IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.35572 of 2021

Arising Out of PS. Case No.-114 Year-2017 Thana- BEGUSARAI TOWN District- Begusarai

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Dr. Anand Kumar Sharma @ Dr. Anand Sharma S/O Late Baidya Prasad Ray R/O Mohalla-Bahadurpur Housing Colony, P.S-Agamkuan, District-Patna. At Present Residing At Mohalla-Pokharia Ward No.35, P.S-Town (BEGUSARAI), District-Begusarai.

... ... Petitioner/s

Versus

1. The State Of Bihar
2. Prashant Kumar S/O Late Radhe Paswan R/O Vajidpur, P.S-Muffasil, District-Begusarai.

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. P.N. Shahi, Sr. Advocate
Mr.Shivam, Advocate
For the Opposite Party/s : Mr.A.G
For O.P. No. 2 : Mr. Vikram Anurag, Advocate
Mr. Sandeep Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL ORDER

3 18-08-2023 Heard learned counsel for the petitioner and learned APP for the State.

2. This application has been filed for quashing of F.I.R vide Begusarai Town P.S. Case No. 114 of 2017 registered for the offences under Sections 341, 323, 304A, 504 and 34 of the Indian Penal Code and Section 3(i)(r)(s) of the SC/ST (POA) Act.

3. As per F.I.R, daughter-in-law of the opposite party

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no. 2 was admitted in sadar hospital for the purposes of delivery and around 5:00 P.M a child was born. It is alleged that thereafter, the new born child was taken to S.N.C.U but due power cut of about half an hour, the child died. It is alleged that that due to negligence of the doctor, the child died. The petitioner and his staff members abused the opposite party no. 2 and his relatives by taking their caste name and also assaulted them by fist and slaps.

4. It has been submitted by learned counsel for the petitioner that the petitioner is the Superintendent of Sadar Hospital, Begusarai having done MD in Medicine. It has further been submitted that none of the patients are examined by doctor at the Sadar Hospital without registration and thereafter, the patients are examined by the doctor and relevant treatment is prescribed. In this case after completion of aforesaid procedure in Sadar Hospital, the child was shifted to the S.N.C.U and the same cannot be done without the presence or on the direction of a qualified doctor so it is clear that the allegation levelled against the petitioner is false and fabricated. The death of the new born child was caused due to Meconium Aspiration Syndrome which is very common in new born babies who are in the most cases born either on completion of the term of the

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pregnancy or post term.

5. It has further been submitted that the Government of India initiated 'Kayakalp Award Scheme' as an extension of 'Swachh Bharat Mission' with the objective to inculcate a culture of ongoing assessment and peer review of performance related to hygiene, sanitation and infection control and to recognize public healthcare facilities that show exemplary performance in adhering to standard protocols of cleanliness, infection control and sanitation and to create and share sustainable practices related to improving cleanliness in public health facilities which lead to positive health outcomes. The Sadar Hospital of Begusarai had been ranked number 2 in the year 2017 and number 1 on couple occasions subsequently as well. Thereby, the allegation with regard none supply of electricity which caused delay in treatment is also concocted as immediately on break down of power supply, the generators are turned on.

6. It has further been submitted that Final Form was submitted by the police and the same has been kept on record which is evident from the order dated 07.08.2019 and notice has been issued to the informant as well.

7. It has further been submitted that the present F.I.R

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has been filed against doctor and the guidelines mentioned in Judgment of Hon'ble Supreme Court in case of ***Hitesh Verma Vs. State of Uttrakhand*** in ***Cr. Appeal No. 707 of 2020*** held that an offence under the SC/ST Act is not established merely on the ground that the informant is a member of the schedule caste unless there is an intention to humiliate a member of the Schedule Caste or Schedule Tribe for the reasons that the victim belongs to such caste. Moreover, the police after investigation has submitted Final Form though subsequently, the Station House Officer has ordered for further investigation.

8. Learned counsel for the opposite party no. 2 has submitted that petitioner was negligent and because of his negligence, the patient had died and therefore, he should be punished for the criminal negligence committed by him.

9. I have heard the submissions of the parties.

10. The Hon'ble Supreme Court in the case of ***Jacob Mathew Vs. State of Punjab*** reported in ***2005 6 SCC 1*** has held in Paragraphs 48, 49, 50, 51, 52 as follows:-

> *"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*

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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

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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,

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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.

***49.** In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same.*

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Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report). Guidelines Re: 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 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 rash or negligent act within the domain of criminal law under Section 304-A of 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 in his reputation cannot be compensated by any standards.*

51*. We may not be understood as*

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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.

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*

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> *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.*

11. From reading the judgment of the Hon'ble Supreme Court in the case of **Jacob Mathew Vs. State of Punjab (Supra),** it was incumbent for the police to take an expert opinion from the doctors before registering the FIR against the petitioner and any FIR registered against the direction of the Hon'ble Supreme Court is bad in law.

12. Moreover, in the present case the expert opinion of the doctors has come during the hearing and there was no medical negligence on the part of the petitioner.

13. In these circumstances prosecuting the petitioner is nothing but the abuse of process of the Court. In that view of the matter, this application is allowed. The F.I.R vide Begusarai Town P.S. Case No. 114 of 2017 registered for the offences

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under Sections 341, 323, 304A, 504 and 34 of the Indian Penal Code and Section 3(i)(r)(s) of the SC/ST (POA) Act and all consequential proceedings arising out of aforesaid F.I.R are hereby quashed in the interest of justice.

(Sandeep Kumar, J)

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