

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

CRIMINAL APPLICATION (APL) NO. 853/2018

Dr. Ganesh Bansilal Chandak,
Aged 47 years, Occ. Medical Practitioner,
R/o. Pulgaon, Tah. Pulgaon, Dist. Wardha

.... APPLICANT

// VERSUS //

- 1] **State of Maharashtra,**
Through Police Station Mangrul Dastagir,
Dist. Amravati
- 2] **Rahul Prashant Borkar,**
R/o. Police Station Mangrul Dastagir,
Dist. Amravati

.... NON-APPLICANT(S)

Shri N. Opai, Adv h/f Shri M.N. Ali, Adv for the applicant
Shri N.S. Rao, APP for the non-applicant no. 1

CORAM : Z.A.HAQ & AMIT B. BORKAR, JJ.
FEBRUARY 17, 2021

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

- 1] Heard.
- 2] **RULE.** Rule made returnable forthwith.

3] By this application under Section 482 of the Code of Criminal Procedure, the applicant has challenged registration of F.I.R. bearing Crime No. 87/2018 registered with the non-applicant no. 1 – Police Station for the offence punishable under Section 304-A of the Indian Penal Code. The first information report came to be registered against the applicant with the accusations that the victim was admitted in the hospital of the applicant for treatment on 15/08/2016 and the victim expired due to the negligence of the applicant. It is alleged that the Civil Surgeon of Wardha District had conducted enquiry and opined that due to the wrong treatment given by the applicant, the victim expired.

4] The applicant has therefore challenged registration of the first information report by way of filing the present application. This Court on 17/09/2018, issued notice to the non-applicants for final disposal and granted ad-interim relief directing that charge-sheet should not be filed against the applicant. The non-applicant no. 1 in pursuance of the notice issued by this Court, has filed reply and it is stated that the Committee was constituted in order to ascertain whether the deceased was provided proper medical treatment by the applicant. It is stated that the Committee evaluated the entire case and submitted its report that the medicines prescribed by the applicant were proper and the applicant failed to take proper medical tests and failed to consult the senior doctors. It is further alleged that the applicant was running the hospital without the hospital being registered

under the provisions of the Bombay Nursing Homes Registration Act, 1949. In the enquiry report issued by the duly constituted committee, it was revealed that the applicant is guilty of the negligent act. The non-applicant no. 2 though served with the notice of this criminal application, has neither appeared personally nor through Advocate.

5] We have carefully considered the contents of the first information report and the report dated 15/02/2018 submitted by the Enquiry Officer and Additional Civil Surgeon, General Hospital, Wardha. The opinion of the Enquiry Committee is that the death of the victim might have been caused due to infective diarrhoea/gastritis. The Committee has further opined that the hospital of the applicant was not registered under the provisions of the Bombay Nursing Homes Registration Act and it appears that serious patient like the victim was not properly treated. If we consider the report of the Expert Committee, the Committee though has opined that the proper medical treatment was not given to the victim, the Committee has not opined that the applicant has committed gross negligence while providing treatment to the victim. At the most, it can be said to be a case of error of judgment which is permissible in case of medical profession. 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 vs. State of Punjab & anr.* reported in 2005 ALL MR (Cri) 2567 (S.C.) has

categorically held that mere error of judgment is not sufficient to attract the criminal liability. The Hon'ble Supreme Court in the case of *Jacob Mathew* (supra), in para no. 49, has summed up its conclusions 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, 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 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 304-A 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."

6] In our opinion in the facts of the present case, the conclusions in Clauses 49 (6) and 49 (7) in the judgment given 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 ordinary senses and prudence would have done or failed to do. We are therefore satisfied that the ingredients of the offence punishable under Section 304-A of the Indian Penal Code are not fulfilled in the present case. Insofar as the conclusion of the Committee that the hospital of the applicant was not registered under the provisions of the Bombay Nursing Homes Registration Act and the victim was not properly treated is concerned,

we have carefully considered the allegations in the first information report in that context. From the allegations in the first information report, it does not appear that the victim was admitted in the hospital of the applicant as an indoor patient. The Investigating Agency has not registered any offence against the applicant for violation of the provisions of the Bombay Nursing Homes Registration Act. Therefore, in view of the judgment given by the Hon'ble Supreme 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 continuation of the proceedings against the applicant would amount to abuse of process of the Court.

7] Hence, the following order:-

F.I.R. bearing Crime No. 87/2018 registered with the non-applicant no. 1 – Police Station for the offence punishable under Section 304-A of the Indian Penal Code is quashed and set aside.

Rule is made absolute in the above terms.

JUDGE

JUDGE