2024:KER:78417

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 21ST DAY OF OCTOBER 2024 / 29TH ASWINA, 1946

CRL.MC NO. 5401 OF 2018

CRIME NO.1194/2013 OF Cherthala Police Station, Alappuzha

IN LP NO.11/2018 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, CHERTHALA

PETITIONER/ACCUSED:

CELINAMOL MATHEW
AGED 48 YEARS, W/O BIJUKUMAR
KARUKAPPARAMBIL VEEDU, CMC – 30,
CHERTHALA PO, ALAPPUZHA – 688 525

BY ADV SRI.BETSON P.KUNJAPPAN

RESPONDENT/COMPLAINANT:

1 **STATE OF KERALA**
REPRESENTED BY SHO OF CHERTHALA POLICE STATION
ALAPPUZHA DISTRICT THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

ADDL.R2 RAJESH. K.
AGED 45 YEARS, S/O KUMARAN,
PEEDIKAPARAMBIL, K.R. PURAM P.O., PALLIPURAM,
CHERTHALA. PIN-688547

IS IMPLEADED AS ADDITIONAL 2ND RESPONDENT AS PER THE ORDER DATED 13.07.2023 IN CLR MA 1/2023 IN CRL MC 5401/2018

BY ADVS.
SASI M.R.
N.P.SILPA
KAVYA KRISHNAN
S.SAJIT SANAL
DHARMYA M.S
SRI.NOUSHAD.K.A, SR.PP

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 21.10.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.R.

P.V.KUNHIKRISHNAN, J.

Crl.M.C. No.5401 of 2018

Dated this the 21st day of October, 2024

ORDER

Petitioner, who was a nurse attached to the Taluk Headquarters Hospital, Cherthala, is charge-sheeted under Section 304A of the Indian Penal Code (for short, IPC) alleging medical negligence on her part while treating a patient. The question to be decided is whether a nurse can be prosecuted under Section 304A IPC alleging medical negligence merely based on the oral statement of some witness without an expert opinion from an expert body.

2. If anybody is admitted in a hospital as a patient or is there as bystanders of patients, they will definitely

express their appreciation to the nurses caring for different patients by folding their hands in respect. The devotion, hard work and readiness to face any medical emergency of the patient day and night by the nursing community is to be appreciated by the society. Nursing is not just a job, its a calling. They are known as the backbone of the health care system. Nurses don't just care for patients, they care about patients. Florence Nightingale, an English social reformer and the founder of modern nursing, is renowned for her dedication to healthcare reform and her compassionate approach to patient care, leaving an indelible mark on the nursing profession and public health. Her unwavering commitment to patient care portrays the fact that the nurses' role is not just to treat the disease but to care for the patients. To do what nobody else will do, in a way nobody else can do is the nurses' way. Nursing is an art and if it is to be made an art, it requires an exclusive devotion. As I said earlier, if any of us are admitted in a hospital we

can understand the devotion and hard work of nurses in the hospital. They work day and night and they spent most of the time with their patients. The time spent by a doctor with the patients is less when compared to the time spent by a nurse with a patient. An experienced nurse can do wonders to a patient than an experienced doctor in some medical emergency situations. Therefore, the nurses also deserve care, protection and also moral support from the society while doing their duty.

3. The Apex Court in **Jacob Mathew v. State of Punjab** [2005 KHC 1045] observed that, the Investigating Officer in criminal cases 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 to the facts collected in the investigation. Why not the same

principle be applicable to the nurses in the hospital who are spending their day and night with patience, for the well-being of their patients?

4. I will come to the facts in this case first. The additional 2nd respondent in this case filed a complaint before the Sub Inspector of Police, Cherthala Police Station on 27.06.2013 at 6.10 p.m. He stated that his daughter, aged 10 years, was taken to the Taluk Headquarters Hospital, Cherthala on 27.06.2013 because of diarrhea and vomiting. The doctor concerned treated the child of the defacto complainant and administered tablets and an injection. Thereafter, the daughter of the defacto complainant was admitted in the observation ward. After an hour, another doctor examined her and recommended blood and urine tests. Accordingly, the child was taken to the lab and the result was obtained and shown to the doctor. He indicated that there were no issues with the child and that the defacto complainant could take her home after

sometime. It is the further case of the defacto complainant that, subsequently, the child of the defacto complainant showed symptoms of a high temperature and he informed the same to the nurse concerned. But the nurse said that, he can sponge the body of the child with a wet towel. But, according to the defacto complainant, the temperature increased again, and he contacted the doctor and nurse, but they didn't respond properly. Subsequently, when the defacto complainant contacted the nurse again, she came and suggested taking the child to the doctor. The defacto complainant took the child to the doctor and the doctor declared that the child is dead. Based on the above statement, Crime No.1194/2013 was registered by the Cherthala Police under Section 174 Cr.P.C. Subsequently, Annexure-2 final report was filed alleging offence under Section 304A IPC against the petitioner alone, who is the nurse attached to the hospital. The allegation in Annexure-2 final report is extracted hereunder:

"പ്രതി അപാകമായും ഉദാസീനമായും അശ്രദ്ധയോടും കൂടി 27.6.2013 ൽ ചേർത്തല താലൂക്ക് ആശുപത്രിയിൽ കുട്ടികളുടെ വാർഡിൽ Duty Nurse ആയി ജോലി നോക്കി വരവേ ടി വാർഡിൽ observation വിഭാഗത്തിൽ ചികിത്സയിൽ കഴിഞ്ഞുവന്ന പള്ളിപ്പുറം പഞ്ചായത്ത് 14-)o വാർഡ് പീടികപറമ്പിൽ വീട്ടിൽ രാജേഷ് മകൾ 10 വയസ്സുള്ള ദേവിക എന്ന കുട്ടിയെ പരിചരിക്കാതെയും യഥാസമയം രോഗവിവരം ഡോക്ടറെ അറിയിക്കാതെയും അശ്രദ്ധയോടുകൂടി പരിചരിച്ചതിൽ വച്ച് വൈകി 4.30 മണിയോടുകൂടി യഥാസമയം ചികിത്സ ലഭിക്കാതെ കുട്ടിയുടെ അസുഖം കൂടുതലായതിനെ തുടർന്ന് കാഷ്വാലിറ്റിയിൽ എത്തിച്ച സമയം മരണപ്പെട്ടു പോകുന്നതിനിടവരുത്തി പ്രതിമേൽ വകുപ്പ് പ്രകാരം ശിക്ഷാർഹമായ കുറ്റം ചെയ്തു എന്നുള്ളത്"

5. Admittedly the child of the defacto complainant was treated by a doctor. Moreover, the doctor suggested testing the blood and urine of the child. After perusing the report, the doctor suggested that the defacto complainant could take the child home after sometime because there is no serious problem to the child. At that time, there was a

spike in the child's temperature which was brought to the notice of the nurse concerned. The petitioner submitted that it is a Taluk Headquarters Hospital where the petitioner nurse has to attend about 30-40 beds at a time. Therefore she was not able to attend to the child of the defacto complainant immediately especially since the doctor indicated that there was no issues with the child. When the defacto complainant approached the nurse for the second time, the First Information Statement itself states that, the nurse went to the place where the defacto complainant's child was sleeping and directed him to take the child to the doctor. In such circumstances, I am of the considered opinion that there is absolutely no negligence on the part of the petitioner nurse. Moreover, the 2nd respondent filed an affidavit before this Court in which he stated that he has no grievance against the petitioner. According to the 2nd respondent, who is the defacto complainant, he came to know that the sole accused in the above Calendar Case was

a temporary/provisional nurse working in the said hospital. He further stated that as per the records, she was on duty from 1.30 pm onwards in the second shift and the child died at 4.40 pm. According to the 2nd respondent, the petitioner is innocent and there is no negligence on the part of the petitioner. It is also stated by the 2nd respondent that the doctors and permanent nurses in charge of the ward in the hospital are not arrayed as the accused and the provisional staff who is the petitioner herein is innocent. It is also stated that the way in which the investigation is conducted is a mockery of the administration of justice, and the same is intended to save the persons responsible for the negligence committed. In the light of the above facts and also in the light of the discussion stated above, I am of the considered opinion that absolutely no negligence is there on the part of the petitioner who was working as a temporary nurse in the hospital at the relevant time.

6. Moreover, the Apex Court, in **Kurban Hussein**

Mohamedali Rangawalla v. State of Maharashtra [1964 SCC OnLine SC 162] observed that, to convict an accused for the offence under Section 304A IPC, the death should be the result of a rash and negligent act on the part of the accused and must be the proximate and efficient cause without the intervention of another's negligence. It will be better to extract the relevant portion of the judgment is extracted hereunder:

> "3. We may in this connection refer to *Emperor v. Omkar Rampratap* where Sir Lawrence Jenkins had to interpret S.304-A and observed as follows:
>
> > "To impose criminal liability under S.304-A Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *cause causans*; it is not enough that it may have been the *cause sine qua non*."
>
> This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of S. 304-A. It is not necessary to refer to other decisions, for as we have already said this view has been generally

> accepted. Therefore the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under S. 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was therefore in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence. The appellant must therefore be acquitted of the offence under S. 304-A."

7. The above decision was again reiterated by the Apex Court in **Ambalal D. Bhatt v. The State of Gujarat** [(1972) 3 SCC 525]. The relevant portion is extracted hereunder:

> "10. It appears to us that in a prosecution for an offence under Section 304A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of

a rash or negligent act or that any such act was the proximate and efficient cause of the death. If that were so, the acquittal of the appellant for contravention of the provisions of the Act and the Rules would itself have been an answer and we would have then examined to what extent additional evidence of his acquittal would have to be allowed, but since that is not the criteria, we have to determine whether the appellant's act in giving only one batch number to all the four lots manufactured on November 12, 1962 in preparing Batch No. 211105, was the cause of deaths and whether those deaths were a direct consequence of the appellants' act, that is, whether the appellant's act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another's negligence. As observed by Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap* the act causing the deaths "must be the cause causans; It is not enough that it may have been the causa sine qua non". This view has been adopted by this Court in several decisions. In *Kurban Hussein Moham-medali Rangwala v. State of Maharashtra*, the accused who had manufactured wet paints without a licence was acquitted of the charge under Section 304A because it was held that the mere fact that he

allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it would be a negligent act, would not be enough to make the accused responsible for the fire which broke out. The cause of the fire was not merely the presence of the burners within the room in which varnish and turpentine were stored though this circumstance was indirectly responsible for the fire which broke out, but was also due to the overflowing of froth out of the barrels. In *Suleman Rehiman Mulani v. State of Maharashtra* the accused who was driving a car only with a learner's licence without a trainer by his side, had injured a person. It was held that that by itself was not sufficient to warrant a conviction under Section 304A. It would be different if it can be established as in the case of *Bhalchandra alias Bapu v. State of Maharashtra* that deaths and injuries caused by the contravention of a prohibition in respect of the substances which are highly dangerous as in the case of explosives in a cracker factory which are considered to be of a highly hazardous and dangerous nature having sensitive composition where even friction or percussion could cause an explosion, that contravention would be the causa causans."

8. From the above it is clear that, to convict a person under Section 304A IPC, the death should be the direct result of a rash and negligent act of the accused and the act was the proximate and efficient cause without the intervention of another's negligence. As observed by the Apex Court, the act causing the death must be causa causans; it is not enough that it may have been the causa sine qua non. Therefore no offence is made out against the petitioner in this case, even if the entire allegations are accepted.

9. Before parting, I am of the considered opinion that the nurses in the hospital should also get protection from malicious prosecution. They should be given moral support by the society and government. They should be allowed to work without fear of any prosecution and let them known as Indian nursing Nightingales. The Apex Court in **Jacob Mathew's case** (supra) considered the medical negligence by the doctors in detail and conclusions

summed up in paragraph 49 of that judgment, which is extracted hereunder:

> “49. 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."

10. Thereafter the Apex Court issued certain guidelines for prosecuting medical professionals. It will be better to extract relevant portion of the above Judgment:

"51. GUIDELINES – RE:PROSECUTING MEDICAL PROFESSIONALS:

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.

52. 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.

53. 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 tune with the above directions, the government of Kerala issued Circular No.73304/ssb3/2007/Home dated 16.06.2008 instructing procedure to be followed by the investigating officers of complaints registered against

doctors. I am of the considered opinion that the nurses in the Government service and in private hospitals should also get protection like the doctors, if a prosecution is initiated under Section 304A IPC alleging medical negligence. The Government should issue necessary orders/circular in tune with **Jacob Mathew's case** (supra) to see that the nurse in the Government service and in private hospitals are protected from malicious and frivolous prosecutions. A private complaint shall not be entertained by courts against a nurse in the Government service or in private hospitals alleging medical negligence, unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent authority to support the charge of rashness or negligence on the part of the nurse concerned. The Investigating Officer should, before proceeding against a nurse in the Government service or in private hospitals based on complaints of rash or negligent act or omission while they discharge their duty,

obtain an independent and competent medical opinion preferably from medical experts qualified in that branch of nursing with a doctor who can normally be expected to give an impartial and unbiased opinion. In tune with the directions in **Jacob Mathew's case** (supra), this Court declare that a nurse in the Government service or in private hospitals accused of alleged rashness or negligence while discharging duty, may not be arrested in a routine manner (simply because a charge has been levelled), unless his/her arrest is inevitable for furthering the investigation or for collecting evidence or the investigation officer feels satisfied that the nurse proceeded against would not make herself available to face the prosecution unless arrested. The State Government should issue a circular in tune with the above directions of this Court adopting the principle laid down by the Apex Court in **Jacob Mathew's case** (supra) as far as the nurses in the Government service and in the private hospitals are concerned, within three months from

the date of receipt of a copy of this order, similar to Circular No.73304/ssb3/2007/Home dated 16.06.2008 issued for the doctors.

12. Coming back to the facts of this case, I am of the considered opinion that, even if the entire allegation in Annexure 2 final report are accepted, absolutely no materials are produced by the prosecution to prove any negligence on the part of the petitioner. But I make it clear that, if any further evidence is obtained by the officer in charge of the police station about medical negligence on the part of anybody else, the officer concerned can do the needful in accordance with law by conducting further investigation and this order will not stand in the way of such further investigation.

Upshot of the above discussion is that the proceedings against the petitioner can be quashed. Therefore, this Criminal Miscellaneous Case is allowed with the following directions:

1. All further proceedings against the petitioner in L.P. No.11/2018 on the file of the Judicial First Class Magistrate Court-I, Cherthala, arising from Crime No.1194/2013 of Cherthala Police Station, are quashed.

2. Registry will forward a copy of this order to the Additional Chief Secretary, Home(SSB) Department, State of Kerala and Principal Secretary, Health and Family Welfare Department, State of Kerala forthwith for issuing necessary circulars as directed in paragraph 11 of this order.

Sd/-
P.V.KUNHIKRISHNAN
JUDGE

JV

APPENDIX OF CRL.MC 5401/2018

PETITIONERS' ANNEXURES

Annexure-1	COPY OF FIR IN CRIME NO.1194/2013 OF CHERTHALA POLICE STATION
Annexure-2	COPY OF THE CHARGE SHEET IN CRIME NO.1194/2013 OF CHERTHALA POLICE STATION
Annexure-3	COPY OF THE POST MORTEM CERTIFICATE IN CRIME NO.1194/2013 OF CHERTHALA POLICE STATION
Annexure-4	COPY OF IDENTITY CARD ISSUED BY ACADEMY OF LEARNING COLLEGE, CANADA
Annexure-5	COPY OF SUMMARY OF OFFICIAL TRANSCRIPT OF ACADEMY OF LEARNING COLLEGE, CANADA ISSUED TO THE PETITIONER
Annexure-6	COPY OF CERTIFICATE OF COMPLETION OF THE COURSE BY NATIONAL ASSOCIATION OF CAREER COLLEGES, CANADA, CISSUED TO THE PETITIONER
Annexure-7	COPY OF LETTER ISSUED BY THE TRAINING DIRECTOR OF ACADEMY OF LEARNING COLLEGE, CANADA
Annexure-8	COPY OF COURSE CERTIFICATE ISSUED BY THE ACADEMY OF LEARNING COLLEGE, CANADA
Annexure-9	COPY OF IDENTITY CARD OF THE CANADIAN RED CROSS ISSUED TO THE PETITIONER
Annexure-10	COPY OF TOPIC ON LARYNGEAL EDEMA/GLOTTIC EDEMA SYMPTOMS

RESPONDENT ANNEXURES

Annexure Addl.R2 (a)	TRUE COPY OF FINAL REPORT IN C.C. NO. 1710/2013 ON THE FILE OF JUDICIAL FIRST CLASS MAGISTRATE COURT I, CHERTHALA.
Annexure Addl.R2(b)	A NOTARIZED COPY OF THE AFFIDAVIT DATED 18.01.2024.