IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.157 of 2015
M.P.No.1 & 2 of 2015

Dr.T.Jayaraman ... Petitioner/5th Accused

Vs.

N.Srinivasan
Grade -I, Bench Clerk,
1st Additional District Court,
Salem ... Respondent/Defacto Complainant

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records with respect of C.C.No.169 of 2014 on the file of the learned Judicial Magistrate No.III, Salem, and quash the same as far as the petitioner is concerned.

For Petitioner : Mr.R.Nalliayappan

For Respondent : Mr.M.Mohamed Riyaz,
Additional Public Prosecutor

ORDER

This petition has been filed to quash the proceedings in C.C.No.169 of 2014 on the file of the learned Judicial Magistrate No.III, Salem.

2. The learned counsel for the petitioner would submit that the petitioner is Doctor and he is running a hospital namely Kurinji Hospital at Salem. On 02.09.2008 one Vijaya was admitted for treatment for the injuries sustained in the road accident in the petitioner's hospital. Till 16.09.2008, the petitioner gave treatment to the said Vijaya and on 16.09.2008, the relatives of the said Vijaya requested to discharge her to get treatment at higher centre. Hence, the petitioner issued discharge summary and discharged the said Vijaya on 16.09.2008 at 1.00 a.m. When

the patient was about to leave the hospital, she died at about 2.30 a.m., on 16.09.2008 and the same was recorded as death summary.

2.1. The learned counsel further submitted that subsequent to the death of the said Vijaya, a petition under Section 166 of MV Act in M.C.O.P.No. 138 of 2008 has been filed before the learned I Additional District Judge, Salem, claiming compensation. In the said case, a summon was issued on the petitioner to depose witness and the petitioner was also examined as RW1. Through the petitioner, the death summary was marked as Ex.R.1. But one of the claimant has marked the discharge summary issued by the petitioner herein as Ex.P.3. Based on which the learned Judicial Magistrate No.III, Salem, made complaint through the respondent herein that the petitioner had given false certificate as if the deceased was alive and discharged from the hospital on 16.09.2008, after recording the death summary. The petitioner alleged to deliberately issued a false certificate knowing fully well the same would be used in Court of law. The said complaint has been taken cognizance in C.C.No.169 of 2014 on the file of the learned Judicial Magistrate No.III, Salem, for the offences punishable under Section 193, 463, 465 and 471 of IPC, as against five persons, in which the petitioner is A5.

2.2. The learned counsel appearing for the petitioner would further submit only on the request of the deceased relatives the petitioner issued discharge summary and when the patient about to leave the hospital went into moribund condition and hence the petitioner being a dutiful doctor had to carry out the resuscitation procedure. But all the efforts went in vain and the deceased died about 2.30 a.m., on 16.09.2008. Further he relied upon the judgment in the case of Jacob Mathew Vs. State of Punjab and Another in Criminal Appeal Nos.144-145 of 2004 reported in AIR 2005 SC 3180 (1) and prayed for quashing the proceedings in C.C.No.169 of 2014 on the file of the learned Judicial Magistrate No.III, Salem.

3. Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that there are five accused, in which the petitioner is arrayed as A5. The petitioner had given a false certificate as if the deceased was alive and discharged from the hospital on 16.09.2008, after recording the death summary. Therefore, he prayed for dismissal of this petition.

4. Heard Mr.R.Nalliyappan, learned counsel for the petitioner, and Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the respondent.

5. It is seen that on 02.09.2008, one Vijaya met with a road accident and admitted in the petitioner's hospital for treatment. Till 16.09.2008, the petitioner gave treatment and on request of the deceased relatives, he issued discharge summary. When the patient about to leave the hospital, she went into moribund conditions and died. The same was also recorded as death summary by the petitioner herein. When both the documents filed in the M.C.O.P.No.138 of 2008, the learned Additional District Judge, Salem came to the conclusion that the said discharge summary issued by the petitioner is a false certificate and therefore lodged a complaint against petitioner and four others for the offences under Sections 193, 463, 465 and 471 of I.P.C.

6. The point for consideration is that whether the petitioner can be prosecuted for the offences under Sections 193, 463, 465 and 471 of I.P.C. Admittedly, the petitioner is a doctor. It is relevant to extract the judgment rendered in the case of Jacob Mathew Vs. State of Punjab and Another in Criminal Appeal Nos.144-145 of 2004 reported in AIR 2005 SC 3180 (1) as follows:

> "49. 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.

50. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

Guidelines re: prosecuting medical professionals

51. 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 in his reputation cannot be compensated by any standards.

52. 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.

53. 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.

Case at hand

54. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non- availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test."

7. The Hon'ble Supreme Court emphasised that 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 and unjust prosecutions. But, in the case on hand the petitioner issued two certificates on the same day and as such the charges for the offences under Sections 193, 463, 465 and 471 of I.P.C. are attracted as against the petitioner and there are materials to connect the petitioner. Therefore, the points raised by the petitioner cannot be considered here and all the points have to be raised before the trial court only during the trial.

8. In view of the above discussion, this Court is not inclined to quash the proceedings in C.C.No.169 of 2014. The petitioner is at liberty to raise all the points before the trial court and establish during trial. However, considering the case is of the year 2014, the trial Court is directed to complete the trial proceedings within a period of six months from the date of receipt of copy of this Order. It is made clear that the trial court is directed to conduct trial uninfluenced by the observation made by this Court while deciding the case.

9. With the above directions, this Criminal Original Petition stands disposed of. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

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To

1. 1st Additional District Court,
   Salem.

2. The Judicial Magistrate Court No.III,
   Salem

3. The Public Prosecutor,
   High Court of Madras.

Crl.O.P.No.157 of 2015
M.P.No.1 & 2 of 2015

SVI(CO)
SP(23/04/2019)