

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.160 of 2016

Arising Out of PS. Case No.-1141 Year-2014 Thana- BHAGALPUR COMPLAINT CASE
District- Bhagalpur

=====

Dr. Amar Kumar, son of late Dr. Tapes Chandra Thakur, Thakur Orthopedic Centre, Ghuran Pir Baba Chowk, in front of Combined Building, S.M. College Road, P.S. Barari, District- Bhagalpur

... .. Petitioner/s

Versus

1. The State of Bihar
2. Daymanti Mishra, wife of Shri Anil Kumar Mishra, resident of village and P.O. Chanda, P.S.- Thakur Gangti, District- Godda (Jharkhand)

... .. Opposite Party/s

=====

Appearance :

For the Petitioner/s	:	Mr. N. K. Agrawal, Sr. Advocate Mr. Suresh Chand Giri, Advocate
For the Opposite Party/s :		Mr. Umeshanand Pandit, APP Mr. A. K. Mishra, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA

CAV JUDGMENT

Date : 04-12-2018

This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 20.01.2015 passed by the Judicial Magistrate, Bhagalpur, in Complaint Case No.1141 of 2014 by which the learned Magistrate after holding enquiry has found *prima facie* case against the Petitioner for the offence under Section(s) 304 Indian Penal Code.

2. It is alleged in the Complaint filed by Dayamanti Mishra that her son, Uttam Kumar Mishra, sustained injury in his left arm in the motorcycle accident on 06.06.2006 as a result of which there was swelling on his hand. She consulted village Doctor, namely, Rajesh Kumar Mishra, on



07.06.2006, who advised and referred him to Dr. Amar Kumar (Petitioner). It is alleged that on 08.06.2006 at about 8.00 AM, in the morning, son of the Complainant went to Clinic of the Petitioner along with his friend, Vivek Thakur where, after investigation Doctor advised for operation. The son of the Complainant deposited a sum of rupees three thousand for test, medicines etc. The son of the Complainant asked the Doctor to talk to his father on mobile phone before operation. The Doctor talked to husband of the Complainant on telephone, who told not to start operation till arrival of the Complainant in Clinic, but the Doctor ignoring the advice of husband of the Complainant took him in the operation theater in her absence at 4.00 PM. The Complainant, in the meantime, reached in the Clinic along with her Dewar, Pankaj Kumar Mishra. She enquired from the Compounder at 5.00 PM about condition of her son, Uttam Kumar, who told that operation is continuing. The Doctor all of sudden came out from the operation theater at 7.00 PM and falsely informed the Complainant that condition of his son is serious and asked her to take him to Mayaganj Hospital immediately. The son of the Complainant by that time had died. The Petitioner called Ambulance and put the dead body of her son along with his two Compounders on the



Ambulance and they proceeded towards Mayaganj Hospital. But, on the instruction of Compounders, the driver of the Ambulance took the Ambulance to Zero Mile instead of Mayaganj Hospital. The Complainant raised objection then both the Compounders told the Complainant that her patient has already died at 5.00 PM and told her to take the dead body, otherwise, they will kill her. In the meantime, three unknown persons came on motorcycle and both Compounders fled away on the motorcycles. Thereafter, the Complainant and her Dewar, Pankaj Kumar Mishra, made request with the driver of the Ambulance to take her back in the Clinic at Bhagalpur. The Complainant again reached in the Clinic of Dr. Amar Kumar at 8.30 PM and found that Dr. Amar Kumar had locked his Clinic from outside. The driver put the dead body out of the Ambulance and fled away with the Ambulance. Neighbouring people along with media persons arrived and took photograph and advised the Complainant to lodge First Information Report and get postmortem of the dead body done. The Dewar of the Complainant made call to police. The police took the dead body in emergency ward of JLNH Hospital. Relative of the Complainant came between 11.00 PM to 1.00 AM (night). The police handed over the dead body at 1.30 AM in the night after



taking signature of five persons on plain paper. The police neither registered the First Information Report nor get the postmortem of the dead body done. Thereafter, the Complainant along with her villagers took the dead body of her son, Uttam Kumar Mishra, to her house in Godda on 09.06.2006. Younger son of the Complainant, Amit Kumar Mishra, who is posted in Indian Military Force in Manipur came to village on 10.06.2006 and dead body was cremated at 7.00 PM at Kahalgaon crematorium. The Complainant has alleged that Doctor and his two Compounders in conspiracy have illegally taken rupees three thousand on the plea of fees and without doing any operation gave wrong medicines to her son, who became unconscious. He committed murder of her son by making him unconscious.

3. The aforesaid Complaint was sent to P.S. under Section 156(3) Cr.P.C. for investigation. The police after investigation submitted final form on 30.04.2013 mentioning error of fact for the alleged offence. Xerox copy of the final form submitted by the police is annexed as Annexure-5. The Complainant had filed Protest Petition in the Court below on 29.07.2006 alleging that the police was in collusion with the accused persons. Xerox copy of the Protest Petition is enclosed



as Annexure-3. During pendency of police investigation, matter was reported to the Civil Surgeon cum Chief Medical Officer, Bhagalpur, by the Superintendent of Police, Bhagalpur, who constituted a Medical Board. Meeting of the Medical Board was held on 03.01.2007 in presence of Petitioner and husband of the Complainant. Both parties were heard and records were verified. The Medical Board by its report dated 15.06.2007 (Annexure-4) has submitted that it is difficult to say cause of death without postmortem report. The Medical Board has further mentioned in the aforesaid report that without submitting any document by the Complainant and the postmortem report, the Petitioner cannot be held guilty of negligence in treatment of son of the Complainant.

4. Learned counsel for the Petitioner has submitted that there is delay in filing Complaint Petition. Occurrence is alleged to have take place on 08.06.2006 and Complaint Petition was filed before the Chief Judicial Magistrate, Bhagalpur, on 26.06.2006. On the same day, the Complaint Petition was sent to P.S. under Section 156(3) Cr. P.C. The police after investigation submitted final form as mistake of fact in the case. The Court below in the mechanical manner has taken cognizance against the Petitioner. The Court



below has failed to look into *Sanha* entry dated 08.06.2006, which discloses that on the basis of application filed by Pankaj Kumar and five villagers including Awadhesh Thakur, they had received the dead body from the police.

5. Counsel for the Petitioner has further submitted that in the context of medical profession, a simple lack of case, an error of judgment or an accident is not proof of negligence on the part of a medical profession. He has relied on the judgment of Hon'ble Supreme Court in the case of ***Jacob Mathew vs. State of Punjab and anr.*** reported in ***2005(4) PLJR (SC) 213.***

6. Counsel for the Opposite Party No.2 has submitted that 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. Three essential ingredients of negligence are (i) duty, (ii) breach and (iii) resulting damage.

7. This Court after looking into the allegation in the Complaint Petition and the materials available on record finds that during investigation Protest Petition was filed by the Complainant on 29.07.2006 (Annexure-3) alleging that the police is in collusion with the accused persons. The Court below



after submission of final form by the police by order dated 09.04.2014 after accepting the final form ordered to register the Protest Petition as Complaint and after examining the Complainant on Solemn Affirmation and other three witnesses found *prima facie* case against the Petitioner for the offence under Section 304 Indian Penal Code by the impugned order. Solemn Affirmation of the Complainant and statement of three witnesses recorded before the Magistrate is enclosed as Annexure-6 series. From the aforesaid statements, it appears that all have supported the case of the Complainant.

8. The Hon'ble Supreme Court in the case of ***Jacob Mathew vs. State of Punjab and anr.*** reported in **2005(4) PLJR (SC) 213** has held that *a professional may be held liable for negligence on one of 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 a given case, the skill which he did possess.*

9. The Hon'ble Supreme Court has further observed in the aforesaid judgment that three essential components of negligence are duty, breach and resulting damage. If the claimant satisfies the Court on the evidence that these three ingredients are made out, the defendant should be



held liable in negligence. The Hon'ble Supreme Court has also observed in the aforesaid judgment that for fastening liability under Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law. The essential ingredients of *mens rea* cannot be excluded from consideration when the charge in a Criminal Court consists of criminal negligence.

10. In the instant case, specific allegation has been levelled against the Petitioner of taking the son of the Complainant in operation theater in absence of the Complainant and giving false information to the Complainant when she reached that condition of her son is serious and asking her to take him to another Nursing Home, whereas, the fact was that son of the Complainant had already died in the clinic of the Petitioner itself during course of operation. It is also alleged that this Petitioner and his two Compounders forcibly put the dead body of son of the Complainant on Ambulance on the pretext to get him admitted in Mayaganj Hospital. The driver of the Ambulance in collusion with two Compounders, who were accompanying the Complainant on the instruction of this Petitioner, got the Ambulance moved towards Zero Mile instead of going to Mayaganj Hospital and gave threat to the



Complainant and his family members and also told that her son had already died at 5.00 PM. Thereafter, both the Compounders fled away on motorcycles of unknown persons, who reached there by that time. It is also alleged that the Complainant requested the driver of the Ambulance to bring back her son to the Clinic of the Petitioner. The driver brought her son to the Clinic of the Petitioner. The clinic was found locked from outside. The driver also fled away after putting the dead body of son of Complainant out of Ambulance.

11. The Complainant also alleged that police did not lodge the case at initial stage. The police neither lodged the First Information Report nor held the postmortem of the dead body.

12. The Complainant thereafter filed Complaint Petition in the Court, which was sent to P.S. under Section 156(3) Cr. P.C. The Complainant not being satisfied with the way and style of investigation by the police, filed Protest Petition in the Court on 29.07.2006 stating that police was in collusion with the accused persons. The police, ultimately, submitted final form in the case as mistake of fact (Annexure-5). Medical Board was also constituted. The Medical Board in its report (Annexure-4) has stated that no opinion with regard to



death could be given in absence of postmortem report.

13. The Complainant has alleged in the Complaint Petition that no paper with regard to treatment of her son was given to her by the Petitioner. The Medical Board opined that there is no paper of treatment or postmortem report. In absence of any paper of treatment or postmortem report the Petitioner cannot be held guilty.

14. The Court below on the basis of Protest Petition registered it as Complaint and held enquiry under Section 202 Cr.P.C. The Complainant along with three other witnesses were examined by the Court below (Annexure-6 series). All the witnesses including the Complainant in her Solemn Affirmation have supported the case as alleged in the Complaint Petition.

15. This Court from the allegation in the Complaint Petition and statement of witnesses recorded during enquiry finds that there was negligence on the part of Petitioner. There was also *mens rea* on the basis of allegation in the Complaint Petition and statement of witnesses recorded during enquiry.

16. The Hon'ble Supreme Court has observed in the case of *Jacob Mathew vs. State of Punjab and anr.* reported



in **2005(4) PLJR (SC) 213**, that three essential components of negligence are duty, breach and resulting damage. This Court on the basis of allegation made in the Complaint and statement of witnesses recorded during enquiry as well as in the facts and circumstances of the case *prima facie* finds that all the three essential components of negligence as observed by Hon'ble Supreme Court in **Jacob Mathew's** case are made out in this case.

17. The Court below is only required to see whether *prima facie* case of negligence is made out on the basis of statement of witnesses as well as Solemn Affirmation of the Complainant recorded during enquiry.

18. In view of such, this Court does not find any illegality in the impugned order passed by the learned Court below.

19. This application is, accordingly, **dismissed**.

20. The Court below will proceed in the case in accordance with law.

(Sanjay Priya, J)

J. Alam/-

AFR/NAFR	AFR
CAV DATE	05-09-2018
Uploading Date	06-12-2018
Transmission Date	06-12-2018

