

(2016) 04 PAT CK 0058

In the Patna High Court

Case No : Criminal Miscellaneous No. 48105 of 2013(Arising Out of PS. Case No. 402 Year 2013 Thana-Shastri Nagar District-Patna).

Dr. Sanjay Singh @ Dr. Sanjay Kumar Singh, son of Dr. Surendra Mohan Singh, resident of Bailey Road, Raja Bazar, P.S. Shastri Nagar, District Patna and Others APPELLANT

Vs

The State of Bihar and another RESPONDENT

Date of Decision : 08-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 304, 34, 88

Citation : (2016) 2 BBCJ 182 : (2016) 2 BLJud 287 : (2016) 2 CPR 415 : (2016) 2 Crimes 496 : (2016) 4 PLJR 907

Hon'ble Judges : Chakradhari Sharan Singh, J.

Bench : Single Bench

Advocate : Sandeep Kumar, Sanjay Kumar and Ashutosh Kumar, Advocates, for the Appellant; Kumar Ranjit Ranjan, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

Chakradhari Sharan Singh, J.(Oral) - Dealing with criminal prosecution of a medical professional for an act done in discharge of his professional obligation, the Supreme Court, in its oft quoted decision in the case of Jacob Mathew v. State of Punjab and Another, reported in (2005) 6 SCC 1, made following observation of immense significance:-

"29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason--whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the lifesaving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the

subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society."

2. Chapter IV of the Indian Penal Code lays down exceptions and Section 88 of the Indian Penal Code reads thus:

88. Act not intended to cause death, done by consent in good faith for persons benefit ? Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied to suffer that harm, or to take the risk of that harm.

3. The illustration, under Section 88 of the Indian Penal Code, conceives of a situation where a surgeon intending in good faith, performs an operation of a person, knowing well that such operation is likely to cause death of the said person, such action of a surgeon is saved by general exception under Chapter IV of the Indian Penal Code. Section 88 of the Indian Penal Code, in most unambiguous term, provides that nothing is an offence by reason of any harm, which it may cause, or be intended by doer to cause to any person for whose benefit it is done in good faith and it is not intended to cause death.

4. In the present case, the petitioners are qualified doctors/surgeons of a private hospital in Patna and seek quashing of the First Information Report of Shastrinagar Police Station Case No. 402 of 2013, registered for the offence punishable under Section 304 read with Section 34 of the Indian Penal Code, invoking this Court's inherent jurisdiction under Section 482 of the Code of Criminal Procedure.

5. I have heard Mr. Sandeep Kumar, learned Counsel, appearing on behalf of the petitioners and Mr. Kumar Ranjit Ranjan, learned Additional Public Prosecutor for the State.

6. Despite service of notice to the informant, the informant/Opposite Party No. 2, upon notice, entered appearance by filing vakalatnama through the learned Counsel. There is no representation, however, on her behalf, despite repeated call.

7. According to the First Information Report, the husband (since deceased) of the informant had gone to Paras HMRI Hospital on 18.09.2013, at 08:00 AM for his check up, along with his previous medical records. The Superintendent of the Hospital, Dr. Anand Kumar, referred him to Dr. Sanjay Kumar Singh, a Cardiologist in the Hospital. It appears that name of Dr. Anand Kumar has wrongly been mentioned in the First Information Report and one Anand Padere was the Superintendent of the Hospital, who is petitioner no. 2 in the present application. The petitioner no. 1, Dr. Sanjay Kumar Singh, was the Cardiac Surgeon in the Hospital, as per the statement made in the present application. The petitioner No. 1, describing the condition of the husband of the informant to

be critical, advised him to go for Angiography and immediate admission in the Hospital. According to the informant, her husband was forcibly admitted in the Hospital and a sum of Rs. 5,00,000/- was demanded by the Hospital Administration from the informant. The accused persons assured successful operation of heart. On 21.09.2013, the informant was made to deposit a sum of Rs. 3,50,000/- but she was given receipt for a sum of Rs. 1,30,000/- only. 23rd September, 2013, was the date fixed for bypass surgery of the informant's husband. It is alleged that the petitioner no. 1 told the informant that he had conducted thousands of such operations and petitioner no. 2, described the Hospital to be one of the best in Asia. It is alleged that the son of the informant discussed with the doctors of the Hospital for shifting the deceased to All India Institute of Medical Sciences, New Delhi, for the surgery, but the petitioner nos. 1 and 2 gave false assurances and describing the condition of the deceased to be critical, did not allow them to go to Delhi. They, somehow or the other, got written consent from the informant for the purpose of surgery. The informant was subsequently introduced to one Dr. Pramod (Dr. Pramod Kumar, petitioner no. 3), who claimed that they had conducted several operations in the State of Bihar and other States. On 25.09.2013, the operation was conducted, where after the deceased remained unconscious and subsequently died. It is alleged that the Hospital management demanded several units of blood during the period 24.09.2013 to 26.09.2013. On 25.09.2013, the informant was told that her husband's health condition had become critical and was, therefore, put on ventilator. On 26.09.2013, the doctors told the informant that Kidney of the deceased had been badly affected and the patient was required to be put on dialysis. She thereafter came to know that there was no dialysis machine in the Hospital. She, thereafter, said to have requested the Hospital Administration to allow her to take the patient to other medical institution, even in an Air Ambulance. The Hospital administration and the doctors, however, did not allow her to do so. With these allegations, First Information Report came to be registered on 27.09.2013.

8. Mr. Sandeep Kumar, learned Counsel, appearing on behalf of the petitioners, has submitted that institution of the First Information Report with the allegations as contained in the First Information Report is an abuse of the process of law. According to him, the act of these petitioners, who are indisputably qualified and are experts in their respective fields, are covered by the general exception under Section 88 of the Indian Penal Code. He has relied on Supreme Court decision in the case of Jacob Mathew (*supra*), in support of his submission that there is no allegation that the petitioners did something or failed to do something, which, in the given facts and circumstances, in their ordinary senses and prudence, would not have done or failed to do something which was required to be done by them as medical professionals. He submits that the medical professionals have been placed on a pedestal different from the ordinary mortals for the purpose of criminal prosecution against them pertaining to their professional conduct. According to him, this is the reason why act of medical professional done in good

faith for the benefit of a person falls under the general exceptions of Chapter IV of the Indian Penal Code. He has also submitted that no case of negligence or misrepresentation, per se, is made out, as per the allegations made in the First Information Report. The narration of the informant that the petitioners misrepresented her in any manner, as alleged in the First Information Report, is mere twisting of the facts.

9. Mr. Sandeep Kumar has also placed reliance on subsequent decision of the Supreme Court in the cases of *Martin F. D'Souza v. Mohd. Ishfaq*, reported in (2009) 3 SCC 1 and *A.S.V. Narayanan Rao v. Ratnamala and Another*, reported in (2013) 10 SCC 741. According to him, the test applied in the case of *Bolam v. Friern Hospital Management Committee*, reported in (1957) 2 All Enquiry Report 118 (QBD), was, for the first time, applied by the Supreme Court in the case of *Jacob Mathew (supra)* and have been invariably followed in other decisions of the Supreme Court. He has also placed reliance on a recent decision of this Court in the case of *Dr. Ashok Kumar Singh and Another v. The State of Bihar and Another*, reported in 2015 (3) PLJR 454.

10. I find substance in the submissions advanced on behalf of the petitioners. The Supreme Court, in the case of *Jacob Mathew (supra)*, dealing with the case of negligence by medical professional, laid down the law in the following terms.

"18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practices. In *Michael Hyde and Associates v. J. D. Williams and Co.Ltd.*, (2001) P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charles worth and Percy, *ibid*, Para 8.03)

19. An of quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J. in *Bolam v. Friern Hospital Management Committee*, (1957) 1 W.L.R. 582 in the following words:

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill . . . A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charles worth and Percy, *ibid*, Para 8.02)

20. The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. After a review of various authorities Bingham L.J. in his speech in *Eckersley v. Binnie*, (1988) 18 Con.L.R. 1 summarised the Bolam test in the following words:-

"From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet." (Charles worth and Percy, *ibid*, Para 8.04)

21. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England(Fourth Edition, Vol.30, Para 35):-

"35. The practitioner must bring to his task a reasonable degree of skill and

knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practise accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practise is not necessarily evidence of negligence. To establish liability on that basis it must be shown

- (1) that there is a usual and normal practise;
- (2) that the defendant has not adopted it; and
- (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

The above said three tests, have also been stated as determinative of negligence in professional practise by Charles worth and Percy in their celebrated work on Negligence (ibid, para 8.110)

22. In the opinion of Lord Denning, as expressed in *Hucks v. Cole*, (1968) 118 New LJ 469, a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

23. The decision of House of Lords in *Maynard v. West Midlands Regional Health Authority*, (1985) 1 All ER 635 (HL) by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of Lord President (Clyde) in *Hunter v. Hanley* 1955 SLT 213, observing that the words cannot be bettered ?

"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men...The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary

skill would be guilty of if acting with ordinary care...".

Lord Scarman added ?

"a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practise exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."

His Lordship further added that

"a judge's "preference" for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."

24. The classical statement of law in Bolam's case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practise is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practise as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, 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 point of time on which it is suggested as should have been used.

25. A mere deviation from normal professional practise is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practise prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was

acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

11. The Supreme Court also held, in Jacob Mathew (*supra*) that indiscriminate prosecution of medical professionals in a criminal case is counter productive and does no service to the society.

12. The Supreme Court, in paragraph 48 of Jacob Mathew (*supra*), has explained various aspects of negligence by a doctor as follows:

"49. 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 and Dhirajlal (edited by Justice G.P. Singh), referred to herein above, 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 practise 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 practise 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 practise 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 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."

13. In the case of Martin F. D'souza (supra), the Supreme Court, following the ratio in the case of Jacob Mathew (supra), issued specific direction that whenever a complaint is received against a doctor or hospital by a consumer forum or criminal court, then, before issuing notice to the doctor or the hospital, against whom the allegation is made, it 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. Only after the report of such doctor or committee confirms that there is, prima facie, a case of medical negligence made out, the doctor or the hospital, as the case may be, should be noticed. The Court issued the directions in order to avoid unnecessary harassment to the doctors. [See, paragraph 106 of Martin F. D'souza (supra)].

14. Almost similar view was taken by the Supreme Court in the case of Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others, reported in (2010) 3 SCC 480.

15. Upon perusal of the First Information Report, I do not find that the allegations made therein come within the parameters laid down by the Supreme Court in various decisions for the purpose of prosecution of a medical professional. This has not been disputed that the petitioners have the qualification to conduct the surgery and advise medication and other procedures. In case of Kusum Sharma (supra), the Supreme Court observed that it would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck. The Supreme Court further observed that it is the bounden duty and obligation of the civil society to ensure that medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

16. Upon perusal of the present First Information Report and considering the submissions advanced on behalf of the petitioner, I am of the considered view that lodging of the First Information Report by the informant-Opposite Party No. 2 has been used as a tool for pressurising the doctors/hospital for oblique purposes, which warrant this Court to invoke its extraordinary inherent jurisdiction under Section 482 of the Code of Criminal Procedure.

17. Considering the above noted decisions of the Supreme Court, the decision of this Court in the case of Dr. Ashok Kumar Singh (supra), I am of the view that the First Information Report of Shastrinagar Police Station Case No. 402 of 2013 and entire proceedings arising out of it deserve to be quashed for the ends of justice and are accordingly quashed.

18. This application is allowed.