IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.Nos.3368 & 2424 of 2014 and Crl.M.P.Nos.839 & 840 of 2017 and M.P.Nos.1, 1 & 2 of 2014

1.Dr.P.Shanthi
2.Dr.P.Vasantha Mani ... Petitioners/Accused in Crl.O.P.No.3368 of 2014

Dr.Rajendran ... Petitioner in Crl.O.P.No.2424 of 2014

Vs.

1.Inspector of Police,
Law & Order,
H-3, Tondiarpet Police Station,
Chennai - 600 081

2.T.Mahesh ... 1st and 2nd Respondents/Complainant & Defacto Complainant in both Crl.O.P.'s

Dr.Rajendran ... 3rd respondent/A3 in Crl.O.P.No.3368 of 2014

PRAYER in Crl.O.P.No.3368 of 2014: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records in C.C.No.4265 / 2013 on the file of the Hon'ble XV Metropolitan Magistrate's Court at George Town, Madras, and quash the same against the A1 & A2.

PRAYER in Crl.O.P.No.2424 of 2014: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records in C.C.No.4265 / 2013 on the file of the Hon'ble XV Metropolitan Magistrate, George Town, Chennai and quash the charges levelled against the petitioner/accused-3 in the above case.

For Petitioners : Dr.B.Cheran
in both Crl.O.P.No.3368/14

For R1 in both Crl.O.P.'s : Mr.M.Mohamed Riyaz, Additional Public Prosecutor

For R2 in
Crl.OP.No.3368 of 2014 &
2424 of 2014 : Mr.G.Ayyanar
for M/s.Lawman Associates
For Petitioner in
Crl OP No.2424/14 and
R3 in Crl OP No.3368/14 : Mr.R.Rajasekaran

COMMON ORDER

These petitions have been filed to quash the proceedings in C.C.No.4265 of 2013 on the file of the XV Metropolitan Magistrate, George Town, Chennai.

2. Dr.B.Cheran, the learned counsel for the petitioners would submit that the petitioners are A1 to A3. The defacto complainant and his wife consulted the first accused for antenatal check up. She delivered at her native place. She gave history of loss of consciousness for few seconds during delivery. She also explained that there was some difficulty with the normal delivery procedure. During the second pregnancy she was having mild pregnancy induced hypertension for which she was consulting nephrologist at third accused hospital continuously till delivery. The ultrasound revealed 37 weeks of growth and a loop of cord around the neck of foetus. She was admitted in to the third accused hospital and the second accused was called for opinion. There was also risk of complications of big baby delivery. Therefore, the defacto complainant agreed for the surgery and the second accused performed surgery and delivered a male baby. The complainant and her husband wanted sterilization and it was performed as a combined procedure. The abdomen was closed after perfect heamostatis and after verifying instrument and pad count. Thereafter there was no complaint. she came for suture removal and there was no complaint and wound was healed well, sutures were removed. Thereafter, the wife of the defacto complainant did not come for any review for many months. Only once she consulted the first accused for the pain in abdomen. The first accused immediately advised Ultrasound abdomen. The report was also normal. Thereafter the wife of the complainant went to Vandhana Hosital where she was admitted and examined by another doctor. The scan was also taken and it was found that some foreign elements were present when the first and second accused had stitched the wound by keeping a small piece of cotton inside the stomach in a negligent manner. Thereafter, another surgery was conducted and the same was removed. Hence, the charge against the petitioners for the offence under Section 284, 338 and 506(ii) I.P.C.

3. The learned counsel for the petitioners would further submit that no foreign body was left during the surgery. The CT

scan report is false and doubtful for various reasons. Due to professional jealousy and occupational rivalry, the other hospitals and doctors made false allegation as against the petitioners. Further he submitted that there was no need to open the stomach and the operation was done only in her wishes. But, there is no need for keeping the cotton ball in the somach. Further he relied on 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.4265 of 2013 on the file of the XV Metropolitan Magistrate, George Town, Chennai.

4. Per contra, Mr.G.Ayyanar, the learned counsel for the second respondent complainant contended that his wife was admitted in the hospital headed by the third accused in which the first and second accused were working and they are gynaecologists. On their opinion, his wife was admitted and got operated by caesarian and a male baby was born. After discharging, his wife felt incurable pain in the abdomen and approached the first accused and she diagnosed that the pain was ordinary stomach ache. Thereafter she was taken to Vandhana Hospital where she was suggested for scan. On scan it was found that a foreign body (cotton cloth) was negligently left inside the abdomen and the same was removed by a surgery. Thereafter she was referred to Apollo Hospital as the stay of the foreign body(cotton cloth) developed increased drainage and wound gaping and sepsis and she was suffering from abdominal sepsis - post FB post Laparotomy Status and conducted surgery for Laparotomy, abdominal toileting, bowel resection, ileostoy otherwise situation would have caused her death. Only on the negligence of A1 to A3 foreign body was kept inside the abdomen of victim and as such she sustained huge injury. Therefore, he lodged complaint that only on the negligence of the petitioners / accused the foreign body was kept in the abdomen. Therefore he vehemently opposed this petition and prayed for dismissal of the same.

5. Mr.M.Mohamed Riyaz, Additional Public Prosecutor appearing for the first respondent would submit that the petitioners are arrayed as A1 to A3. They examined seven witnesses and also obtained expert opinion to prosecute as against the petitioners. On investigation, it discloses the negligence on the part of the petitioners and filed final report and the same was taken cognizance in CC.No.4265 of 2013 for the offences under Sections 284, 338 I.P.C. Further he submitted that the third accused is the administrator of Malligai Hospital and A1, A2 conducted operation at the time of delivery of baby. Further the investigation reveals that cotton cloth was kept inside the abdomen during the time of delivery of baby. Only due to negligence of the first and second accused, cotton cloth

was negligently kept inside the abdomen of the wife of the defacto complainant. Therefore, he prayed for dismissal of this petition.

6. Heard, Mr.B.Cheran, the learned counsel for the petitioners, Mr.G.Ayyanar, the learned counsel for the second respondent and Mr.M.Mohamed Riyaz, Additional Public Prosecutor appearing for the first respondent.

7. The petitioner are A1 to A3 and charged for the offences under Sections 284 and 338 I.P.C. The victim was admitted in the hospital owned by the third accused and consulted with A1, A2. They suggested for caesarian operation for the birth of male child. On caesarian they gave birth of a male child and thereafter she was discharged from the hospital. Thereafter she suffered with incurable abdomen pain and consulted with the first accused and the first accused diagnosed only small pain and stated that it will be cured in future since it is an ordinary stomach ache. Due to intolerable pain, again she was taken to another hospital and found that a foreign body was negligently left inside the abdomen and the same was removed from the abdomen by a surgery. Again she was referred to Apollo Hospital as the stay of the foreign body(cotton cloth) developed increased drainage and wound gaping and sepsis and she was suffering from abdominal sepsis - post FB post Laparotomy Status and conducted surgery for Laparotomy, abdominal toileting, bowel resection, ileostoy otherwise situation would have caused her death. Therefore the complaint was lodged against petitioners 1 to 3 / accused 1 to 3 and were charged for the offences under Sections 284 and 338 I.P.C.

8. The point for consideration is that whether the petitioners can be prosecuted for the offences under Sections 284 and 338 I.P.C. Admittedly, the petitioners are doctors and Superintendent. 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."

9. 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 due to negligence of the petitioners a foreign body was kept inside the abdomen of the victim and it was removed by another surgery. Therefore, again she was referred to Apollo Hospital as the stay of the foreign body(cotton cloth) developed increased drainage and wound gaping and sepsis and she was suffering from abdominal sepsis - post FB post Laparotomy Status and conducted surgery for Laparotomy, abdominal toileting, bowel resection, ileostoy otherwise situation would have caused her death. The petitioners failed to remove the foreign body (cotton cloth) from the abdomen of the victim and as such the charges for the offences under Sections 284 and 338 I.P.C are attracted as against the petitioners and there are materials to connect the petitioners. Therefore, the points raised by the petitioners cannot be considered here and all the points have to be raised before the trial court only during the trial.

10. In view of the above discussions, this Court is not inclined to allow the prayer sought for in these petitions as such these criminal original petitions are dismissed. However, the petitioners are at liberty to raise all the points before the trial court and establish during trial. 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. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

lok

To

1.The Inspector of Police,
Law & Order,
H-3, Tondiarpet Police Station,
Chennai - 600 081
2. The Hon'ble XV Metropolitan Magistrate,
George Town, Chennai
3. The Additional Public Prosecutor,
High Court of Madras.

+2 cc's to M/s.Lawman Associates, Advocate SR.No.15840
+1cc to Mr.R.Rajasekaran, Advocate Sr.22754 [10/09/2019]

Order made in
Crl.O.P.Nos.3368 & 2424 of 2014
and Crl.M.P.Nos.839 & 840 of 2017
and M.P.Nos.1, 1 & 2 of 2014

SAI(CO)
CSL/10.04.2019