

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APL) NO. 197 OF 2016

Dr. Bhagirath Bansilal Jaju,
Aged about 65 years, Occ. Medical
Practitioner, R/o. Near State Bank
ATM, Akola Road, Malegaon, tah.
Malegaon, Distt. Washim-444503. **APPLICANT**

---VERSUS---

1. The State of Maharashtra,
Through Malegaon Police Station,
District Washim.
2. Vinod s/o. Vitthalrao Chavan,
Aged about 38 years, Occ. : Business,
R/o. Near Purohit Petrol Pump,
Tah. Malegaon, District – Wardha.
3. Public Health Department of
State of Maharashtra through its
Secretary, Mantralaya, Mumbai -32.
4. Civil Surgeon, Civil Hospital,
Washim.

NON-APPLICANTS.

Shri Ashish Chavan, Advocate h/f Shri Ashish P. Chaware Advocate
for the applicants.

Ms. Mayuri Deshmukh, APP for the non-applicant no.1.

Shri O.Y. Kashid, Advocate for non-applicant no.2.

CORAM : Z. A. HAQ AND
AMIT B. BORKAR, JJ.
DATED : 08.03.2021

ORAL JUDGMENT (PER : AMIT B. BORKAR, J.) :

1. By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicant has challenged Charge-sheet, arising out of the First Information Report No.134/2014 registered with the non-applicant no.1 - Police Station for offences punishable under Sections 304-A of the Indian Penal Code and proceedings bearing SCC No.694 of 2015 pending before the Judicial Magistrate First Class, Court Room no.1, Malegaon.

2. The First Information Report came to be registered against the applicant with the accusations that due to negligence of the applicant, deceased Kavita Pramod Chavan died while she was operated for curating and removing incomplete abortion. It is alleged that during surgical procedure, proper care was not taken by the non-applicant no.2 and due to excessive bleeding the victim died on 26.7.2014.

3. The non-applicant no.1 carried out investigation and the charge-sheet was filed before the Judicial Magistrate First Class, Court room no.1, Malegaon. During the investigation, the Investigating Officer contacted Civil Surgeon, Washim Dr. Surekha Mendhe, who had given three different reports to the Investigating Officer.

4. The applicant has, therefore, challenged filing of the Charge-sheet by way of filing present application. This Court on 13.04.2016 issued notice to the non-applicants and on 16.11.2017, this Court issued Rule and granted interim relief in terms of prayer clause (C).

5. The non-applicant no.1, in pursuance of the notice of this Court, has filed reply and stated that the Investigating Officer called for report from Dr. Mendhe, Civil Surgeon, Washim who stated that the victim was having incomplete abortion and bleeding. It is stated in her report that curating was done in emergency to save life of victim. It is stated that according to Dr. Mendhe, the applicant has not neglected the patient. It is further stated that the cause of death was due to hemorrhagic shock.

6. The applicant has filed rejoinder and affidavit and stated that the applicant is registered under the Medical Termination of Pregnancy Act. It is stated that the cause of death is in consonance with the condition in which the victim was admitted in her hospital. It is stated that it is not the case of gross negligence, as per the judgment in the case of **Jacob Mathew Vs. State of Punjab and another**, reported in **2005 ALL MR (Criminal) 2567**.

7. The non-applicant no.4, who is Civil Surgeon of Washim

hospital has filed an affidavit. It is stated that Inspection Committee of five Medical Experts have opined that the treatment given to the victim by the applicant was adequate.

8. We have carefully considered the allegations in the First Information Report and the affidavit filed by the non-applicant no.1 - Civil Surgeon. The opinion of the Enquiry Committee is that the applicant has given proper treatment to the Victim. It is pertinent to note that the Committee of the Medical Experts had not opined that the applicant has committed gross negligence in providing treatment to the victim.

9. To attract the criminal liability, it was necessary on the part of the prosecution to bring on record the material of such nature which proves gross negligence on the part of the applicant. The Hon'ble Supreme Court in the case of Jacob Mathew (supra) has categorically held that mere error of judgment is not sufficient to attract criminal liability. The Hon'ble Supreme Court in the case of Jacob Mathew in paragraph 49 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 practises. 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”.

10. In our opinion, in the facts of the present case, the conclusions in Clauses 94 (6) and 94(7) in the judgment in the case of *Jacob Mathew* (supra) are squarely attracted. There is no allegation against the applicant that the applicant has done something, which the medical professional in the ordinary senses has not done and or failed to do. We are satisfied that the ingredients of offence punishable under Section 304-A of the Indian Penal Code are not fulfilled in the present case.

11. Therefore, in view of the judgment of the Apex Court in the case of *Jacob Mathew* (supra), we are of the opinion that the applicant has not committed gross negligence while providing treatment to the victim. Therefore, we find that the continuation of the proceedings against the applicant would amount to abuse of

process Court. Hence, we pass the following order:

ORDER

Charge-sheet in pursuance of First Information Report No.134/2014 and consequent proceedings bearing SCC No.694/2015 pending before the Judicial Magistrate First Class, Court Room no.1, Malegaon against the applicant is quashed and set aside.

Rule is made absolute in the above terms.

JUDGE

JUDGE

Ambulkar