

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.18451 of 2015

Arising Out of PS. Case No.-290 Year-2013 Thana- SONEPUR District- Saran

Dr. Sunil Kumar s/o Late Prakash Chandra Prasad Permanent resident of Village Mokama , P.S.-Mokama, District Patna , currently residing at Lakshmi Nursing Home, Near P.N. B. Bank , Angrezi Bazar, P.S. Sonapur, District Saran

... .. Petitioner/s

Versus

1. The State Of Bihar
2. Suraj Paswan, S/o Sita Ram Paswan, R/o Village-Angrezi Bazar, Sonapur, P.S.-Sonapur, District-Saran.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr.Harsh Singh, Adv
	:	Mr.Alok Chandra, Adv
For the State	:	Mrs. Anita Kumari Singh, APP
For the Opposite Party/s	:	None

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 30-07-2019

Heard learned counsel for the parties.

2. This application under Section 482 Cr.P.C. has been filed for quashing the order dated 23.06.2014 passed in Sonapur P.S.Case No. 290 of 2013 corresponding to U.T. No. 224 of 2014 whereby cognizance has been taken against the petitioner for offences under Section 304A I.P.C. and Section 3(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. According to FIR, the cousin brother of the informant, namely, Mahesh Paswan felt pain in his abdomen on 14.07.2013. The informant carried him to the Nursing Home of the



petitioner. After a look at the ultrasound report, the petitioner advised that the surgery of appendix would be required. On 17.07.2013, petitioner performed surgery on Mahesh Paswan. Thereafter, treatment of the patient continued till 24.07.2013. In between this period, the patient developed complications. When the petitioner was consulted he allegedly abused the informant by taking his caste name and expelled him from the clinic. Thereafter, petitioner was carried to Dr. Manishankar at Hajipur. At the clinic of Dr. Manishankar, the patient was hospitalized for two days and the patient developed infection in whole body as advised by Dr. Manishankar. Thereafter, the patient was carried to Rainbow Emergency Trauma Hospital at Patna. During course of treatment, the patient died on 02.08.2013. Allegation is that the death took place due to negligence of the petitioner.

4. A team of Doctors performed the postmortem examination and they were of the opinion that death was caused due to thrombo embolin (blockade of blood vessels).

5. Submission of learned counsel for the petitioner is that the petitioner is a qualified M.B.B.S. Doctor, as such, is competent to perform minor surgery including operation of appendix. There is no allegation or material on the record to suggest that the petitioner was otherwise negligent in performing



the surgery. The patient was treated at two other places also, however, there is no material on the record to suggest that what the subsequent Doctors diagnosed and what treatment was provided to the patient. This could have established the real cause of death. Learned counsel for the petitioner has relied on the judgment of the Hon'ble Supreme Court in **Jacob Mathew Vs. State of Punjab & Anr**, reported in **2005(4)PLJR(SC)213** and other subsequent judgments of this Court for his submission that the blame of criminal negligence cannot be levelled against a professional having expertise in that particular field unless a case of gross negligence is made out. Submission is that the FIR or the material collected during investigation, it does not find support with opinion of any medical expert that treatment which the petitioner had given to the patient was of the nature which is covered under the definition of gross negligence.

6. Submission of learned counsel for the State is that prima facie material is there that the petitioner being a simple M.B.B.S. was negligent enough in performing surgery on the deceased. Moreover, some of the witnesses have supported the allegation of abuse to the informant by taking caste name.

7. In **Jacob Mathew case (Supra)**, the Hon'ble Supreme Court held that 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 necessary for every professional to possess the highest level of expertise in that branch which he practices. The petitioner is a qualified Doctor having degree to practise in medicine as well as in surgery. There is no material to suggest that the surgery was performed at a place which was not suitable for performance of surgery rather the material is on the record that the petitioner first verified from the ultrasound report regarding the complication in the abdomen of the patient and thereafter decided to perform surgery. After performance of surgery, the patient was undergoing treatment and after few days complication to the patient developed and he was carried to two different places for better treatment and at both the places treatment was given. However, there is no material to suggest as to at which level and of what kind of lapses in medical care took place which resulted in death of the cousin of the informant. In para-50 of **Jacob Mathew** Case, the Hon'ble Supreme Court summed up following conclusions as guidelines.

50. "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 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's case** [1957] 1 W.L.R. 582, 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 304A of 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 304A of the 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”.

8. Considering the settled principles of law, in my view, there is complete lack of evidence to prosecute the petitioner for offence under Section 300A I.P.C.

9. Submission is that the only relation between the petitioner and the informant was of a Doctor and patient and they were not known to each other from before. No other witness except the informant stated before the police that the petitioner



committed abuse by taking caste name of the informant rather allegation is exaggerated one to harass the petitioner after death of the cousin of the informant. Therefore, cognizance under Section 3(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act also suffers from non-application of judicial mind.

10. Since there is no material collected during investigation to substantiate the aforesaid allegation of the informant, the cognizance for offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is also not sustainable in law.

11. Accordingly, the impugned order is set aside and this application stands allowed.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	02.08.2019
Transmission Date	02.08.2019

