

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M No.19672-2014 (O&M)
Date of decision : 30.01.2019

Dr.Manish Bansal

..... Petitioner

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present: Mr.Abhilaksh Grover, Advocate for the petitioner
Mr.Sandeep Vashisth, AAG Punjab
Mr.D.D.Singla, Advocate and
Mr.Kuldip Singh, Advocate for the complainant

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

KULDIP SINGH J.

Dr.Manish Bansal, Senior Medical Officer, now posted at CHC Bhattu Kalan, District Fatehabad filed the present petition under Section 482 Cr.P.C. in the year 2014 for quashing of FIR No.77 dated 30.7.2011, registered at Police Station Guhla along with the police report dated 22.8.2012 (Annexure P1) and the consequential proceedings, including framing of charge and the impugned order dated 25.10.2012 (Annexure P5) passed by learned Judicial Magistrate First Class, Guhla and order dated 23.4.2014 (Annexure P7) passed by Additional Sessions Judge, Kaithal.

Further prayer was made for discharging the petitioner.

Petitioner is M.B.B.S., M.S. (General Surgery) and claims to have experience of more than 15 years. He is working as Senior Medical Officer, General Hospital, Bhattu Kalan, District Fatehabad, Haryana. On 30.7.2011, FIR No.77 was registered against the petitioner under Section 304-A IPC on the basis of the complaint made on 29.7.2011 by Mahender Ram son of Sona Ram, resident of village Kharka, PS Guhla. In the said complaint, Mahender Ram has stated that on 28.7.2011, his daughter-in-law Paramjit Kaur wife of Surjit Ram was brought to CHC, Guhla for sterilization operation. She was quite right. However, when she returned home in Government Vehicle, after sterilization operation, she complained of acute pain. She was being brought to CHC, Guhla, but she died on the way. It was alleged that Paramjit Kaur died because of negligence of the doctor. On the basis of same, FIR was registered.

In this case charge under Section 304-A IPC was framed on 23.11.2011. An application for discharge was filed by the petitioner, which was dismissed vide order dated 25.10.2012 (Annexure P5). Revision against the said order was dismissed by learned Additional Sessions Judge, Kaithal on 23.4.2014 (Annexure P7). The petitioner approached this Court in the year 2014 for quashing FIR.

I have heard learned counsel for the parties and have also carefully gone through the file.

Application for discharge was primarily moved on the ground that there is no sanction to prosecute the petitioner under Section 197(8) Cr.P.C. Therefore he is liable to be discharged. Learned Magistrate observed that charge under Section 304-A IPC was framed on 23.11.2011.

In the postmortem report, the Board has given opinion about the death of

the person. During the subsequent investigation, Board gave opinion that there is no negligence on the part of the operating surgeon. Trial Court observed that two doctors Dr.Suman Lata and Dr.Dinesh are the same doctors, who previously gave their opinion in the postmortem and it was mentioned that the Board is of the opinion that cause of death is shock and hemorrhage. It was observed that no appeal or revision against the order framing charge was filed.

Learned counsel for the petitioner has relied upon authority in the case of Jacob Mathew vs. State of Punjab and another, 2005 AIR (SC) 3180, wherein, while dealing with the medical negligence, the Apex Court has summoned up as under:-

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.*

Reference is also made to the observations made by the Apex

Court as under:-

54. *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.

55. *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.*

Learned counsel for the petitioner has also referred to the law laid down by the Apex Court in Dr.Sou Jayshree Ujwal Ingole vs. State of Maharashtra and another, 2017(2) R.C.R. (Criminal) 549, wherein the Apex Court summoned up as under:-

48. 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 the 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 vs. Friern Hospital Management Committee (1957) 1 WLR 582 at p. 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 304-A 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 304-A 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.”

Learned counsel for the petitioner relied upon judgment of Apex Court in Devinder Singh and others vs. State of Punjab through CBI, 2016(2) RCR (Criminal) 876 and contended that sanction was required from the competent authority to prosecute the petitioner under Section 197 Cr.P.C. In that case, the Apex Court summoned up as under:-

37. The principles emerging from the aforesaid decisions are summarized hereunder :

I. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

II. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed

narrowly and in a restricted manner.

III. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under section 197 Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

IV. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.

V. In case sanction is necessary it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

VI. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.

VII. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

VIII. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question

of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

IX. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial.

Learned counsel for the petitioner has contended that allegations against the petitioner are that he conducted sterilization operation and that the lady on reaching home in the Government vehicle, complained of acute pain. She was being brought to the Guhla Hospital but she died on the way. Board of doctors gave opinion that cause of death is shock and hemorrhage. In the report submitted under Section 173 Cr.P.C., the police took the view that the applicant discloses that the death is under suspicious circumstances. From the opinion of the doctor, the police came to the conclusion that there is negligence in performing sterilization of Paramjit Kaur deceased. Therefore, offence under Section 304-A IPC is made out.

Learned counsel for the petitioner has also relied upon the inquiry report (Annexure P2). Inquiry was conducted on the orders of Civil Surgeon by Board of doctors, which was agreed to by Civil Surgeon, Kaithal. Inquiry Committee observed that patient walked from the bed to the Ambulance and from Ambulance to her home. It was further observed that when the attendants were bringing her back to the hospital they returned midway, presuming her to be dead. They never consulted any doctor at CHC, Guhla. Committee of the doctors observed as under:-

Following minilaparotomy, major complications happen

in 1.8% cases and minor complications in 14% cases (WHO, 1982) Operative complication include anaesthetic hazards, bowel or bladder injuries, injury to fallopian tubes & ovaries; broad ligament hematoma uterine bleeding & uterine perforation (in cases of minilaparotomy). Post operative complications including wound infection (most common), wound hematoma, wound dehiscence, pelvic infection, peritonitis, urinary infection, pelvic hematoma, intra peritoneal hemorrhage, bladder and bowel fistulae etc.

Mortality rate in India varies from 10 to 70 per one lakh procedures. (Anklesaria 1969, Rao 1974, ICMR 1982). The three major causes of death after female sterilization are anaesthetic hazards, infection and hemorrhage.

Therefore, Committee was of the opinion that there is no negligence on the part of the operating Surgeon.

I am of the view that in this case, it is not alleged that the petitioner was not possessing necessary qualifications. He performed several operations and there were no complication in other cases but in one case of Paramjit Kaur, she went in the government vehicle to the house and there she complained of acute pain. When she was being brought back to the hospital, she died on the way and was taken back by her attendants.

Now, question would arise as to what is the prima facie evidence of negligence?

Doctor was duly qualified being M.B.B.S. M.S. (General Surgery). It is not alleged that he was drunkard or he used the tools which were not meant for surgery. He performed surgery in several cases. Section

304A IPC is reproduced as under:-

304A. Causing death by negligence.—*Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

For offence under Section 304A IPC, it must be proved that the Act was rash and negligent. The doctor performed surgery and except the fact that subsequently, the patient on reaching home, complained of acute pain, will not be sufficient to conclude that the petitioner doctor was negligent in performing surgery.

After considering the law laid down in the cases of Jacob Mathew and Dr.Sou Jayshree Ujwal Ingol (supra), I am of the view that the present case is a fit case, where powers under Section 482 Cr.P.C. should be exercised to quash the proceedings, leaving the complainant to claim compensation from the Government, if he so desires.

Further, in this case, the petitioner was a government doctor. He was performing official duties and was conducting sterilization operations. Several operations were conducted. Therefore, the sanction of the petitioner was required from the competent authority to prosecute the petitioner under Section 197 Cr.P.C., since alleged act was done by the petitioner in the discharge of his official duties. The said sanction was required before the Court could take the cognizance.

In view of the foregoing discussion, the present petition is allowed. FIR No.77 dated 30.7.2011, registered at Police Station Guhla along with the police report dated 22.8.2012 (Annexure P1) and the consequential proceedings, including framing of charge and the impugned

order dated 25.10.2012 (Annexure P5) passed by learned Judicial Magistrate First Class, Guhla and order dated 23.4.2014 (Annexure P7) passed by Additional Sessions Judge, Kaithal are hereby quashed.

30.01.2019
gk

(Kuldip Singh)
Judge

Whether speaking/ reasoned:	Yes
Whether Reportable:	Yes