IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.257 OF 2018

Dr. Nilesh s/o Hiralal Jaiswal,
Age: 42 years, Occu: Medical Practitioner,
R/o. Shivaji Road, Near New High School,
Kannad, District Aurangabad ..APPLICANT

VERSUS

1. The State of Maharashtra
(Through Kannad City Police
Station, Aurangabad)

2. Tanveer Baig Hakim Baig,
Age: Major, Occu: Business,
R/o. Kannad, District : Aurangabad ..RESPONDENTS

Mr Nilesh S. Ghanekar, Advocate for applicant;
Mr S. W. Munde, A.P.P. for respondent No.1;
Mr Sk. Mujtaba Gulam Mustafa, Advocate for respondent No.2

CORAM : PRASANNA B. VARALE
AND
SMT. VIBHA KANKANWADI, JJ.

DATE : 3rd April, 2018

JUDGMENT (PER : PRASANNA B. VARALE, J)

Heard Advocate Mr N. S. Ghanekar appearing for the applicant, learned APP Mr S. W. Munde for non-applicant No.1 and Advocate Mr Sk. Mujtaba Gulam Mustafa for non-applicant No.2.

2. Rule. Rule made returnable forthwith. By consent, heard finally.

3. The petitioner is before this Court with a prayer of quashment of first information report bearing Crime No.389/2017, registered with Kannad City Police Station, Kannad, Aurangabad for the offence punishable under Section 304 of the Indian Penal Code.

4. Brief facts for giving rise for decision of the present application are summarized as follows:

Respondent No.2 lodged a report at Kannad City Police Station, Aurangabad on 12th December, 2017 against the applicant. It is stated in the report that on 20th March, 2017 at about 4.30 p.m., Amina, minor daughter of respondent No.2 - Tanveer Baig Hakim Baig, aged 8 months fell down from the cot and when she was taken up to the clinic of the applicant, the applicant was available in his clinic. As such, on 21st March, 2017, at about 11.00, again the wife and the mother of respondent No.2 carried Amina to the clinic of the applicant. The applicant, on examination, prescribed certain medicines and the medicines suggested by the applicant were administered to the minor daughter Amina but there was no positive recovery. The minor daughter started vomiting and was in unconscious condition. On 22nd March, 2017, at about 8.00 a.m., respondent No.2 along with his wife again carried Amina to the clinic of the applicant and informed him that Amina is vomiting. The applicant told the couple that it may be

possible due to fever and cold and directed them to have a blood examination of Amina. Accordingly, the report from the clinical laboratory was submitted to the applicant and the applicant informed the couple that the patient is suffering from low hemoglobin. Respondent No.2 and his wife sought an advise from the applicant as to whether it would be necessary to perform city scan, to which the applicant replied that there is no need for any city scan. When the couple proceeded for the return journey to Aurangabad, their daughter Amina became unconscious near Padegaon and she was immediately taken up to M.G.M. Hospital, Aurangabad where the doctor of the M.G.M. Hospital declared her dead. Then the body of Amina was carried to the Rural Hospital, Kannad and it was subjected to autopsy/post mortem. It was reported that death of the patient was due to brain hemorrhage. Then it is stated in the report that due to negligence of the applicant, minor daughter Amina suffered death and as such, the report was lodged against the applicant.

5. Mr Ghanekar, learned Counsel appearing on behalf of the applicant vehemently submitted that lodgment of the report against the applicant is nothing but an afterthought attempt to involve him in a criminal case. It is also submitted by Mr Ghanekar that the police authorities have acted in an undue haste and in spite of various pronouncements, without following any cautionary measure as

directed either by Honourable the Apex Court or the High Courts, they seem to have been succumbed to pressure of respondent No.2 for the reasons best known to them.

6. Mr Ghanekar, learned Counsel for the applicant then vehemently submitted that even assuming without admitting bare facts reflected in the report, it would show that there is an inordinate delay and no satisfactory explanation is provided in the report for such an inordinate delay. It is submitted by Mr Ghanekar that as per the statement of respondent No.2 reflected in the report, the incident took place on 20th March, 2017 and the report is lodged in the police station on 12th December, 2017 i.e. nearly after eight months of the incident. There is not a single word in the report leave aside any justifiable explanation about the delay. Mr Ghanekar then submitted that when the patient was brought to the clinic of the applicant, no history of fall was disclosed to the applicant and what was informed to the applicant, was the history of fever and vomiting. Accordingly, on the backdrop of history reported to the applicant, the applicant advised L-Salbutamol drops. The applicant found that the patient i.e. minor daughter is anemic and as such he advised for the blood test. It is also submitted by Mr Ghanekar that the report is nothing but a bundle of untrue facts. It is stated in the first information report that on 20th March, 2017, Amina was brought to the clinic of the applicant and the

applicant was not present in his clinic. It is submitted by Mr Ghanekar that the record maintained by the applicant clearly shows that on 20th March, 2017, the applicant was very much available in his clinic and had examined as many as 49 patients. It is then submitted by Mr Ghanekar that the applicant is M.D. D.C.H., having his hospital i.e. Laxmi Maternity Hospital and he is running his hospital since last twelve years. It is then submitted by Mr Ghanekar that during this long span of twelve years, not a single complaint is made against the applicant by any of his patients. It is then submitted by Mr Ghanekar that respondent No.2 had also changed his stand conveniently by concealing certain facts. He then submitted that though respondent No.2 carried his minor daughter Amina to Dr. Pravin Pawar on 22nd March, 2017, this fact is not disclosed in the report. As per his opinion, there was another complaint initially submitted by respondent No.2, wherein this fact was referred to. He also submitted that the relatives of respondent No.2 had entered in the clinic of the applicant and committed an act of trespass in the clinic and had ransacked, due to which there was a fear and apprehension in the staff as well as in the patients. In respect of this incident, Crime No.55 of 2017 was registered with Kannad Police Station. Thus, Mr Ghanekar, learned Counsel for the applicant submitted that the possibility of giving counter blast to the complaint lodged against respondent No.2 by submitting report against the applicant, cannot be ruled out.

7. Mr Ghanekar, learned Counsel for the applicant then vehemently submitted that the police authorities have also misdirected themselves by lodging an offence under Section 304 against the applicant. By inviting our attention to Section 299 of the Indian Penal Code, he submitted that the prerequisite for allegations against the applicant for commission of an offence under Section 304 of the Indian Penal Code is either an intention or knowledge. He then submitted that in the present matter, there is absolutely no iota material to show that the applicant had any intention or knowledge so as to cause death of minor daughter Amina. He then submitted that the medical store of cousin of the applicant was also subjected to damage at the instance of the relatives of respondent No.2. He then submitted that brother of respondent No.2 – Shabbir Baig initially lodged N.C. under Sections 504, 506 read with Section 34 of the Indian Penal Code. Thereafter, on an exaggeration of the facts, an attempt was made to seek direction for registration of first information report under Section 336 of the Indian Penal Code, taking recourse to the order under Section 156(3) of the Code of Criminal Procedure. He further submitted that Criminal Application No.4582 of 2017 was filed for quashing of the order under Section 156(3) of the Code of Criminal Procedure.

8. Mr Ghanekar, learned Counsel for the applicant then placed heavy reliance on oftenly quoted judgments of Honourable the Apex Court in the matter of **Jacob Mathew vs. State of Punjab & anr.**, reported in **AIR 2005 SC 3180**, in the matter of **Dr. Suresh Gupta Vs. Govt. of NCT of Delhi & anr.**, reported in **AIR 2004 SC 4091**, in the matter of **A.S.V. Narayanan Rao Vs. Ratnamala & anr.,** reported in **2013 (12) LJSOFT (SC) 427** and in the matter of **Dr. Sou. Jayshree Ujwal Ingole Vs. State of Maharashtra**, reported in **LEX (SC) 2017 4 4.** Thus, Mr Ghanekar, learned Counsel for the applicant prayed for quashing of the first information report lodged against the present applicant.

9. Learned A.P.P. vehemently opposed the application. He made available the material collected by the investigating agency in the process of investigation on lodgment of the report.

10. On hearing learned Counsel appearing on behalf of the respective parties and on going through the material submitted before this Court, we are of the clear opinion that learned Counsel for the applicant has made out a case for allowing the present application. We are also of the opinion that before registration of an offence under Section 304 against the applicant, the police authorities have failed to follow the guidelines issued by the Honourable the Apex Court in the matter of **Jacob Mathew** (supra) case.

11. On perusal of the material collected by the investigating agency, it reveals that there is a substance in the submission of Mr Ghanekar, learned Counsel appearing on behalf of the applicant. Respondent No.2 had initially carried his minor daughter in the clinic of the applicant and subsequently she was also carried to another hospital, namely, Sanjivani Bal Rugnalaya and Critical Care Centre, Aurangabad and this fact is not disclosed in the report. Perusal of the post mortem report shows the cause of death of Amina, which reads thus :

> "Death due to cardio respiratory arrest due to Intracranial bleed due to Head Injury……."

12. Perusal of the material further shows that there is no supportive material to the statement of respondent No.2 that the fact of fall of Amina was disclosed to the applicant when Amina was carried to his clinic. Perusal of the material further shows that on 20th March, 2017, the applicant had examined many patients. The statement/record maintained by the applicant is collected by the investigating agency and thus, perusal of this statement shows that there is substance in the submission of Mr Ghanekar, learned Counsel for the applicant that on 20th March, 2017, the applicant was in his clinic and examined the patients and as such, the statement made in the report by respondent

No.2 that on 20th March, 2017, the applicant was not available in his clinic, is not true.

13. There are certain statements recorded by the investigating agency to submit that the applicant was not providing proper treatment to the patients. It is stated in the statements that the applicant does not posses medical knowledge. These statements are of the farmers, general store owner and grocery shop owner. It is difficult to accept these statements to arrive at a conclusion that the applicant was negligent for a simple reason that none of these persons whose statements are recorded, possess medical knowledge and these are only their general statements about diagnosis of the applicant. The most interesting fact is the report of the Medical Officer, Rural Hospital, Kannad. An opinion was sought for by forwarding a query letter through the police inspector of police station, Kannad City. It is stated in the report that at no point of time, the history i.e. fall of minor daughter Amina was disclosed to the applicant and the applicant had provided treatment on the clinical examination of the patients as well as on the other medical parameter, such as, weight of the child, etc. The report then clearly states that the Medical Officer, Rural Hospital, Kannad, on perusal of the material i.e. the papers of the treatment opined that prima facie, no act of negligence can be attributed against the applicant.

14. Mr Ghanekar, learned Counsel for the applicant is justified in placing reliance on the judgments of the Honourable the Apex Court. We may refer certain observations of these judgments for ready reference. The observations made by the Honourable the Apex Court Jacob Mathew vs. State of Punjab & anr. (supra) in para nos.50, 51 and 52 are as follows:

> "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 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 rash or negligent act within the domain of criminal law under Section 304-A of 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.
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> 51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the

interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced 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 accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government, service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against

him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

15. The Honourable the Apex Court has observed in the matter of A.S.V. Narayanan Rao Vs. Ratnamala & anr. (supra) thus :

"Appellant is a cardiologist who conducted by-pass surgery as the angioplasty had failed _ Subsequently various complications developed and eventually the patient died _ Doctors are not immune from legal proceedings but in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution _ Police report show that matter was referred to Medical Council and they opined that doctor had done his best to as per records _ Though there was a delay of 5 hours in conducting by-pass but the evidence shows that time gap between the angioplasty failure and the surgery is not the factor for the death of the patient _ Negligence, if any, on the part of the appellant cannot be said to be "gross" _ Prosecution of the appellant is uncalled for"

16. The observations of the Honourable the Apex Court in the matter of Jayshree Ujwal Ingole Vs. State of Maharashtra (supra) are as follows :

“30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

After discussing the entire law on the subject, this Court concluded 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. …….
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> (4) The test for determining medical negligence as laid down in Bolam vs. Friern Hospital Management Committee (1957) 1 WLR 582 at p. 586 holds good in its applicability in India.
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> (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."

17. Considering all the above referred facts, we are of the opinion that learned Counsel for the applicant has made out a case for allowing the present applicant. Resultalntly, following order is passed :

The application is allowed. The first information report bearing Crime No.389 of 2017 registered with Kannad City Police Station, District Aurangabad for offence punishable under Section 304 of the Indian Penal Code, is quashed and set aside.

Rule is made absolute in the above terms.

(SMT. VIBHA KANKANWADI, J.) **(PRASANNA B. VARALE, J.)**

sjk