HONOURABLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.10848 of 2013

ORDER:

The petitioner is A1 by name Dr. D.Sridevi, Medical Practitioner running own hospital by name Laxmi Maternity & General Nursing Home and the 2nd respondent is the defacto complainant. The petitioner in this application under Section 482 Cr.P.C. is seeking to quash the proceedings in PRC.No.22 of 2013 pending for committal on the file of learned II Additional Judicial First Class Magistrate, Mancherial, Adilabad District, taken cognizance for the offences punishable under Sections 304-A & 314 IPC.

2. The 2nd respondent-complainant even though served failed to attend. Heard learned counsel for the petitioner and learned Public Prosecutor representing the 1st respondent-State and perused the material on record.

3. The factual matrix from the report of the defacto complainant-B.Tirupathi, no other than husband of the deceased-B.Sumalatha in registration of the crime No.212 of 2012 dated 21.05.2012 giving report against A1-Dr. Sridevi supra, A.2-Dr. A.Ganesh, Anesthetist that on 21.05.2012 at about 11.00 AM he joined his wife Sumalatha pregnant when suffering from stomach ache in the Laxmi Nursing Home of Dr. Sridevi, the family doctor and Dr. Sridevi-petitioner and A2 Doctor examined said Sumalatha and took her into operation theatre saying to operate her and after passing an hour they came out saying Sumalatha was facing difficulty in breathing to provide oxygen and after passing another

hour they came out saying her condition is critical and to provide ventilator facility and she has to be shifted to Karimnagar hospital and she was taken by boarding in DCM Van. What he alleged was they made him to believe that they were administering oxygen to the dead Sumalatha by then by said Sridevi and Ganesh as if Sumalatha alive even expired due to their negligence. After registration of the crime, in the course of investigation the fetus was seized and sent to Government Hospital, Mancherial and body of Sumalatha was subjected to PME examination conducted by team of 3 Doctors and the viscera preserved sent to FSL, Hyderabad and fetus sent to KMC, Warangal for examination and report. The team of Doctors who conducted autopsy with final opinion also with reference to the FSL report that there is no definite opinion can be given to the cause of death having conducted autopsy over the body of the deceased Sumalatha and fetus and questionnaire was also send by the IO to the Superintendent, Government Area Hospital, Mancherial-LW.14 that the deceased Sumalatha even for her earlier delivery admitted in same hospital of A1 Sridevi and gave birth to a child in February 2012 and again when she was carrying she was undergoing frequent medical checks under the care of A1 with confirmation of pregnancy and prescribing medicines for frequently conducting medical tests including on the growth of child in the womb. On 14.05.2012 defacto complainant and his wife Sumalatha (deceased) attended the hospital of A1 who advised for a scan report and Sumalatha was taken to Keeri Scanning Centre by her husband and the report obtained and after observing the report of there is single live fetus in Breach presentation of 21 weeks

Oligohydramnious, no gross anomalies detected, advised rescan after two weeks and A1 prescribed some medicines. On 18.05.2012 said Sumalatha went to her parents' house at Srirampur. On 21.05.2012 she suffered stomach ache and same was informed to A.1 over phone by defacto complainant and taken by defacto complainant said Sumalatha (deceased) to hospital of A1 along with mother of deceased-LW.3 in assistance and there necessary tests conducted of blood, urine etc., and A1 Dr. Sridevi examined and informed to undergo operation immediately for there is danger to life from the child in the womb and called thereafter A2 to the hospital to give anesthesia as a pre-arrangement to the operation and the operation started at about 01.30 PM and at about 02.00 PM A1 Dr. Sridevi came out by revealing that the fetus brought out from womb of Sumalatha but there is difficult in her breathing due to insufficient oxygen and advised to shift to Karimnagar for ventilation support and called LW.6 Dr. Chandra Dutt and one Dr. Raghunandan and they came and found Sumalatha under unconscious stage with difficult in breathing having observed her pulse of 130/80, PACO2 was 67, deceased was having severely pulmonary edema and has forthy sprotum from her mouth and on the advice of LW.6 Dr. Chandra Dutt given injection of Lasix 60 mg 3 ambles, I.V. and A2 continued ventilation support 100% oxygen to Sumalatha patient and even pulseox status did not improve 65% as such 3 amples of Lasix administered and injection efcorlin also given and condition of patient reached to PACO2 62% and on the advice to shift to Karimnagar hospital with ventilation support. The defacto complainant called his brother LW.4 in shifting. It is the

observation thereafter from the police final report of it is the negligence in conducting abortion operation by A1 and A2 in administration of overdose of anesthesia to deceased she lost her breath, however they made believe the defacto complainant as if deceased was alive and gave treatment by boarding the deceased in DCM Van to shift to Karimnagar with ventilation support and A2 in the DCM Van stated of deceased breathed last and went away and said investigation established of the operation conducted for abortion without any rescan and medical suggestion with intent to terminate pregnancy of deceased woman as a female child there in her womb by removal of fetus very negligently with that resulted and thereby they committed the offences under Sections 304-A, 314 & 336 IPC as referred supra cognizance taken under Sections 304-A & 314 IPC in allotting the PRC number to commit the case to the Court of Session by the learned Magistrate.

4. The contentions in the quash petition in impugning the said police final report with cognizance order are that there is no basis for saying the conclusion in conducting the operation by anesthesia overdose administered by A2 for the operation done by A1 or from which the deceased breathed last and the PM examination by team of doctors came to the conclusion of no definite opinion can be given regarding cause of death and the KMC, Warangal after examining the fetus given report of fetus is dead born with low birth weight with intra uterine growth retardation and after chemical analysis of viscera of the deceased the FSL report given of no poisonous substance found and once such is the case, there is no basis to attribute any gross negligence or culpable negligence to foist criminal prosecution against the

Doctors and the questionnaire answered by the Superintendent of the Government Hospital-LW.14 also shows no negligence of such an extent to launch any criminal prosecution but for bald allegation of negligence even in the report much less to say any faulty operation or improper treatment or due to overdose of anesthesia and thereby the proceedings are liable to be quashed.

5. Learned Public Prosecutor opposing the petition saying there is sustainable prima facie accusation to face trial by accused and nothing to quash the proceedings.

6. Before going further to the facts on hand, it is necessary to refer the expression of the Apex Court in **Jacob Mathew Vs. State of Punjab**[1] for criminal negligence to make out an offence, there must be element of mens rea shown to exist thereby different to civil negligence as degree of negligence is gross or very high to make out an offence of such negligence. In **Martin Desouza Vs. Mohd. Ishfaq**[2], the Apex Court held that Judges are not experts in medical science rather they are laymen and they shall rely on testimonies of other Doctors and Doctors sometimes have tendency to support their own colleagues charged with medical negligence and testimony may also be difficult in understanding complicated medical matters by layman like a Judge and the balance has to be struck in such cases. No doubt it is observed in the expression supra of **Martin**, Doctors who caused death or agony due to their negligence should certainly be penalized however like other professionals, Doctors too can make errors of judgment and if they are chosen to be punished, no Doctor can practice with equanimity

[1] 2005 (6) SCC 1
[2] 2009 (3) SCC 1

and that serves as counter productive to the society which is not good and also placed reliance on **Malay Kumar Ganguley Vs. Dr. Sukumar Mukherjee**[3], of standard of proof as also culpability and under Section 304-A IPC stand on altogether different footing for criminal law in contra distinction to Tort Law or Consumer Protection Act, a claim for degree of negligence attributable is not same or similar in civil and criminal branches and if there is no gross negligence or recklessness on part of discharge of the duties any Doctor resulted in death of patient no required to fix penal consequences. In **VM Shah Vs. State of Maharastra**[4] the Apex Court observed that findings recorded by Civil Court prevail until reversed by the appellate court after due consideration of the material and weighing the evidence and mere pendency of appeal against the Civil Court finding does not have the effect of suspending the operation of the decree of the civil Court already gave its findings and though in civil case evidence to be weighed by preponderance of probabilities. So far as criminal case, it is duty of the complainant or prosecution to prove beyond reasonable doubt and even from preponderance of probabilities there is no material to find any negligence, the question of sustainability of the criminal prosecution where proof is much higher than mere civil negligence attributable and which is lacking consequent thereto and as held in **Dr. Suresh Gupta Vs. Government of NCT of Delhi**[5] in fixing criminal liability on a Doctor or surgeon, the standard of negligence required to be proved should be so high to describe as “gross negligence” or “recklessness” and not mere lack

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[3] 2009 (9) SCC 221
[4] 1995 (5) SCC 767
[5] 2004 (6) SCC 422

of necessary care, attention and skill as observed by the House of Lords in **R Vs. Adomako** that a Doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patients as to amount to a crime against the State. When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as criminal liability unless it shows gross lack of competence or inaction and wanton indifference to his patient's safety which is not even any result of death of patient from error of judgment or accidental or mere inadvertence or some degree of want of adequate care and caution as also held in **Jacob Mathew supra** and **ASV Narayanan Rao Vs. Ratnamala**[6], **Martin FD Souza supra**, even earlier to it **P.B. Desai (Dr.) Vs. State of Maharashtra**[7] besides **Malay Kumar Gangulay supra**, which principle in all in same line making clear as a settled proposition of mere negligence is not sufficient to fasten criminal liability in the absence of showing gross negligence with high recklessness on part of the Doctor.

7. From the above legal position, coming to the facts besides the expression of the single judge of this Court in **Dr. P.Kanakadurgamma Vs. State, by Inspector of Police, I Town Police Station, Hindupur**[8] of rash or negligent words used in Section 304-A for so called medical negligence to be read as qualified by words grossly and when allegation do not prima facie constitute any offence, Section 482 Cr.P.C. jurisdiction can be invoked and for that conclusion referred **Jacob Mathew supra**

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[6] 2014 (1) SCC (Crl) 102
[7] 2013 ACC 68 SC
[8] 2007 (2) ALT (Crl.) 81 (AP)

where it was observed of a case of occupational negligence is different from one of professional negligence and simple lack of care or error of judgment or an accident is not proof of negligence on the part of medical professional and as long as a Doctor follows a practice acceptable to medical profession of that day, cannot be 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 been chosen to follow or resort to that practice or procedure to which the accused followed and a failure to use special or extra ordinary precautions which might have prevented the particular happening cannot be a standard for judging the alleged negligence. Even failure to use a particular equipment by itself also will not fasten with criminal negligence as professional may be held liable for negligence either not possessed of requisite skill which he professed to have possessed or did not exercise reasonable competence in given case and in the absence of culpable negligence or recklessness a person cannot be held liable for the offence under Section 304-A IPC. Thus there is no offence under Section 304-A IPC made out.

8. Even in the factual matrix, now coming to the offence under Section 314 IPC for the questionnaire served by the Investigating Officer to the Superintendent of the Area Hospital, Mancherial, the answers given are the following date 22.04.2013 viz., one whether the abortion can be done when fetus is 21 weeks, the answer is under MTP Act abortion can be allowed up to 20 weeks in some condition and for the 2nd question if abortion is allowed under what conditions and what is the procedure to be adopted during such operation, answer is congenital anomalies,

dead fetus and complications endangering mother's life and the procedure depends on the complications and general conditions of the patient and it may be done medically and surgically and for the 3rd question whether the both Dr. Sridevi and Dr. A.Ganesh having said qualification to do such operation, answer is if both the Doctors having qualification of MD/DGO and MD Aneshthtist/DA with MCI registration they can do such procedure and for the 4th question whether with the consent of patient's husband such operation can be done, answer is in emergency it can be done and on the 5th question as to other suggestion with regard to irregularities committed if any and the answer is nil. Even from that questionnaire there is nothing to show any negligent treatment much less what is required for the criminal prosecution of culpable negligence and recklessness treatment. Even in the case on hand, the patient and husband permission taken so also of mother of patient present and it is not even his case of it is against their consent and it is not even his case of Doctors are in experience as for the earlier delivery also A1 treated the patient and delivered one child and in so far as the 2nd pregnancy while carrying by deceased frequently visiting and progress by examination of the child in the womb and all the medicines are prescribing and scans were taking to know the progress of the fetus and it is not even his case of any medicine wrongly prescribing it is only when the mother while carrying the fetus went to her parents house from the husband's house to different place there is some complication arisen from stomach pain and taken to the hospital and after examination by conducting it is even found the fetus to be removed for saving of the life of the

mother and from the consent operation conducted for not a case of voluntary abortion of fetus up to 20 weeks permissible under the Act and a case of even after 20 weeks from saving life of the mother which permissible as per the questionnaire received from the Medical Superintendent of the Government Hospital, leave about the very investigation shows from the oxygen ventilation provided from breathing problem of the patient and 2 other Doctors also secured who also examined and advised for shifting with oxygen ventilation support to the Karimnagar to some Super Specialty Hospital with better amenities to provide treatment keeping in ICU and at the advice of LW.6-Dr. Dutt besides another Doctor Raghunandan further treatment even provided to improve oxygen levels there is nothing to say any medical negligence or any other offence for Section 304-A and 314 IPC but for if at all for any civil remedy to enforce for not a case to continue the criminal prosecution. Leave it apart as per the guidelines of the Constitution Bench expression of the Apex Court in **Lalita Kumari Vs. Government of Uttar Pradesh**[9], there is no any preliminary inquiry even conducted in registration of the crime much less any panel of Doctors opinion obtained before the final report filed much less even Superintendent of the Hospital categorically stated for the questionnaire of no negligence as referred supra.

9. Having regard to the above, the cognizance order of the learned Magistrate from the police final report for the offences supra in allotting PRC is unsustainable and liable to be quashed.

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[9] 2014 (2) SCC 1

10. Accordingly and in the result, this Criminal Petition is allowed by quashing the proceedings in PRC.No.22 of 2013 against the accused-petitioner.

Pending miscellaneous petitions, if any, shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 18.03.2019
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