IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.32172 of 2015

Arising Out of PS. Case No.-35 Year-2014 Thana- PATNA COMPLAINT CASE District-Patna

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Dr. Vijay Kumar @ Vijay Kumar Son of Late Bhawani Prasad Sinha, Resident of Mohallah -Ashiana Phase I, Police Station - Rajeev Nagar, District Patna, at present posted as Associate Professor, Department of Orthopedics, Patna Medical College Hospital, P.S. Pirbahore, District - Patna.

... ... Petitioner/s

Versus

1. The State Of Bihar.
2. Smt. Siyamani Devi, Wife of Shankar Thakur, resident of village - Bhakesar, P.S. Paliganj, District - Patna at present residing at S.P. Verma Road, infront of federal Bank, P.S. - Kotwali, District - Patna.

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Prabhat Ranjan, Advocate
For the Opposite Party/s : Mr. Anshuman Singh, Advocate
For the State : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL JUDGMENT

Date : 12-05-2023

Heard learned counsel for the parties.

This application has been filed for quashing the order dated 04.07.2014 by which learned Judicial Magistrate, 1st Class, Patna has taken cognizance against the petitioner in Complaint Case No. 35 of 2014 (Siyamani Devi vs. Dr. Vijay Kumar and Ors.) registered for the offence under Sections 338 and 504 of the Indian Penal Code.

As per prosecution, the complainant has filed complaint on 03.01.2014 before learned Chief Judicial Magistrate, Patna alleging that for treatment for pain in waist and leg she was

admitted in the Orthopedics Department on 18.05.2013 in the unit of Dr. Vijay Kumar (petitioner). It was further stated that she was diagnosed with a tumor in the Spinal cord and finally she was operated on 31.05.2013. After operation, she lost her senses below the waist. Upon query, she was misbehaved by the accused persons and upon insistence, she was referred to AIIMS, New Delhi to the Neuro Surgery Department on 06.07.2013. Upon treatment in AIIMS, New Delhi she was treated by one Dr. Vivek Tandon who after going through the records opined that Tumor has actually not been operated and the complainant has suffered paralysis on account of damage to the Nerve. The complainant returned to Patna and re-visited the accused persons where she was again misbehaved with and threatened with dire consequence.

Upon the aforesaid allegation, the complainant filed Complaint Case No. 35/2014 against the petitioner.

Learned counsel for the petitioner further submits that before issuing summons against the petitioner the learned C.J.M., Patna 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***, the following paragraphs 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.

From reading of the aforesaid discussions 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 case against a doctor and any case registered against the directions of the Hon'ble Supreme Court is bad in law.

Further, in the case of Martin R. 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."

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

Accordingly, this application is allowed and vide Complain Case No. 35 of 2014 registered 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)

Ranjeet/-

AFR/NAFR	NAFR
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