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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 28th January, 2019

+ CRL.M.C. 2920/2016 and Crl. M.A. 18638-18641/2017

MOHAN LAL BAJAJ

..... Petitioner

Through: None

versus

STATE GNCT OF DELHI & ORS

..... Respondents

Through: Ms. Prabhsahay Kaur, Advocate
for R-1 with SI Pramod Kumar
Mr. K.P. Gupta, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. Master Saurabh, six years old son of the petitioner, was suffering from jaundice and was taken for treatment to Handa Nursing Home, a medical facility of the second respondent on 21.04.2006. The child unfortunately died in the evening of 26.04.2006 in the nursing home. The petitioner had made a call to the police control room (PCR) at about 6.30 p.m. on 26.04.2006 on the basis of which DD no.19A came to be recorded by police station Moti Nagar, a crowd of persons having held demonstration in or about the nursing home lodging protests and demanding its closure.
2. The petitioner had made certain complaints to the police authorities alleging acts of commission or omission. There being no

action initiated, he presented a criminal complaint (CC no.3795/07 – new no.225/1/10) on 12.10.2007 seeking criminal action for offences allegedly committed, they being punishable under Sections 201, 203, 304A, 506 and 34 of Indian Penal Code, 1860 (IPC) impleading the second respondent as the first prospective accused adding the third and fourth respondents as parties. The Metropolitan Magistrate held inquiry under Sections 200 and 202 of the Code of Criminal Procedure, 1973 (Cr.P.C) but found no grounds to proceed against any person and dismissed the complaint under Section 203 Cr. P.C by order dated 05.05.2015.

3. The petitioner challenged the aforesaid order in the court of Sessions by criminal revision (no.38/2015) which was unsuccessful, the revisional court dismissing the petition by order dated 05.05.2016 holding that there was no infirmity or illegality in the view taken by the Magistrate.

4. The present petition invoking the inherent power and jurisdiction of this court under Section 482 Cr. PC was presented to assail the two consistent orders of the courts below, the prime contention being that there was substantive evidence adduced to make out a case for the second respondent to be summoned for causing death of his minor son due to medical negligence, it being an offence punishable under Sections 304A IPC. It may be mentioned here that accusations of the offence under Section 304A IPC are the core area of the criminal complaint, the accusations levelled for invoking offences under Sections 201, 203 and 506 IPC being connected thereto.

5. During the pre-summoning inquiry, the petitioner (complainant) had examined nine witnesses including himself (as CW-3), the other witnesses who deposed at inquiry under Sections 200 and 202 Cr. PC at the instance of the petitioners being Suresh Chand (CW-1), Inspector Ramesh Chandra (also shown as CW-1, hereinafter referred to as CW-1A), Kishan Lal (CW-2), Inspector Sudesh Ranga (CW-4), Dr. K.K. Bannerjee (CW-5), Dr. Richa Dewan (CW-6), Dr. A.P. Dubey (CW-7) and Dr. S.K. Khanna (CW-8).

6. It is the case of the complainant (petitioner) that though he wanted to have his son discharged from the nursing home on 22.04.2006 as he intended to take him for ayurvedic treatment, the doctors in the nursing home did not allow him to do so. He would also state that on 24.04.2006, his son underwent dialysis and thereafter was transferred to intensive care unit (ICU). He would state that the treating doctors had demanded money and on account of his inability to pay the sum he had been asked to deposit, his resources being deficient, he was threatened that the treatment of the child would be stopped. He claims that on 24.04.2006, he was asked by the second respondent to deposit an amount of Rs. One Lakh failing which the treatment would not continue. It is his grievance that he was not allowed to see his child in ICU on 26.04.2006 and that after he insisted and had entered the ICU ward, he had seen his child lying unconscious, there being no doctor or nursing staff attending on him nor any equipment attached. It is against this backdrop that he made a

call to the PCR, his child having died, according to him, due to gross negligence and irresponsible conduct of the second respondent.

7. The evidence of CW-1 and CW-2 has been presented to support the case of the petitioner that there was a threat for treatment to be stopped unless charges as demanded were paid. The evidence presented during preliminary proceedings reveals that the matter arising out of DD no.19A of 26.04.2006 was inquired into by CW-4. By the time he reached the nursing home, the child had died. He arranged for the dead body to be sent for post-mortem examination, the medical records relating to treatment of the deceased child having been seized by him. At his request, the Government of National Capital Territory of Delhi (GNCTD) had instituted an inquiry by a medical board headed by Dr. K.K. Bannerjee (CW-5). The medical board headed by Dr. Bannerjee, however, could not give a clear opinion as to the cause of death due to non-availability of histopathology report concerning tissues of liver spleen, kidney, brain and lungs which had been preserved.

8. Be that as it may, later, the Dean of Maulana Azad Medical College (MAMC) constituted a committee comprising of three doctors including Dr. Richa Dewan (CW-6), Dr. R.S. Ahlawat and Dr. Dinesh to give opinion on the question of medical negligence. This committee expressed opinion that the matter pertained to paediatric specialization, the committee in which CW-6 was a member being not qualified to give opinion in the case since its members were physicians.

9. Eventually, another committee was constituted comprising of Dr. A.P. Dubey (CW-7) and Dr. S.K. Khanna (CW-8), the former being professor and director of the department of Pediatrics and the latter also a professor and a director in the department of forensic medicine, both of MAMC. The opinion given by these doctors has been proved as Ex. CW-7/A, which reads thus :-

“...Above mentioned child was admitted in Handa Nursing Home for treatment of jaundice and expired on 26.04.2006 during treatment. The parents and the relatives of the deceased alleged negligence on part of doctors. A postmortem was conducted on 28.04.2006 by a medical board at GTB hospital chaired by Dr. K.K. Bannerjee of GTB Hospital. Final opinion regarding the cause of death was given by the board on 03.07.2008 stating the cause of death in this case was hepatorenal failure consequent upon hemolysis due to G-6PD deficiency, a congenital defect. The Board further referred the case for opinion of a medical specialist to decide the question of negligence.

The records made available have been examined by the members of the committee. On the basis of available records it seems that the child (Saurabh) was given treatment in a proper manner in an ICU setting. His condition was monitored regularly. The available records do not suggest any negligence on the parts of the treating doctors.”

10. In *Jacob Mathew vs. State of Punjab and Ors.*, (2005) 6 SCC 1, the Supreme Court summarized the law on medical negligence holding thus :-

“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 case[(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[Ed.: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] 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 reamust 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.

11. Further, the following guidelines were laid down on the subject of prosecuting medical professionals :-

“50. 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 the 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 a rash or negligent act within the domain of criminal law under Section 304-A 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 to his reputation cannot be compensated by any standards.

51. 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 emphasise 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 prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. 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 the Bolam[(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

12. This court agrees with the view recorded consistently by the two courts below that mere word of the complainant (petitioner) that his son was denied proper medical care or attention cannot be accepted against the above noted opinion of the medical board which is founded on the analysis and scrutiny of the medical records of treatment by medical professionals.

13. In these circumstances, the petition is found to be devoid of substance and merit. The petition and the applications filed therewith are dismissed.

R.K.GAUBA, J.

JANUARY 28, 2019

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