IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.61109 of 2023

Arising Out of PS. Case No.-204 Year-2015 Thana- JAMUI District- Jamui

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DR. NAGENDRA KUMAR @ NAGENDRA KUMAR SON OF SRI UMESH PRASAD RESIDENT OF VILLAGE - BARDI, P.S. - ISLAMPUR, DISTRICT - NALANDA, AT PRESENT SIRCHAND NAWADA, P.S. - JAMUI, DISTRICT - JAMUI

... ... Petitioner/s

Versus

1. THE STATE OF BIHAR
2. URMILA DEVI W/O DINANATH PANDEY R/O-VILLAGE- KUNDRA, P.S.-JAMUI, DISTRICT-JAMUI

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Ajay Kr. Thakur
Ms.Vaishnavi Singh
Mr. Ritwik Thakur
For the Opposite Party/s : Mr.Murli Dhar

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CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR

ORAL ORDER

7 16-07-2024 Heard learned counsel for the petitioner, learned counsel for the O.P. No. 02 and learned APP for the State.

2. This application has been filed on behalf of the petitioner for quashing the order dated 04.08.2023 passed by the Additional Sessions Judge-III, Jamui in Sessions Trial No. 589 of 2022 arising out of Jamui P.S. Case No. 204 of 2015.

3. Learned counsel for the petitioner has filed supplementary affidavit in this case and leanred counsel for the O.P. No. 02 has filed reply to the same. Learned counsel for the petitioner Shri Ajay Kumar Thakur has also produced the registration certificate of the anesthesist Rajiv Babu who is a

qualified anesthesist who had assisted the petitioner in the surgery performed by the petitioner and in support of the same Rajiv Babu has sworn an affidavit, which is a part of the supplementary affidavit filed by the petitioner.

4. The prosecution case in brief is that one Urmila Devi lodged written report addressed to the Officer Incharge of Jamui Police station stating therein interalia that her daughter Sangeeta Devi was pregnant and her pregnancy period was complete. Thereafter, the informant contacted one person of Garsanda village who runs a medicine shop and has suggested her that Dr. Nagendra (the petitioner) is a good doctor for delivery and on his advice, the informant went to the clinic of Dr. Nagendra. After seeing the daughter of the informant, the doctor assured the informant that everything was and normal delivery will be done. Thereafter, the daughter of the informant was taken to the delivery room/operation theater and after some time, the doctor came out from the operation theater and asked the informant to deposite the operation charge but the informant showed inability to deposite the same and called the medicine shopkeeper of Garsanda who told her that a Vein of the daughter of the informant was cut in the operation and because of continuous bleeding, she will have to give blood. On request of

the informant, her Villager Himanshu Kumar gave blood but Doctor continued demanding the operation charge and asked her that if she will not deposit the operation charge he will not transfuse blood to informant's daughter. After lapse of some time, on suspicion the informant along with the co-villagers went inside the operation theater and found her daughter dead and child was alive. The informant alleged that due to non-deposite of operation charge, the doctor left her daughter to die and on the basis of the aforesaid written report, Jamui P.S.Case No. 204 of 2015 was registered against the petitioner.

5. It has been submitted by the learned counsel for the petitioner that the petitioner has not committed any offence. The petitioner is a qualified doctor and he passed M.B.B.S. course from Darbhanga Medical College and Hospital and done M.S. (General Surgery) from Patna Medical College, Patna University. Thereafter, he was registered under Bihar Medical Council bearing Certificate No. 34450.

6. Learned counsel for the petitioner further submits that from the FIR itself, it is evident that the daughter of the informant was treated by the doctor and the cesarean operation was done and the doctor being a qualified doctor, has conducted the same.

7. The informant came with her daughter and she was advised to undergo Ultrasound of Uterus and the U.S.G. of uterus report was very alarming as maternal pelvis was shown to be contracted which means that normal delivery was not possible and under this circumstance the only remedy available is immediate surgery otherwise it will cause death of both, the mother and the child and this is the general principle in Gynecological Medical Science.

8. Acting on the advice of the petitioner, the informant has consulted other doctors also and finally has agreed for operation and for that she has filled risk bond also.

9. Immediately after lodging the first information report the police inspected the clinic of the petitioner and no blood stain etc was found scattered at the alleged place of occurrence which also falsified the entire prosecution case and no opinion of any medical board was taken in order to ascertain as to whether there was any negligence on the part of the treating doctor in the death of the daughter of informant or not.

10. In support of his arguments, learned counsel for the petitioner has relied upon the judgment of ***Jacob Mathew Vs. State of Punjab (2005) 6 SCC 1*** and has contended that if any case is filed against the doctor/medical practitioner for

medical negligence then before registering the case, the Police is duty bound to do the investigation in proper manner and is not supposed to issue summons/warrants to the doctor till the completion of the investigation or come to the conclusion that there was negligence on the part of the medical practitioner.

11. He also submits that as per the case of ***Jacob Mathew Vs. State of Punjab (Supra)*** the investigating agency i.e. the police should take opinion from a Doctor or Board Of Doctors related from the same field. The Hon'ble Supreme Court in the case of ***Jacob Mathew Vs. State of Punjab (Supra)*** has held in Paragraphs 48, 49, 50, 51, 52 as follows:-

> ***48.*** *We sum up our conclusions as under:-*
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> *(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'.*
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> *(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.*

12. Learned counsel for the petitioner has also relied upon the Judgment of Hon'ble Supreme Court passed in the case of ***Martin F. D'Souza Vs. Mohd. Ishfaq reported in (2009) 3 SCC 1*** and has submitted that before proceeding against the petitioner the police ought to have got a report from an expert committee and then only the petitioner can be prosecuted for medical negligence but in the present case the same has not been done and therefore the entire prosecution of the petitioner is bad in law and the same is fit to be quashed.

13. The Hon'ble Supreme Court has also held in the case of ***Martin F. D'Souza Vs. Mohd. Ishfaq (Supra)*** with regard to expert opinion has held in Paragraph 117 of the judgment as follows:-

> **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.*

14. Learned APP for the State very fairly submits that the investigation has not been done in accordance with the law laid down by the Hon'ble Supreme Court in the cases of ***Jacob Mathew Vs. State of Punjab (Supra)*** and ***Martin F. D'Souza Vs. Mohd. Ishfaq (Supra).***

15. I have heard and considered the submissions of the parties.

16. From reading the judgment of the Hon'ble Supreme Court in the case of ***Jacob Mathew Vs. State of Punjab (Supra),*** it is clear that 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. The petitioner could have been discharged by the Court below and the prosecution of the petitioner is nothing but the abuse of the

process of the Court.

17. In view of the above discussion, this application is allowed.

18. Accordingly, the order dated 04.08.2023 passed by the Additional Sessions Judge-III, Jamui in Sessions Trial No. 589 of 2022 arising out of Jamui P.S. Case No. 204 of 2015 is hereby quashed.

(Sandeep Kumar, J)

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