BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl.O.P.(MD)No.19635 of 2015
and
M.P.(MD)Nos.1 and 2 of 2015

1.Dr.Suriyagandhi
2.Janaki
3.Backialakshmi ...Petitioners / A2, 4 & 5
4.Chithra Sivasankari
5.Karpagaraj
(Petitioners No.4 and 5 are
suo motu impleaded vide Court order
dated 03.12.2019) ... Petitioners

-vs-

1.The State represented by
The Inspector of Police,
Puliyankudi Police Station,
Thirunelveli District.
(Crime No.200 of 2010) ... 1st Respondent / Complainant

2.Subakaani ... 2nd Respondent/Defacto Complainant

PRAYER: Petition filed under Section 482 of the Criminal Procedure Code to call for the records in C.C.No.457 of 2014 on the file of the District Munsif cum Judicial Magistrate, Sivagiri, Tirunelveli District and quash the same.

For Petitioners :Mr.V.Kathirvelu,
Senior Counsel for Mr.K.Prabhu
For R1 : Mr.A.Robinson
Government Advocate
For R2 : Mr.S.M.A.Jinnah

O R D E R

Heard the learned Senior Counsel appearing for the petitioners, the learned Government Advocate appearing for the first respondent and the learned counsel for the defacto complainant.

2.In the interest of justice, this Court suo motu impleads 1)Dr.Chithra Sivasankari, W/o.Muralidharan, No.103/1, Ponnagaram, Rajapalayam 2)Dr.Karpagaraj, S/o. Appasamy, No.84A, North Car

Street, Vasudevanallur as petitioners 4 and 5.

3.The petitioners herein are figuring as accused in C.C.No.457 of 2014 on the file of the learned Judicial Magistrate, Sivagiri. The defacto complainant is the second respondent herein. The case of the defacto complaint is that his wife Jameela Beevi was admitted to a Government Hospital, Puliyangudi on 23.06.2010 at 6.15 a.m., for child delivery. It is the specific case of the defacto complainant that his wife was attended to only by para medical staff and that the duty Doctor did not attend her. As a result, at around 10.00 a.m., his wife died after she developed labour pain. The child also died in the womb itself. Hence, he lodged a complaint before the Puliyangudi Police Station leading to registration of Crime No.200 of 2010.

4.The case was investigated and final report was filed before the learned Judicial Magistrate, Sivagiri against the petitioners herein. Dr.Chithra Sivasankari, Dr.Sooriyaganthi and Dr.Karpagaraj are shown as Accused Nos.1 to 3. Janaki, Packialakshmi are shown as Accused Nos.4 and 5. Cognizance of the offences under Sections 304(A) of IPC was taken and the case was taken on file in C.C.No.457 of 2014. To quash the same, this Criminal Original Petition has been filed.

5.Even at the outset, the learned Senior Counsel appearing for the petitioner on instructions submitted that the petitioners would deposit a sum of Rs.5,00,000/-(Rupees Five Lakhs only) in a Fixed Deposit in the name of the child of the deceased in a nationalized bank. It is stated that the deceased is having a male child by name Riyaz khan. He is now said to be aged about 12 years. He is now in the care and custody of the defacto complainant.

6.The petitioner is directed to invest the amount in an interest bearing account in a nationalized bank for a period of seven years in the name of the child Riyaz khan as a Fixed Deposit. The defacto complainant or whoever is taking care of the said Riyaz khan, can withdraw the accrued interest once in three months.

7.The learned Senior Counsel stated that the petitioners are innocent and no offence is made against them and that on instructions he is making this offer irrespective of the outcome of the Criminal Original Petition. This submission made by the learned Senior Counsel is placed on record.

8.The question that arises for consideration is whether the petitioners deserve to be prosecuted for the offences under Section 304(A) of IPC.

9.The Hon'ble Supreme Court had dealt with the circumstance as to when a medical professional can be prosecuted for the offences under section 304(A). The leading case on subject is ***Jacob Mathew***

Vs. State of Punjab and another. reported in ***2005 (Crl) LJ 3710.*** The Hon'ble Supreme Court in the said decision held as under:

"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 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.
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> 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 MANU/SC/0579/2004 : 2004CriLJ3870 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)."

10.On going through the statement recorded under Section 161 Cr.P.C., it is seen that the deceased Jameela Beevi was very much attended to by the Doctor as well the paramedical staff. It is stated that Dr.Karpagaraj attended to Jameela Beevi initially. Thereafter, Dr.Chithra Sivasankari had taken scan also in the early morning at about 7.30 a.m. Jameela Beevi thereafter, developed labour pain. The Doctors and the paramedical staff were probably under the impression that Jameela Beevi would have a normal delivery and that she was only complaining of some pain which was quite natural. In the meanwhile, they wanted Dr.Sooriyakanthi(A2) to attend to the patient. This information was sent to her and before she could arrive Jameela Beevi passed away.

11.Section 304(A) will be attracted only if it can be shown that there was some gross negligence and recklessness on the part of the accused. In this case, the Jameela Beevi was very much in a Government Hospital and she was attended to by two Doctors and three paramedical staff.

12.I am therefore of the view that for the unfortunate demise of the wife of the defacto complainant, the petitioners herein cannot be fastened with any penal consequences. Therefore, the impugned proceedings stand quashed and this Criminal Original Petition stands allowed. The petitioners are directed to deposit a sum of Rs.5,00,000/-(Rupees Five Lakhs only) within a period of three weeks from the date of receipt of a copy of this order.

13.The learned counsel for the defacto complainant on instructions states that if the petitioners come forward to make the deposit, he will have no objection for quashing the impugned proceedings and that he will give a quietus to the issue. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To:

1.The District Munsif Cum Judicial Magistrate,
Sivagiri, Tirunelveli Dist.

2.The Inspector of Police,
Puliyankudi Police Station,
Thirunelveli District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.PRABHU, Advocate (SR-103195[F] dated 03/12/2019)
+1 CC to M/s.S.M.A.JINNAH, Advocate (SR-103308[F]

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SMA/03/02/2020/6P/6C