IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr.M.P. No. 2866 of 2016

Dr. Suman Kumar Pathak @ Dr. S.K. Pathak ..... … Petitioner
Versus
1. The State of Jharkhand.
2. Ritesh Kumar Sinha ..... … Opposite Parties

CORAM : HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. Rajeev Kumar Sinha, Advocate.
For the State : Mr. Fahad Allam, A.P.P.
For the O.P. No. 2 : Mr. Praveen Shankar Prasad, Advocate.

08/ 18.06.2024 Heard learned counsel appearing for the petitioner, learned A.P.P. for the State and learned counsel appearing for the O.P. No. 2.

2. Prayer in this petition is made for quashing of the entire criminal proceeding including the order taking cognizance dated 14.01.2016, by which, cognizance for the offence under Section 304-A of the Indian Penal Code has been taken against the petitioner, in connection with Complaint Case no. 1201 of 2012, pending in the court of learned Judicial Magistrate, Dhanbad.

3. The complaint case was lodged by the O.P. No. 2 alleging therein that the complainant is the younger son of the deceased Kanti Sinha who died due to the gross medical negligence committed by the accused persons while she was admitted in the Hospital namely Dwaraka Das Jalan Memorial Hospital (Accused No. 1 in CP case). It is alleged that the accused No. 1 Hospital is being managed by Jeevan Rekha Trust and the accused No. 2 (The present Petitioner) is the treating Doctor under whom the deceased was under treatment and accused No. 3-5 are Junior Doctor who mostly attended to the deceased and used to give medicine by their own or on advice of the petitioner and accused No. 6 is the chairman of the said Hospital. It is further alleged that 08.09.2011 the deceased patient complaint about her weakness and trouble in passing of urine, therefore she was taken into Hospital and after consultations with the petitioner he paid some amount on counter and further admitted into the Hospital.

It is alleged that on advice of the Petitioner, the deceased was admitted in the CCU as she was suffering from Urinary tract

infection and asked to purchase some medicine and it was also told by the petitioner that since she is suffering from high blood sugar, therefore insulin is required to administered and the Hospital does not share any thing to the patient or attended, they were only providing the slip of medicine and complainant was required to purchased the same from the shop which also runs by the Accused no. 1 Hospital. More enough than not, they also collected some amount even after death of the patient but the Complainant or other witness were totally unaware about the reason of death.

It is further alleged that it reveals only when the elder son of the deceased in the month of November 2011 applied for the copy of documents for medical claim then only they could see and scrutinized the medical record of the patient which took time in collecting the same and from 8th September 2011 itself the accused No. 3 administered insulin on regular basis even in order to check Blood Sugar, the accused person put glucometer in use. It is further alleged that on 10th September 2011 the complainant raised this question with the accused no. 2 & 3 regarding use of Glucometer and the complainant requested for biochemical test but the accused no. 2 insisted upon using the Glucometer which led to heavy administration of Insulin leading to fatal consequences as the accused persons does not rely upon biochemical analysis.

It is alleged that on the one hand the complainant and the witnesses are not medical expert and further accused persons were also not sharing any thing with them except the fact that insulin was being administered in much quantity and thus it was gross failure on their part. The accused no. 2 adopted method of telephonic prescription of medicines and drugs even to the patient kept in critical care Unit and on advice of the petitioner, the patient was admitted in the CCU but the accused No. 2/petitioner did not taken care and overdose of insulin was administered

caused death of patient and it was revealed when medical report was provided to them.

It is also alleged that though accused no. 3 to 5 are qualified Doctor but they do not utilize their skill and they do only what accused No. 2 guided them. It is also surprising that accused no. 2 take defend himself by saying that he treats or prescribes medicine on the diagnosis of accused No. 3 to 5 and such kind of delegation leads to the death of patient and it is apparent from the medical records that the treatment particulars especially the discharge is tampered with to give an impression that the patient was deemed to be referred to higher centre. It is thus clear that tampering with the documents have been done with ulterior motives to give different impression. It is also alleged that accused no. 1 has been grossly negligent in providing reasonable infrastructure in the critical care Unit. The instrument used for testing of glucose was faulty that led to erroneous reading of the blood sugar level. The accused No. 1 and accused No. 6 failed to discharge their duty of care to the deceased patient who was kept in critical care Unit. It is lastly alleged that though as per principle laid down in Harisson's Principles of Internal Medicine regarding Sugar level and insulin supplement but with gross negligent of accused persons they administered high dose causing death of the Patient within 2 hours hence the instant Complaint Case.

4. Learned counsel appearing for the petitioner submits that the petitioner is a practicing doctor in the city of Dhanbad and he is a qualified and highly experienced and also occupies the requisite degree and having the work experience and has done nothing wrong in the treatment of the mother of the informant. He submits that mother was admitted in the hospital namely Dwaraka Das Jalan Memorial Hospital, Dhanbad, as she was having some problem and her sugar level was found to be high. He further submits that no case under Section 304-A of the Indian Penal Code is made out, in spite of that the learned court has been pleased to take cognizance against the petitioner. He submits

that the wrong allegations are made that high doze of Glucose was administered to the patient, due to which, she has left for her heavenly abode. He further submits that the petitioner and the other doctors were taken care of the mother of the O.P. No. 2, and in spite of their best efforts, they have not been able to save the life of the mother of the O.P. No. 2. He submits that before filing of the present case, the guidelines made by the Hon'ble Supreme Court in the case of ***Jacob Mathew Versus State of Punjab***, reported in **(2005) 6 SCC 1** is not followed. On these grounds, learned counsel appearing for the petitioner submits that the entire criminal proceedings may kindly be quashed.

5. Learned A.P.P. for the State submits that on the complaint petition, the learned court has been pleased to take cognizance against the petitioner.

6. Learned counsel appearing for the O.P. No. 2 submits that the sugar level was wrongly administered by this petitioner, who happened to be the treating doctor of his mother, as such, the case under Section 304-A of the Indian Penal Code is made out. He submits that this court may not exercise its power at this stage under Section 482 Cr.P.C. and all these arguments of the petitioner can be considered by the learned trial court only. On these grounds, he submits that this petition may kindly be dismissed.

7. In view of the above, the court has gone through the contents of the complaint petition, solemn affirmation as well as the order taking cognizance. In the solemn affirmation, the complainant has asserted that due to some illness, his mother got checked up in the hospital namely Dwarka Das Jalan Memorial Hospital by Dr. S.K. Pathak and since the sugar level was found to be high, she was advised to be admitted in the hospital and thereafter the treatment was started. On 08.09.2011, the mother of the O.P. No. 2 was admitted in the said hospital, however, the death was occurred on 12.09.2011 at 12.30 in the night. Thus, it is crystal clear that for some days, the treatment was going on, however, her life was not saved in spite of the efforts made by the doctors and thereafter the complaint case was filed on the ground

that the high dose of Insulin was administered upon the deceased.

8. A preliminary enquiry with regard to the said alleged negligence is necessitated as has been held by Hon'ble Supreme Court in the case of ***Jacob Mathew v. State of Punjab(supra),*** paragraph nos. 48 to 52 of the said judgment is quoted below:-

> *"**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 the 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 case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[**Ed.**: Also*

at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] 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 304-A 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 304-A 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 case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] and reaffirm 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 case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] . 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 [[**Ed.**: The following is the said extract from Merry and McCall Smith: Errors, Medicine and the Law, cited with approval in Dr. Suresh Gupta case, (2004) 6 SCC 422 (at pp. 247-48 of the book):"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high — a standard traditionally described as gross negligence.***Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it*

has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis."]] from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta case [(2004) 6 SCC 422 : 2004 SCC (Cri) 1785] (noted vide para 27 of the Report).

***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 the 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 a rash or negligent act within the domain of criminal law under Section 304-A 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 to 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 emphasise 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 prefer recourse to criminal process as a tool for pressurising 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 the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.*

9. The above judgment referred in another series of judgments of different High Courts including Jharkhand High Court and further in the case of ***Martin F. D' Souza v. Md. Ishfaq, (2009) 3 SCC 1.*** In paragraph no.106 of the said judgment, it has been held as under:-

> ***"106.*** *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 the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised 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 doctor/hospital concerned. 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 case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , otherwise the policemen will themselves have to face legal action."*

10. In view of the above two judgments of the Hon'ble Supreme Court, it is crystal clear that a private complaint may not be

entertained unless the complainant has produced prima facie evidence in the form of credible opinion given by another doctor to support the charge of rashness or negligence on the part of the accused doctor. It appears that to allow the proceeding to continue, will amount to an abuse of the process of law.

11. Accordingy, the entire criminal proceeding including the order taking cognizance dated 14.01.2016, by which, cognizance for the offence under Section 304-A of the Indian Penal Code has been taken against the petitioner, in connection with Complaint Case no. 1201 of 2012, pending in the court of learned Judicial Magistrate, Dhanbad, are hereby, quashed.

12. This petition is allowed and disposed of.

(Sanjay Kumar Dwivedi, J.)

Amitesh/-

[A.F.R.]