(2023) 06 JH CK 0003

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 1387 Of 2023

Dr. Shakuntala Kumar @ Shakuntala Kumar — APPELLANT

Vs

State Of Jharkhand And Others — RESPONDENT

Date of Decision : 14-06-2023

Acts Referred:
Constitution Of India, 1950 — Article 226
Indian Penal Code, 1860 — Section 120B, 304, 304A
Code Of Criminal Procedure, 1973 — Section 155(2), 156(1), 482

Citation : (2023) 06 JH CK 0003

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : R.S. Mazumdar, Nishant Kumar, Ravi Prakash, Atanu Banerjee

Final Decision : Allowed/Disposed Of

Judgement

Sanjay Kumar Dwivedi, J

1. The facts of Cr.M.P. No.1674 of 2012 is different and in that view of the matter, let Cr.M.P. No. 1674 of 2012 be detached from Cr.M.P. No.1387 of 2012.

2. Heard Mr. R.S. Mazumdar, learned senior counsel assisted by Mr. Nishant Kumar Roy, learned counsel for the petitioner, Mr. Ravi Prakash, learned counsel for the State and Mr. Atanu Banerjee, learned counsel for opposite party no.2.

3. This petition has been filed for quashing the entire criminal proceeding in connection with Bermo P.S. Case No.69 of 2011, corresponding to G.R. Case No.613 of 2011 and also for quashing the cognizance order dated 29.05.2012, pending in the court of the learned Sub Divisional Judicial Magistrate, Bermo at Tenughat.

4. The FIR was lodged alleging therein that on 08.05.2011, the wife of the informant was admitted in the hospital of this petitioner. After seeing the patient, the petitioner has advised for operation immediately, but due to negligent act of the petitioner during course of operation the wife of the informant succumbed to

her injuries and the baby was referred to Bokaro General Hospital where he was also declared dead on 09.05.2011 and the present case has been lodged.

5. Mr. Roy, learned counsel appearing for the petitioner submits that the I.O. of the case has investigated the matter and thereafter charge-sheet has been submitted on 30.04.2012 under Section 304 and 120B of the Indian Penal Code against the present petitioner, who happened to be a doctor and it has been alleged that she has operated the deceased for delivery of a baby child. He further submits that the learned court has taken cognizance. He also submits that the allegation made that the death has occurred due to medical negligence, is not correct. He further submits that the petitioner has been implicated in a false and fabricated case in a preplanned manner by the informant after a delay of about 37 days of the alleged incident. He also submits that the wife of the informant was pregnant and she was brutally assaulted by her husband due to which the victim had sustained grievous injury and for that the brother of the deceased has registered an FIR being Jaridih P.S. Case No.61 of 2011 and final form has been submitted in that case. He further submits that the petitioner is a registered doctor and she was practicing there and at the time of admission of the deceased in the hospital, the situation of the deceased was not healthy and she was having the injury and that has been accepted by the informant and he has also written to that effect in the hospital. He further submits that in that circumstance, the petitioner bonafidely admitted her and tried to save the life and in spite of her best efforts, she has not been able to save the life of the deceased and her child. He also submits that there is no medical opinion of independent doctors and in that view of the matter, the entire criminal proceeding is required to be quashed in view of the judgment passed in Jacob Mathew v. State of Punjab; [(2005) 6 SCC 1].

6. On the other hand, Mr. Banerjee, learned counsel for opposite party no.2 submits that it is not only a case under Section 304 of the Indian Penal Code whereas, the charge-sheet has been submitted under Section 304 of the Indian Penal Code. The postmortem report is on the record, which suggests that the negligence is there and in the form of postmortem report, medical opinion is there and in that view of the matter, after cognizance at this stage, this Court may not interfere under Section 482 Cr.P.C. He further submits that in the uterus there is no rupture, which has come in the postmortem report and it is fit case to dismiss the case at this stage. He also submits that in the case filed by the brother of the deceased, final form has been submitted in favour of opposite party no.2. He further submits that at this stage also, this case can be referred to the Medical Board.

7. Mr. Prakash, learned counsel for the State submits that as per the postmortem report, the death has not occurred due to injury. He further submits that the learned court has already taken cognizance and at this stage, this Court may not interfere.

8. In view of the above submissions of the learned counsel for the parties, the

Court has gone through the materials on the record and finds that at the time of admission of the deceased, the informant has informed the concerned hospital that she has received injury because of fall from the roof. He has also disclosed that for saving the life, operation was necessary and he has also written in that document that he is aware of risk during operation. In view of that, the injury on the body of the deceased was there and for that FIR was also registered by the brother of the deceased which was numbered as Jaridih P.S. Case No.61 of 2011. In this background, it appears that only to save his skin, the informant has filed the present case implicating the doctor who has tried to save the life of his wife who was pregnant, but in spite of her best efforts she has not been able to save the life of the deceased and her child. If such a disputed question of fact is involved in the present case, the Court is required to consider whether this petitioner should be allowed to face the trauma of trial or not in the case of medical negligence. In a case of medical negligence, the preliminary enquiry with regard to the negligence is a must as has been held by the Hon'ble Supreme Court in Jacob Mathew v. State of Punjab; [(2005) 6 SCC 1]. Paragraph nos. 48, 49, 50, 51 and 52 of the said judgment are quoted hereinbelow:

"48. 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 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, 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 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. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta case1 (noted vide para 27 of the Report).

Guidelines — Re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by 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 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. 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, as has been held at paragraph 52 of the above case. The above judgment has been further followed by several High Courts.

10. Further if the malicious prosecution case is found and proved before the Court and the Court comes to the conclusion that the prosecution was malicious even the F.I.R can be quashed in light of the judgment of Hon'ble Supreme Court in State of Haryana v. Bhajan Lal; [1992 Supp (1) SCC 335]. Paragraph 102 of the said judgment is quoted below:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police

officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. Summoning of an accused in a criminal case is a serious matter, which has been held by the Hon'ble Supreme Court in Pepsi Foods Ltd. v. Special Judicial Magistrate; [(1998) 5 SCC 749] wherein in paragraph 28 it has been held as under:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

12. In several judgments, it has been repeatedly held by the High Courts that if such a case against the doctor is brought before the Investigating Officer, he should be very cautious in proceeding with the investigation and should strictly follow the directions of the Hon'ble Supreme Court made at paragraph 52 of the judgment passed in Jacob Mathew (supra). In Martin F.D'souza v. Mohd. Isfaq; [(2009) 3 SCC 1], the Hon'ble Supreme Court has even held that even in the consumer cases against the doctor notice is not required to be issued at the threshold and only after obtaining the opinion of the expert, notice may be issued for medical negligence against the doctor. The totality of the entire facts

and the documents on the record cast shadow on the role of the police.

13. The Court has also looked into the cognizance order dated 29.05.2012 and finds that the word cognizance is filled up in blank space, which also suggests that there is non-application of judicial mind.

14. As a cumulative effect of the above facts, reasons and analysis, the Court comes to the conclusion that if the petitioner is allowed to face trauma of trial, it will amount to abuse of process of law. Accordingly, the entire criminal proceeding in connection with Bermo P.S. Case No.69 of 2011, corresponding to G.R. Case No.613 of 2011 as well as the cognizance order dated 29.05.2012, pending in the court of the learned Sub Divisional Judicial Magistrate, Bermo at Tenughat is quashed.

15. Accordingly, this petition is allowed and disposed of.

