

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.844 of 2019

Arising Out of PS. Case No.-29 Year-2015 Thana- KHAJEKALA District- Patna

Dr. Naveen Kumar, son of Anirudh Prasad Singh, Resident of Village- Flat No. 102, Vishal Ganga Apartment, West Boring Canal Road, Anandpuri, P.S.- Srikrishnapuri, District- Patna.

... .. Petitioner

Versus

1. The State of Bihar, through the Director General of Police, Patna, Bihar
2. The S.H.O., P.S. Khajekalan, District- Patna.
3. Dharmendra Kumar Singh, Son of Late Ram Niwas Singh, Resident of Nehru Chak, Badi Patan Devi Chauraha, P.S.- Alamganj, District- Patna.

... .. Respondents

Appearance :

For the Petitioner	:	Mrs. Sagrika, Advocate Mr. Anuj Kumar, Advocate
For the Respondents	:	Mr. Manish Kumar, G.P.-4

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 20-04-2023

This application has been filed by the petitioner for quashing of the F.I.R. vide Khajekalan P.S. Case No. 29 of 2015 registered for the offence under Section 304 of the Indian Penal Code.

2. As per the F.I.R. on 17.02.2015 the cousin brother of the informant met with an accident and was taken to Adarsh Orthopedic Centre, which belongs to the petitioner. Upon examination, the petitioner said that the patient had fracture in his right hand. After applying temporary plaster upon his right hand and asked the patient to come back on 18.02.2015



for surgery. It is alleged that on the next day, the cousin brother of the informant was taken to the operation theater and was administered local anesthesia without calling the anesthetist. The patient was kept in operation for next three hours and then without performing the surgery, the petitioner came out of the operation theater and left his clinic and went to Rajeshwar Hospital. When his family member enquired, the petitioner said that the patient had gone into deep coma and is unconscious and thus, suggested them to admit the patient in Rajeshwar Hospital. It is also alleged that the informant saw his cousin's face was pale and was not breathing. Immediately, they rushed him to Rajeshwar Hospital where he was declared brought dead.

3. It is alleged that though the petitioner is an orthopedist, who has no skill or experience to administer anesthesia and he out of negligence and greed, intentionally did not call the anesthetist in order to save some money which resulted into administering a high dose of anesthesia and that in turn led to the death of his cousin.

4. Learned counsel for the petitioner submits that the petitioner is a qualified medical practitioner and the informant and others brought the patient in a very serious condition in his nursing home. He duly attended him and upon



examination concluded that he had fracture on his right hand and suggested a surgery. She further submits that on next day, an anesthetist was also called and the patient was administered anesthesia and as per the established protocol OT Note was also prepared during the course of surgery and a risk bond was also got signed by the family of the patient informing about the risks involved in the surgery and that of the anesthesia also.

5. Learned counsel for the petitioner also submits that upon administration of anesthesia, the petitioner found that the condition of patient was deteriorating and therefore, he immediately asked the family members of the patient to take him to Rajeshwar Hospital but, seeing the condition of the patient deteriorating instead of taking the patient to Rajeshwar Hospital they created scene at the nursing home. Therefore, there was no negligence on the part of the doctor rather negligence was on the part of the family of the patient.

6. Learned counsel for the petitioner further submits that before lodging the F.I.R. the police did not follow the mandatory guidelines issued by the Hon'ble Supreme Court in the case of *Jacob Mathews vs. State of Punjab & Anr.* reported in *AIR 2005 SC 3180* and in the case of *Martin F. D'Souza vs. Mohd. Ishfaq* reported in *AIR 2009 SC 2049*.



7. Learned counsel for the State has opposed this application.

8. Learned counsel for the informant/opposite party no.3 submits that as per the F.I.R. *prima facie* case is made out against the petitioner since the petitioner did not call the Anesthetist in order to save money and himself administered high dose of anesthesia upon the patient and as a result of which, the patient died.

9. I have considered the submissions of the parties. I have also perused the materials available on record. In nutshell, the allegation against the petitioner is that though he is an orthopedist, who has no skill or experience to administer anesthesia and he out of negligence and greed, intentionally did not call the anesthetist in order to save money which resulted into administering a high dose of anesthesia and that, in turn, led to death of the patient. However, the O.T. Note, prepared during the operation, suggests that Dr. Ravi Anand, the Anesthetist has attended the patient and administered anesthesia to the patient. Further, the records also suggests that a risk bond was signed by the family of the patient about the risk involved in the surgery and that of the anesthesia also.

10. In the case of *Jacob Mathews vs State of*



Punjab and Anr. (supra), the Hon'ble Supreme Court has held in paragraph nos. 48 to 52 as follows:-

“48. Conclusions summed up 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 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. 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 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 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. In view of the above observations of the Hon’ble Supreme Court coupled with the facts that the O.T. Note, prepared during the operation, suggests that an Anesthetist has attended the patient and administered anesthesia to the patient and a risk bond was also signed by the family of the patient about the risk involved in the surgery and that of the anesthesia also, inasmuch as, it is not disputed by the prosecution side that the petitioner is not a qualified orthopedic surgeon, I am of the view that the prosecution against the petitioner cannot continue.

12. Further, in the case of ***Martin F. D’Souza vs. Mohd. Ishfaq*** (supra) the Hon’ble Supreme Court has held in paragraph no.17 with regard to obtaining expert’s opinion before lodging the F.I.R. against a doctor, which is as under:-

“117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether



District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action."

13. From reading of the aforesaid decisions of the Hon'ble Supreme Court, it is clear that it is incumbent upon the police to take an expert's opinion before registering the F.I.R. against a doctor and any F.I.R. registered against the directions of the Hon'ble Supreme Court is bad in law.

14. In view of the above discussions, the prosecution against the petitioner is nothing but an abuse of the process of the Court.



15. Accordingly, this application is allowed and the F.I.R. vide Khajekalan P.S. Case No. 29 of 2015 lodged against the petitioner and all consequential proceedings arising out of the aforesaid F.I.R. are hereby quashed in the interest of justice.

(Sandeep Kumar, J)

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AFR/NAFR	A.F.R.
CAV DATE	N/A.
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