

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.598 OF 2008

Dr. Nandkishor s/o Purshottam Deshpande
Age : 44 years, Occu : Medical Profession,
R/o. Nityaseva Hospital, Prashant Nagar,
Ambejogai, Tal. Ambejogai, Dist. Beed

.. Applicant

Versus

1. The State of Maharashtra
(Through Police Inspector,
Ambejogai Police Station, Ambejogai)

2. Sk. Banu Begam w/o Noor Mohammad
Age : 50 years, Occu : Labour,
R/o. Sadar Bazar, Ambejogai,
Tal. Ambejogai, Dist. Beed

.. Respondents

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Smt R.S. Kulkarni h/f. Shri S.D. Kulkarni, Advocate for Applicant
Shri A.R. Kale, APP for respondent / State
Shri S.S. Jawale, Advocate for Respondent No.2

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CORAM : N.B. SURYAWANSHI, J.

Dated: December 09, 2019

ORAL JUDGMENT :-

1. The applicant is a doctor possessing M.D. (Doctor of Medicine) degree and is a consultant physician. He runs a hospital by name 'Nityaseva Hospital' at Ambajogai since last 12 years prior to the date of incident. One Shaikh Farid Sk. Noor Mohammad was admitted in his hospital on 03.12.2001 in serious condition for

treatment and was there under his treatment for a period of 2 hours only.

2. The applicant administered necessary medical treatment in the form of injections and salines, however there was no response on the part of Shaikh Farid Sk. Noor Mohammad (in short 'patient'). On the advice of the applicant, patient was shifted to S.R.T.R. Hospital for specialized treatment and the applicant accompanied the patient and his relatives at the time of shifting. He was treated at S.R.T.R. Hospital by Dr. N.D. Kulkarni (Professor and HOD Medicine). However, during treatment the patient expired on 03.12.2001.

3. The mother of the patient on 07.12.2001 lodged an information alleging gross negligence on the part of the applicant and holding the applicant responsible for the death of the deceased. Accordingly, Crime No. 319 of 2001 was registered for offences punishable under Section 304-A of the Indian Penal Code (hereinafter referred to as the 'I.P.C.') and after the necessary investigation, the charge-sheet came to be filed against the applicant on 18.01.2002. The Investigating Agency submitted a report under Section 169 of the Cr.P.C. in case of Dr Jyoti Deshpande wife of the

present applicant, which came to be accepted by the learned Trial Court.

4. The applicant filed application under Section 239 of the Code of Criminal Procedure (in short 'Cr.P.C.') seeking discharge, which came to be rejected by the learned Trial Court vide order dated 12.12.2003. Being aggrieved, the applicant preferred Criminal Revision Application No.07 of 2004 which was dismissed, hence the present Criminal Revision Application is filed seeking discharge.

5. The learned counsel for the applicant submitted that, in the entire charge-sheet there is no material showing gross negligence on the part of the applicant. Only for two hours, the patient was admitted in serious condition in the hospital of the applicant and he was given proper treatment which is ordinarily given to the patient in that condition. Since the patient was not responding to the treatment, the applicant advised to take him to the S.R.T.R. Hospital, Ambajogai and the applicant personally accompanied the patient and his relatives and admitted him in a S.R.T.R. Hospital, Ambajogai. Thus, the applicant has taken all the necessary care, which a normal doctor would take in the given situation. It is further argued that, as per the Post Mortem report the

death is due to pulmonary oedema, associated with pulmonary kocks with e/o. Splenomenary cerebral oedema and e/o klebsicalla aerognes in blood and C.S.F. and the possibility of reaction of medicines is totally ruled out. In the CA report also no chemical reaction is reflected. In that view of the matter, there is absolutely no material on record to frame charge against the applicant under Section 304-A of the I.P.C. He urged that, both the Courts have erred in rejecting the prayer of the applicant for discharge.

6. The learned Addl. Public Prosecutor on the other hand supports both the impugned judgments and states that, in spite of the fact that the patient was admitted for two hours in the hospital of the applicant, no proper care was taken and due to the medicines given to the patient, he suffered reaction and ultimately expired in the S.R.T.R. Hospital. Hence, there is sufficient material on record to frame charge against the accused.

7. The learned counsel appointed for respondent no.2 contends that, *prima facie* a case is made out by the prosecution to frame charge under Section 304-A of the IPC and it is a matter of evidence to substantiate the said charge and the prosecution would lead necessary evidence to prove the charge. Hence, at this stage, no

interference is warranted in the orders passed by the both the courts.

8. Perused the criminal application, the copy of charge-sheet and the documents filed on record. It is not disputed that, the patient was admitted only for two hours in the hospital of the applicant and he was given proper treatment. The grievance of the first informant appears to be that though she repeatedly requested the applicant to accompany her to see the patient, the applicant refused to do so stating that he has already given necessary medicines and the informant should have some patience and faith. It is further allegation of the informant that, because of the treatment administered by the applicant, there was a reaction due to which ultimately the patient died.

9. If we see the Post Mortem Report, it reveals that, the death is due to pulmonary oedema, associated with pulmonary kocks with e/o splenomenary cerebral oedema and e/o klebsicalla aerognes in blood and C.S.F. From the Post Mortem Report even the learned Trial Court has agreed that the possibility of death of patient due to reaction of the medicines is clearly ruled out. If Chemical Analyzers Report is also of no help to the prosecution as

no chemical reaction is reflected in the said report.

10. The learned Counsel for the applicant has placed reliance in the case of **Dr. Sujoy Das s/o Arjunkumar Das Vs. State through Public Prosecutor**, reported in **2006 ALL MR (Cri) 993**. To support her contention that 'merely because the patient was not attended for some time, that itself does not make out case of negligence, it may at the most lack of care or breach of duty but non-attendance is not Causa causans i.e. to say the direct result of the negligent act on the part of the applicant resulting into the death of the patient.' It is further observed by this Court in that, 'in any event, that part of the alleged negligence of non attending to the patient in time cannot be said to be so reckless or grossly negligent act so as to invite the prosecution of the applicant for criminal negligence under Section 304 I.P.C.'

11. The learned counsel for the applicant further relied upon the judgment in the case of **Jacob Mathew Vs. State of Punjab and Ors**, reported in **(2005) Volume 6 SCC 1**, wherein the Hon'ble Apex Court relied on **Bolam Vs. Friern Hospital Management Committee**, [1957] 1 W.L.R. 582 and several other foreign judgments to come to a conclusion that, a medical practitioner

would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. The important excerpts from Boalm's case are reproduced in this judgment. It is also held that, 'a mere deviation from normal professional practice is not necessarily evidence of negligence.' 'No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career.'

. The Apex Court also held that, '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.' '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.' 'A simple lack of care, an error of judgment or an accident is not proof of negligence on the part of a medical

professional.’

12. If the ratio of above mentioned authorities is applied to the facts of the present case, it is clear from the record that, there is absolutely no material to show that, the applicant did not exercise skill with reasonable competence and the skill which he did possess. There is also no material on record to show that the applicant has not acted like any ordinary doctor. Taking into consideration the material collected during investigation and the documents, there is no material to substantiate charge under Section 304-A of I.P.C. The prosecution has failed to collect material to sustain a charge under Section 304-A of I.P.C. and the continuation of the proceeding would be waste of judicial time and energy. It would cause serious embarrassment and harassment to the applicant and the chances of conviction in the trial are none.

13. Both the Courts below have failed to apply the ratio laid down in **Jacob Mathew** (cited supra) to the facts of the present case in the proper perspective and have committed an error in rejecting the prayer of the applicant seeking discharge. Non application of mind on the part of both the courts is apparent on the face of the record and both the impugned judgments are

unsustainable.

14. In light of the aforesaid observations, it is clear that, even if the material on record is accepted as a whole, at the face value it does not make out any case of criminal negligence against the applicant and the charge against the applicant is groundless. In that view of the matter, following order is passed.

ORDER

- (i) The Criminal Application is allowed.
- (ii) The proceedings of Regular Criminal Case No.58 of 2002 pending on the file of learned Judicial Magistrate First Class, Ambajogai are quashed and set aside and the applicant is discharged from the offence punishable under Section 304-A of the I.P.C.
- (iii) Rule is made absolute in above terms.
- (iv) There shall be no order as to costs.
- (v) The learned counsel appointed on behalf of respondent no.2 has rendered able assistance to this Court which is appreciated. The High Court Legal Services Sub-Committee, Aurangabad to pay fees of Rs.5,000/- (Rs.Five Thousand) to him within a period of one month from today.

(N. B. SURYAWANSHI)
JUDGE

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