

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.214 of 2017

Arising Out of PS. Case No.-46 Year-2017 Thana- PATRAKARNAGAR District- Patna

Dr. Ajit Pradhan, S/o Late Pradhan Jwala Prasad, Managing Director, Jeevak Heart Hospital and Research Institute Pvt. Ltd., 06 Doctors Colony, P.S. - Patrakar Nagar, Town and Dist. - Patna - 800020.

... .. Petitioner

Versus

1. The State of Bihar Through The Director General of Police, Bihar, New Secretariat, Patna
2. The Senior Superintendent of Police, Patna, Bihar.
3. The Officer In-Charge, P.S. - Patrakar Nagar, District - Patna.
4. Mr. Sunit Kumar Singh, I.O., P.S. - Patrakar Nagar, District - Patna.
5. Janki Devi, Widow of Late Saryu Prasad Sinha, resident of Adarsh Nagar, Road No. 3, PS - Phulwari Sharif, District Patna.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr.Chittaranjan Sinha, Sr. Advocate Mr. Sunil Kumar Alias Sharma, Advocate
For the State	:	Mr.Ajay Kumar Sharma, A.C.to A.G.
For the Respondents	:	Mr. Anuj Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

Date : 04-07-2022

Petitioner in the present case is seeking the following reliefs:-

“i. For quashing of the order dated 09/12/2015 & 19.12.2016, passed in Complaint case No. 4053(c)/2015 by which the Court of Chief Judicial Magistrate, Patna has directed for forwarding/ forwarding/ sending the complaint to SHO/officer-in-charge, Patrakar Nagar police station through the S.S.P, Patna for investigation of the case



u/s 156(3) of the Cr.P.C.

ii. For quashing of the First Information report of Patrakar Nagar P.S. Case No. 46/2017 dated 01/02/2017, registered under sections 304/304A of the Indian penal code arising out of Complaint case no.- 4053(c)/2015.

iii. For direction to the respondents concerned for not to take any coercive steps against the petitioner on the basis of the above mentioned First Information Report.

iv. For any other writ/writs, order/orders, direction/directions which this court may find appropriate in the facts and circumstances of the case.”

2. It appears on perusal of the records that a complaint petition was filed in the court of learned Chief Judicial Magistrate at Patna by the opposite party no. 5. She alleged that her husband who was aged about 81 years and retired from the Postal Department in the year 1992 was treated by the petitioner in his hospital between 14.10.2015 and 29.10.2015. In course of consultation when it was noticed that the patient was suffering from Coronary Artery disease, the petitioner being a qualified doctor by profession advised her husband to undergo a procedure known as Coronary Artery Bypass Grafting (in short ‘C.A.B.G.’ disease). It is alleged that the petitioner assured the informant and her family that the disease would be completely



cured. The allegation is that in fact in course of carrying on the procedure of C.A.B.G. the husband of the informant did not survive and he died. Negligence has been alleged on the part of this petitioner in carrying out the procedure.

3. The opposite party no. 5 though filed the complaint petition but in the said petition no statement was made that after the Police refused to register her F.I.R., she made an application under Section 154(3) Cr.P.C. to the Superintendent of Police. The complaint petition was filed without any affidavit attached with the same. In fact on perusal of the records, it appears that a typed one page affidavit was though attached to the complaint petition but there is no seal and signature of any Notary Public and in course of hearing, it is found to be an admitted position that the complaint was filed without any affidavit.

4. The learned Chief Judicial Magistrate vide his order dated 09.12.2015 sent the copy of the complaint petition to Kankarbagh Police Station under Section 156(3) Cr.P.C. through the S.S.P., Patna but the Officer-In-Charge of Kankarbagh Police Station reported that the matter pertains to the jurisdiction of Patrakar Nagar Police Station then vide order dated 19.12.2016 the copy of complaint petition was sent to the S.H.O. of the Patrakar Nagar Police Station through the S.S.P.,



Patna to register the complaint and investigate the matter. Accordingly, Patrakar Nagar P.S. Case No. 46 of 2017 has been registered for the offences punishable under Section 304/304A of the Indian Penal Code. A copy of the F.I.R. has been placed as Annexure '1 series' to the writ application.

5. Mr. Chittaranjan Sinha, learned Senior Counsel assisted by Mr. Sunil Kumar, the Advocate-on-Record has assailed the impugned order dated 19.12.2016 passed by learned C.J.M. It is submitted that while passing the said order, the learned C.J.M. failed to examine as to whether the complaint petition was filed duly supported by an affidavit.

6. Learned Senior Counsel submits that in the case of **Priyanka Shrivastava and another versus The State of Uttar Pradesh and others** reported in (2015) 6 SCC 287, the Hon'ble Supreme Court held inter alia that an F.I.R. registered against statutory authorities by misusing remedy available under Section 156(3) Cr.P.C. would be an abuse of the process of court.

7. Learned Senior Counsel has relied upon yet another judgment of the Hon'ble Supreme Court in the case of **Jacob Mathew versus State of Punjab and Others** reported in (2005) 6 SCC Page 1 to submit that to make out a prima-facie



case against a doctor it must be shown that the accused doctor did something or failed to do something which is in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do.

8. It is submitted that the impugned order as well as the F.I.R. are liable to be quashed in the light of the discussions in the judgment of the Hon'ble Apex Court in the case of **Priyanka Shrivastava** (supra) and **Jacob Mathew** (supra).

9. Learned Senior Counsel further submits that the petitioner is a renowned Cardiac Surgeon who has pioneered C.A.B.G. in Bihar. He has been conducting C.A.B.G. and Open Heart Surgery regularly at his hospital known as Jeevak Heart Hospital & Research Institute Pvt. Ltd.

10. It is submitted that a bare reading of the complaint petition would show that the only allegation against the petitioner is that he had assured the complainant and her family that the husband of the complainant would be fully cured. At one stage, in her complaint petition, the complainant has alleged that the doctor had wrongly advised her to get her husband admitted for a C.A.B.G. at the age of 81 years.

11. It is submitted that these allegations would not fall within the purview of the judgment of the Hon'ble Supreme



Court in the case of **Jacob Mathew** (supra) so as to draw prosecution of the petitioner.

12. Learned Senior Counsel submits that the allegations as contained in the complaint petition without adding or subtracting anything out of that does not constitute even prima-facie case under Section 304 and 304A of the Indian Penal Code.

Submission of the informant and State

13. Mr. Anuj Kumar, learned J.C. to Mr. Ansul, learned counsel has opposed this application. Learned counsel submits that the learned Chief Judicial Magistrate has passed the order under Section 156(3) Cr.P.C. which is at pre-cognizance stage and at this stage, learned Magistrate is not required to examine the complaint judiciously.

14. Learned counsel further submits that though the petitioner is a duly qualified Surgeon to conduct C.A.B.G. but his assurance to cure the husband of the complainant impressed upon her to get her husband admitted for C.A.B.G. It is submitted that in the given kind of allegations, it would not be just and proper to quash the First Information Report and the impugned order passed by the learned Chief Judicial Magistrate.

15. Learned counsel for the State has only endorsed



the submission of learned counsel for the informant.

Consideration

16. Having heard learned Senior Counsel for the petitioner and learned counsel for the opposite party no. 5 as also Mr. Ajay Kumar Sharma, learned A.C. to learned A.G. for the State and upon perusal of the records, this Court finds that on 08.12.2015, a complaint petition with Vakalatnama was filed in the court of learned Chief Judicial Magistrate. There is no recording that the complaint petition was supported by an affidavit. On the very next day, a prayer was made on behalf of the complainant to send the complaint to the concerned Police Station for investigation and the learned In-charge C.J.M., Patna ordered to send the complaint petition to Kankarbagh Police Station even as it was required to be sent to the Patrakar Nagar Police Station.

17. The certified copy of the complaint petition has been placed on record and this Court has perused the same. In course of perusal, it has been noticed that the complaint petition contains one last page typed as 'शपथ पत्र' but there is no seal and signature of the Notary Public. Prima-facie it appears that the Typist had prepared the complaint petition with the last page of affidavit but no care was taken to get the affidavit done and the



complaint petition was presented without affidavit.

18. This Court further finds that in paragraph ‘14’ of the complaint petition a statement has been made that the complainant had gone to Kankarbagh Police Station to lodge the F.I.R. which was not entertained. The fact is that the petitioner resides within the jurisdiction of Patliputra Police Station and the hospital is situated within the jurisdiction of Patrakar Nagar Police Station and on her own statement the complainant makes it clear that she had not gone to Patrakar Nagar Police Station. There is no statement either that she had sent a copy of the complaint to the Superintendent of Police in terms of Section 154(3) Cr.P.C., this Court has, therefore, no iota of doubt that the requirements for filing a complaint under Section 156(3) Cr.P.C. as envisaged in the judgment of the Hon’ble Supreme Court in the case of **Priyanka Shrivastava and another** (supra) have not been fulfilled. In the case of **Priyanka Shrivastava**, the Hon’ble Supreme Court has categorically stated that “a stage has come in this country where Section 156(3) Cr.P.C. applications must be supported by an affidavit duly sworn by applicant who seeks invocation of the jurisdiction of the Magistrate under the said provision. This affidavit can make the applicant more responsible. There is compulsion to say so as



such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons.....”

19. The Hon’ble Apex Court has cast certain burden upon the Court also to satisfy itself with the requirements as discussed in the judgment of the Hon’ble Supreme Court.

20. In the present case, this Court finds that the learned court below before passing the impugned order has not at all taken care to satisfy itself with the requirements as envisaged in the judgment of the Hon’ble Apex Court in the case of **Priyanka Shrivastava** (supra). The complainant had even not gone to Patrakar Nagar Police Station and had not complied with Section 154(3) Cr.P.C., Section 156(3) Cr.P.C. was not supported by duly sworn affidavit still the impugned order was passed in a routine and mechanical manner.

21. On the merit of the allegations made in the complaint petition, this Court finds that not a single line in the complaint petition is satisfying the conditions required for prosecuting a doctor. The relevant part of the tests laid down by the Hon’ble Supreme Court in **Jacob Mathew** (supra) are being reproduced hereunder for a ready reference:

“**48.** (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*⁹, WLR at p. 586¹⁰ 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”.

⁹ *Bolam v. Frien Hospital Management Committee*, (1957) 1 WLR 582 : (1957) AII ER 118 (QBD)
¹⁰ [Ed.: Also at AII ER p. 121 D-F and set out in para 19. p 19herein.]



(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.”

22. In the given case a bare reading of the complaint petition shows that the allegations are completely vague. The petitioner being a qualified Surgeon, advised the petitioner and his family members for ‘C.A.B.G.’ that alone cannot be said to be an advice against the prudence of a doctor in ordinary senses.

23. For the reasons stated hereinabove, this Court is of the considered opinion that the impugned order dated 09.12.2015 and 19.12.2016 passed in Complaint Case No. 4053(c) of 2015 as well as the First Information Report being Patrakar Nagar P.S. Case No. 46 of 2017 dated 01.12.2017 are



liable to be quashed and those are being accordingly quashed.

24. This application is allowed.

(Rajeev Ranjan Prasad, J)

vats/-

AFR/NAFR	AFR
CAV DATE	
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