital, Patna and, she underwent treatment for almost four days before passing away in Rajeshwar Hospital, Patna.

35. Though, the informant has alleged that blood transfusion was done without cross matching and saline was constantly administered and when urine output of the patient stopped, the petitioners did not use catheter to extract urine from the body of the patient, there is no corroborative material to support such allegation. The investigation of the case has been conducted in a perfunctory manner and in contravention to the law laid down by the Supreme Court in Jacob Mathew (supra) and Martin F. D'Souza (supra).

36. Thus, in absence of even 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 petitioners, in my considered opinion, the learned Chief Judicial Magistrate erred in law in taking cognizance of the offence and summoning the petitioners to face charge under Section 304-A of the Indian Penal Code.



37. In view of the discussions made, herein above, the impugned order dated 23.06.2012/06.09.2012, passed by the learned Chief Judicial Magistrate, Saran at Chapra in Trial No.3919 of 2013 arising out of Chapra Town P.S. Case No.107 of 2011 is, hereby, quashed.

38. The application stands allowed.

(Ashwani Kumar Singh, J.)

Md.S./-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	
Transmission Date	

