

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRM-M-24875 of 2017

Date of decision: 09.10.2018

Hardeep Singh Aulakh

.. Petitioner

Versus

State of Punjab and another

.. Respondents

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Manish Kumar Singla, Advocate
for the petitioner.

Mr. Sandeep Kumar, DAG, Punjab.

Mr. S.S. Tiwana, Advocate
for respondent no.2-complainant.

SURINDER GUPTA, J.

The petitioner is seeking quashing of FIR No. 164 dated 08.09.2016, registered on the statement of complainant-Jaswant Singh for offences punishable under Sections 337, 338 and 270 of Indian Penal Code (for short 'IPC') at Police Station Fatehgarh Sahib and subsequent proceedings arising in the said FIR.

2. Case of complainant, in brief, is that his wife delivered a child on 02.02.2015 at Mahesh Hospital, Sirhind. After the delivery, the child was having breathing problem and after few hours he was taken to Aulakh Children Hospital, Sirhind, where petitioner (Dr. Hardeep Singh Aulakh) admitted and started the treatment of newly born child and introduced a cannula in his finger to administer saline water and other medicines. The treatment of infant continued upto 09.02.2015 and during this period cannula was not taken out from finger of the child as a result of which his finger got swollen and arm of child turned black. On seeing condition of the child deteriorating, he referred him to Cosmo Hospital, Mohali.

Complainant took the child to Cosmo Hospital, Mohali, where he remained admitted from 02.30 a.m. to 09.30 a.m. on 10.02.2015. The doctor of Cosmo Hospital asked the complainant to deposit ₹5 lakhs but did not assure that the child could be saved. Due to their financial constraints, complainant instead of depositing ₹5 lakhs paid fee of Cosmo Hospital, Mohali amounting to ₹16,500/- and took the child to PGI, Chandigarh, where doctor on examination of child diagnosed that he has suffered Gangrene and his right hand may have to be amputated. The doctor treated the child, who recovered but due to Gangrene, the finger of his right hand had to be amputated. The complainant was apprised by the doctors at PGI that the child had suffered Gangrene because of negligence of doctor where he was earlier treated (Aulakh Hospital). Initially, complainant filed petition before the Permanent Lok Adalat for negligence of doctor of Aulakh Hospital, where he was allowed compensation of ₹5 lakhs, which was, however, not paid by the petitioner.

3. After registration of FIR, the investigating officer took note of the report of doctors of PGI, Chandigarh, wherein it has been declared that child suffered Gangrene due to negligence in his treatment by the outside hospital.

4. Learned counsel for the petitioner has argued that against order of Permanent Lok Adalat allowing compensation of ₹5 lakhs to complainant, a writ petition has been filed, which is pending in this Court and the order of Permanent Lok Adalat has been stayed. Non-payment of compensation has prompted complainant to lodge this FIR, which is false and abuse of process of law. While referring to observations of Hon'ble

Apex Court in case of **A.S.V. Narayanan Rao vs. Ratnamala and another,**

2013 (4) RCR (Criminal) 413, he has argued that the investigating officer cannot proceed against petitioner without obtaining an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice. In this case no such opinion has been taken despite the guidelines dated 01.09.2009 issued by Director General of Police, Punjab in this regard, copy of which has been placed on file as Annexure P-3. The negligence of doctor, who treated the child can be made out only if it is proved that the degree of negligence was much higher or of a very high degree.

5. Learned counsel for complainant assisted by learned State counsel has argued that the matter is still under investigation. Further investigation got stalled as vide order dated 14.07.2017, further proceedings in the FIR were stayed. The opinion given by doctor of PGI, Chandigarh that the child has suffered Gangrene due to negligence in his treatment while he was admitted in outside hospital is already with the police. It is also proved on record that child except for a brief admission in Cosmo Hospital, Mohali for few hours was under the treatment of petitioner. This petition is premature. Recording of FIR cannot be termed as misuse of process of law in view of opinion of the doctor of PGI, which is well reputed and specialized institution of north India.

6. In case of **A.S.V. Narayanan Rao (supra)**, Hon'ble Apex Court discussed its observations in case of **Jacob Mathew vs. State of Punjab and another, 2005 (3) RCR (Criminal) 836** and observed in para 10 of the judgment as follows:-

“10. This Court in the case of Jacob Mathew (supra) considered exhaustively the various aspects of

negligence on the part of a doctor and laid down inter alia;

“48. (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. In the above referred case, record pertaining to treatment given to deceased was forwarded to Andhra Pradesh Medical Council and also to Medical Council of India, which had opined that *'the doctors seem to have made an attempt to do their best as per records.'* Taking note of observations in case of **Jacob Mathew (supra)**, it was observed in para 11

as follows:-

11. *This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for prosecuting doctors on charges of criminal negligence. This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed:-*

“52.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 the Bolam 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

8. The above observations of Hon'ble Apex Court have not been disputed. In this case the matter is still at the stage of investigation. The investigating officer before filing of challan can always take opinion of expert and comply with directions in case of **Jacob Mathew (supra)** and **A.S.V. Narayanan Rao (supra)**.

9. The question, which arises for consideration in this petition, is as to whether there is any merit in submission of learned counsel for the petitioner that recording of instant FIR against petitioner is misuse of process of law? The answer to this can only be in negative. The police while recording FIR has considered expert opinion of doctors of PGI, Chandigarh. While proceeding further, the investigating officer may take further steps to comply with directions issued by the Director General of Police to comply

with observations of Hon'ble Apex Court in case of ***Jacob Mathew (supra)*** and to collect other expert opinion as required before reaching the conclusion that offence of negligence is made out against the petitioner. It is not disputed that cannula remained inserted in finger of infant for a period of about one week. On finding swelling and blackening of arm, he was referred to Cosmo Hospital, Mohali, where complainant could not afford expenses of the hospital and rushed to PGI, Chandigarh. Fortunately, the child responded to treatment there but the finger of his right hand had to be amputated. Complainant has all the reasons particularly in view of opinion of medical expert of PGI, Chandigarh to report the matter to police and get the FIR registered, which cannot be termed as misuse of process of law.

10. Consequently, this petition has no merit and the same is dismissed.

11. It is, however, made clear that the petitioner will be at liberty to avail all the legal remedies including filing of a fresh petition at later stage after filing of final report in this case by police in Court.

October 09, 2018

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No