

(2020) 01 MP CK 0102

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 38710 Of 2019

Dr. Arif Ahmad Ansari

APPELLANT

Vs

State Of Madhya Pradesh And Another

RESPONDENT

Date of Decision : 21-01-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482

Indian Penal Code, 1860 — Section 308, 323, 324, 325, 326, 336, 337, 338, 384

Citation : (2020) 01 MP CK 0102

Hon'ble Judges : Vivek Rusia, J

Bench : Single Bench

Advocate : Z.A. Khan, D. Khanchandani, Vikas Yadav, Arshad Ahmad

Final Decision : Partly Allowed

Judgement

1. Petitioner has filed the present petition under section 482 of the Cr.P.C seeking quashment of an FIR registered against him at Crime No.277/2019 in Police Station Palasia, Indore for the offence punishable under sections 336, 337, 338, 308 & 384 of the IPC.

Facts of the case in short which led to the registration of FIR against the petitioner are as under:

2. Petitioner is a medical practitioner having a degree of MBBS and Master of Surgery (MS). According to him, he is specialized in Minimal Access Surgery and vide certificate dated 14.11.2014 the Association of Minimal Access Surgeons of India (FMAS) has certified that he has been qualified in the art and science of minimal access surgery. As per the allegation in the FIR, on 07.03.2018 complainant Shambhu Dayal Agrawal, R/o D/120, Awas Nagar, Dewas came to M.Y Hospital, Indore for treatment of his daughter viz. Ku.Divya Agrawal, aged 21 years as she was suffering from pain in her abdomen. They met the present petitioner who is posted in the surgery department of the M.Y Hospital, Indore. After preliminary examination of Ku Divya, petitioner advised for a minor

operation and told that the operation theater of MY Hospital is contaminated and supporting staff is no competent hence it would be better to take admission in Medi Care Hospital, Old Palasia Indore for which the expenses would be Rs.30,000/- for operation. The petitioner further assured that he is performing such type of operations regularly. On his advice, the complainant has admitted his daughter in Medi Care hospital and after pathological test on 30.05.2018 performed the operation. After two days of the operation, the health condition of Ku. Divya has started deteriorating. The complainant met the petitioner and requested him to examine his daughter further. He again called him in his clinic on 04.06.2018 and again he demanded Rs.70,000/- for another operation and when he objected Ku. Divya has been forcibly discharged from the hospital by the petitioner. On 06.06.2018 the complainant admitted his daughter in Choitram Hospital and came to know that the petitioner has committed negligence in the operation by putting two clips at a wrong place in her liver. Hence, another P.T.B.T operation was conducted in Choitram Hospital for which he spent further Rs.1,00,000/-. After discharge from Choitram Hospital again his daughter became sick, he had to take her to JM Hospital, Coimbatore by air on 23.07.2018. The complainant has further alleged that although the petitioner is a surgeon of breast cancer, however, to extract money from him he has negligently performed the surgery of gall bladder of his daughter and left her to die and still she could not recover. Based on the complaint made by the complainant, the Police investigated the matter and recorded the statement of Ku.Divya and other witnesses and after completing the investigation Challan has been filed on 19.06.2019 against the petitioner for the offence punishable under sections 336, 337, 338, 308 & 384 of the IPC, hence the present petition before this Court for quashing of the FIR by the petitioner.

3. According to the petitioner, Ku.Divya informed him regarding her stomach ache because of which she was unable to eat properly for a long time. He examined her medically and also gone through the previous reports and after clinical diagnosis, he found that she is suffering from chronic cholecystitis with cholelithiasis commonly known as swelling infection in gall bladder because of stone. He explained them regarding the disease, about the treatment i.e. laparoscopy cholecystectomy operation and also advised for some tests to be conducted before such operation. The complainant has agreed for operation and signed the consent letter for operation. On 30.05.2018 she was admitted in Medi Care Hospital and on 31.05.2018 near about 7 hrs. she was shifted to operation theater and operation was started. During operation swelling in gall bladder was seen and small contracted thickened gall bladder was stuck with callous triangle in the stomach. It was also found by him that calloos triangle was completely frozen and artery of the liver was not normal. He performed cholecystectomy very cautiously and carefully and applied abdominal drain on sub haptic region. As there was no bleeding and Biliary leakage, the port side was closed and at around 8.30 hrs. she was shifted to the recovery room in stable condition. On 01.06.2018 petitioner again visited the hospital and examined the patient and

found her in stable condition and the abdominal drain output was minimal. She did not make any complaint of stomach ache or fever to him. However, on 02.06.2018 she started vomiting during the night and after receiving information he immediately rushed to the hospital without any delay and advised for some tests and sonography. After examining the report it was found that she had an injury on bile-duct. Looking to the serious condition of the patient he requested Dr.Vinit Gautam, G.I. Surgeon to visit the hospital for an examination of the patient. Dr.Vinit Gautam visited the hospital and informed that there is a bile-duct injury which is the common and post-operative complication of laparoscopy cholecystectomy and is curable. He suggested for percutaneous transhepatic biliary drainage (P.T.B.D) and since the facility of P.T.B.D was not available in Medi Care Hospital, therefore, the petitioner referred and she was shifted to Choitram hospital on the same day. Thereafter he is not aware of the condition of the patient and on 04.09.2018 the complainant filed a complaint against him before the Chief Medical Officer, who constituted a panel of doctors to enquire about the allegations. The said panel of doctors submitted a report (Annexure P/5) in which she was not found guilty. Later on 19.06.2019 in the police station, Palasia Indore complainant filed the FIR against him.

4. Shri Z.A.Khan, learned Senior Advocate appearing for the petitioner submitted that petitioner is a qualified surgeon having a degree of MS from Devi Ahilya Vishwavidyalaya, Indore in general surgery. He has also passed fellowship in the minimal access surgery examination held at Banaras Hindu University, Varanasi on 10th August, 2014 and has been awarded the certificate in the 9th International Congress of AMASI held on 14.11.2014 in Dubai. The minimally invasive (laparoscopic) surgery has become a major part of general surgery and since the last two decades, the same is being used more widely throughout the world. The doctors having MS in general surgery are eligible to get the training of minimal access abdominal surgery programme. This programme adequately prepares the general surgeon in the art of minimal access surgery. The duration of training is one year in an approved programme, therefore, there is no dispute that the petitioner being a general surgeon having specialization in laparoscopy cholecystectomy. Looking to the clinical diagnosis of the patient the petitioner has rightly operated with due care and precaution. As of today, he has performed more than 300 surgeries of similar nature. There was no irresponsible or wrongful act on the part of the petitioner while treating the patient. The complainant himself decided to admit his daughter in Medi Care Hospital. He has not produced any material before the Police to show that he contacted the petitioner in MY Hospital for the operation. A panel of doctors has examined the patient and submitted the report in favour of the petitioner. The patient suffered the type-4 bile-duct injury after the operation which is very common in such operations. The complainant was explained the percentage of failure of the operation, however, he signed the consent letter. It is very common to occur a bile-duct injury during the attempt or after the operation. In support of his contention, he has placed reliance over the judgment passed by the Apex Court

in the case of Jacob Mathew vs. State of Punjab and another reported in AIR 2005 SC 3180. He has referred paras-19, 26, 27, 29, 30, 31, 49, 51, 52 & 53 of the said judgment and submits that the Apex Court in the aforesaid judgment has held that in order to prosecute a medical professional for negligence under the 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 sense or prudence would have done or failed to do. A simple lack of care and error of judgment or an accident is not proof of negligence. A professional may be held liable for negligence on one or 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 a given case the skill which he did possess. The test for determining medical negligence as laid down in Bolam's case holds good in its applicability in India. Finally, Shri Khan, learned Senior Advocate submitted that the criminal process once initiated against a medical professional would cause a serious embarrassment and harassment to him. At the end of trial, he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standard. There is no material to establish the charges against the petitioner, therefore, this court in the exercise of powers under section 482 can quash the FIR filed against him at this stage alone.

5. Shri Vikas Yadav, learned Govt. Advocate argued that the petitioner is posted as a general surgeon in MY Hospital, Indore. The complainant visited MY Hospital for treatment of his daughter but to extract money he advised him for operation in a private hospital. The hospital has no facility of post-operational care in case of any complication. After the complication in the surgery, the complainant was advised for P.T.B.D operation which was not available in the Medi Care Hospital, therefore, laparoscopy cholecystectomy operation ought not to have been performed by the petitioner in Medi Care Hospital. Still, the daughter of the complainant has not recovered properly and taking food through a tube.

6. Learned counsel appearing for the complainant has also argued in support of the arguments advanced by the learned Govt. Advocate. He stated that it is a matter of trial as to whether the petitioner has advised the complainant to admit his daughter in Medi Care Hospital to extract the money instead of treating her in MY Hospital, Indore. The allegations made in the FIR constitute an offence punishable under sections 336, 337, 338, 308 & 384 of the IPC and no finding cannot be recorded by this Court at this stage to the effect that the petitioner has not committed any offence. In the case of Jacob Mathew (supra) itself, the Apex Court has held that we may not be understood as holding that doctors can never be prosecuted for an offence for which rashness or negligence is an essential ingredient and emphasized the need for care and caution in the interest of society while recording the finding by the trial Court. The Apex Court has not held that no FIR can be registered against a medical practitioner. The charges, especially under sections 336, 337 & 338 are liable to be examined by the trial Court after recording the evidence. At present the charges have not been framed

against the petitioner, therefore, the present petition is pre-mature and liable to be dismissed.

I have gone through the case diary and considered the submission of learned counsel for the parties.

7. As per the allegations against the petitioner in the FIR, the complainant went to MY Hospital, Indore for treatment of his daughter and met the present petitioner but he advised him for operation in private Medi Care Hospital. He has not operated with due care and caution and thereafter he had to shift his daughter to Choitram Hospital for further operation and from there to Coimbatore in Tamil Nadu for which he has incurred huge expenses. Prima facie, there is material in the Final Report submitted by the prosecution that in the laparoscopy cholecystectomy operation the clips were put at the wrong place. The Medi Care Hospital was not having the facility of P.T.B.D. operation. In the case of Jacob Mathew (supra) the Apex Court has held that a simple lack of care and error of judgment or an accident is not a proof of negligence on the part of the medical professional. So long as the doctor follows the practice acceptable to the medical profession of that day he cannot be held liable for negligence merely because of the better alternate course or method of treatment was also available. When it comes to the failure of taking precautions, a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be a standard of judging the allegation of negligence. It has also been held that a professional may be held liable for negligence on one of the two findings either he has not possessed the requisite skill which he professed to have possessed or he did not exercise with reasonable competence in a given case the skill which he did possess. In the present case, there is no dispute that the petitioner possesses the requisite skill to operate but the issue is whether he did it with reasonable competence. The lack of care constitutes a gross deficiency in service. The allegation against the petitioner is that to extract the money he advised the complainant for operation in a private hospital by giving a dirty picture of a govt. hospital and he has acted so rashly or negligently which endangered the life of Ku.Divya. As per the allegations against the petitioner by putting clips at a wrong place in the liver he has caused grievous hurt to the patient and by doing the said act so rashly and negligently he endangered human life. These are matters of trial and no finding can be given at this stage in this petition under section 482 of the Cr.P.C. The Apex Court in the case of Jacob Mathew has not held that there is no complete bar in registering FIR against a medical practitioner or a doctor can never be prosecuted for an offence for which rashness or negligence is an essential ingredient.

8. Counsel for the petitioner submits that FIR is liable to be quashed especially for the offence under Section 308 IPC as same is not attracted in the facts and circumstances of the present case, as there is no material available on record to show that the petitioner had any knowledge or intention to cause death of the daughter of complainant and that the nature of injuries as recorded in the

medical report as also on the parts of the body of the complainant, would not point towards an offence under Section 308 IPC. He submits that merely because the injuries are grievous would not mean that an offence punishable under Section 308 IPC is made out.

That Section 308 IPC is in two parts. The first part deals with a situation where if an act is done by a person, with such intention or knowledge and under such circumstances that, if he by that act caused death, then such person would be guilty of culpable homicide not amounting to murder and shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. The second type of circumstance contemplated under the said Section is when hurt is caused to any person by such act, as mentioned in the first part of the section, then the quantum of punishment would increase to imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Therefore, physical hurt is not a necessary prerequisite for invoking the provisions of Section 308 IPC, which fact is borne out from a bare reading of the aforesaid section, and any hurt which is caused to the victim would only serve to enhance the quantum of sentence. There is no material or any opinion of the expert doctor in the field in this present case, against the petitioner that the injury was sufficient, in the ordinary course of nature, to cause death. If death cannot be caused by such injury, there is no question of the petitioner being prosecuted under Section 308 IPC. A bare reading of the provision of Section 308 IPC would show that even when no hurt is caused, the offence may be made out if other ingredients are fulfilled. A comprehensive reading of provision only reveals what has been stated by the Supreme Court in the case of Sunil Kumar Vs. NCT of Delhi and others, 1998 (8) SCC 557 as below -

4.....offence punishable under Section 308 IPC postulates doing of an act with such intention or knowledge and under such circumstances that if one by that act caused death, he would be guilty of culpable homicide not amounting to murder. An attempt of that nature may actually result in hurt or may not. It is the attempt to commit culpable homicide which is punishable under Section 308 IPC whereas punishment for simple hurts can be meted out under Sections 323 and 324 and for grievous hurts under Sections 325 and 326 IPC.

9. Because of the foregoing discussion, no case is made out for quashing of the entire FIR filed against the petitioner at this stage except charge under section 308 of IPC. Hence, FIR registered under No.277/2019 in Police Station Palasia, Indore for the offence punishable under sections 308 of the IPC is quashed. Accordingly, the petition is partly allowed. However, the petitioner is at liberty to raise all the grounds before the trial Court at the time of framing of charges and the trial Court shall decide the matter without being influenced by the observations made in this order.