
(2015) 05 PAT CK 0073
In the Patna High Court
Case No : Criminal Misc. No. 40493 of 2012

Rakesh Kumar Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 204, 482
Penal Code, 1860 (IPC) — Section 269, 304-A, 338

Citation : (2015) 3 PLJR 535

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Prem Kumar Jha, Shiv Narayan Jha, Mukesh Mishra, Rajesh Kumar Jha and Nishant Kumar Jha, for the Appellant; Rita Verma, Advocates for the Respondent

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J—The present application under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Code") has been filed for setting aside the order dated 1.10.2010 passed by the learned Judicial Magistrate 1st Class, Patna in Complaint Case No. 1743(C) of 2010, whereby, finding a prima facie case to be made out for the offences punishable under Sections 269 and 338 of the Indian Penal Code, the petitioners have been summoned in exercise of power conferred under Section 204 of the Code. The prosecution story, in short, according to a complaint filed by the opposite party No. 2, namely, Ranjit Kumar is that the wife of the complainant delivered a male child on 2.7.2009, who, since his birth, was suffering from pneumonia with jaundice and due to these problems, he developed asphyxia (HIE Stage-III) and that is why he was referred to the Mahavir Vatsalya Hospital for treatment of aforementioned disease on 4th July, 2009. After admission in Mahavir Vatsalya Hospital on 4th July, 2009, the then Dr. Gautam Kishore Verma (Petitioner No. 2) working on the material point of time referred the aforesaid child of the complainant for cranium study to Dr. Uday Pathak in the same hospital in the

Department of Radiology. After aforementioned test, petitioner No. 2 diagnosed that the patient was suffering from pneumonia as well as jaundice and, for the same, treatment was provided to the child, who got cured but the intravenous supply continued even after the medicine given to the said child was stopped. Because of intravenous supply of the said fluid whole body of the neonatal patient swelled up. This happened when the child was only five days old. Considering the aforementioned symptom, Dr. Rakesh Kumar Singh (Petitioner No. 1) stopped giving fluid through the hands of the said child and the syringe for giving the said fluid was taken out from the hands of the said child but the syringe for supply of fluid was attached on the leg of the said child by compounder Raju on the advice of Dr. Rakesh Kumar Singh. After supply of fluid through intravenous system for about half an hour the leg of the said child became cold. This information was given by the complainant to Dr. Gautam Verma, who had taken out the said syringe from the leg of the said child and provided heat treatment for two hours to the leg of the said child. After the said heat treatment the child was taken out from the Intensive Care Unit and brought on the bed of general ward. After about two hours, the leg of the said child was again given heat treatment. On the next day morning i.e. on 6.7.2009 the child was again admitted in the Intensive Care Unit and the complainant was informed to bring back some medicines from medicine shop. On this information, the complainant brought the medicines and gave to Dr. Gautam Verma. Thereafter, the complainant was prohibited to enter and look after the child personally. After some time, the complainant was called for to visit his child. He found that the right leg upto knee of his child had become blue. At that time, Dr. Rakesh Kumar Singh informed the complainant that the right leg from toe to knee had to be amputated. When the complainant wanted to act upon the said advice, Dr. Rakesh Kumar Singh suggested him to get the same operated at the Magadh Hospital by Dr. Sanjeev. On the aforementioned advice, the complainant rushed to the Magadh Hospital where the complainant was informed that such a nascent infant was not treated there, rather that hospital was meant for the treatment of adult. Thereafter, the complainant rushed to the nearby doctor, namely, Dr. Srawan Kumar where the child was admitted for seven days but in spite of the best effort of Dr. Srawan Kumar, the said leg of the child could not be cured, instead, it deteriorated more and it was suggested to amputate the same. Then the complainant took the service of Dr. Kamal at Patna City, who amputated the said leg of the child.

2. It has been further alleged that the petitioners as well as the management of Mahavir Vatsalya Hospital and the compounder of the said hospital have acted negligently as a result of which the child developed infection of another kind because of which his right leg upto the knee had to be amputated. It has further been alleged that the accused persons had extracted about Rs. 1.25 lakhs from the complainant on the pretext of special, personal care to the child as well as specific and particular treatment of the ailment so that the same could be fully cured. The aforementioned amount was taken by the accused persons in various

installments on various pretext at various time.

3. After institution of the complaint case on 24th June, 2010, the complainant was examined on oath on 28th June, 2010. Apart of the complainant, two enquiry witnesses, namely, Vinod Kumar and Sushma Devi were examined in course of enquiry conducted under Section 202 of the Code.

4. Considering the allegations made in the complaint petition as well as the evidence collected in course of enquiry, the learned Judicial Magistrate, 1st Class, Patna, vide impugned order dated 4.10.2010, summoned the petitioners and two others in exercise of power conferred under Section 204 of the Code in order to face trial for the offences under Sections 269 and 338 of the Indian Penal Code. The aforementioned order dated 4.10.2010 is under challenge in the present application.

5. Assailing the impugned order dated 4.10.2010, Mr. Prem Kumar Jha, learned counsel for the petitioner has submitted that the Mahavir Vatsalya Hospital is managed and controlled by a high level public trust, namely, Mahavir Mandir Trust and is serving the patients having many types of diseases at nominal charges since long and it has got high reputation and accountability among the public at large and the entire administration is being managed by the well qualified and experienced persons entrusted with the works and therefore, the petitioners are neither concerned directly with regard to the payment or any other matter with the patient or attendants.

6. According to him, both the petitioners are qualified doctors and are working in the aforesaid hospital since long having good track record of their service and till date, no one has raised any grievance against them and they have got no criminal antecedent. He further states that the petitioners are still sanguine about line of treatment being correct and the only method to save the new born child from his neo-natal illness. It has been submitted that there is no report of any doctor, who treated the child later, that wrong treatment was given by the petitioners at the Mahavir Vatsalya Hospital.

7. It has further been contended that from very perusal of the complaint itself, it would become clear that the neo-natal patient was born on 2nd July, 2009 in the Nursing Home at a different place and was suffering from pneumonia with jaundice since his birth due to which he further developed asphyxia (HIE Stage-III), and thereafter, he was referred to the Mahavir Vatsalya Hospital for treatment on 4th July, 2009, where both the petitioners not only took prompt action in diagnosing the disease but also took due care in giving required treatment to the child due to which he had recovered quickly and hence, any allegation of negligence or omission in treatment of the child by the petitioners or the administration of the Hospital is not only ill-motivated but to malign the image of the esteemed institution, which is a renowned specialized hospital for treatment of neo-natal patients.

8. It has further been contended that it would further appear from the complaint

itself that the informant was properly advised by the hospital administration after sensing the danger to the life of the child to get the affected leg of the child amputated to save his life but the complainant, instead of acting on the advice, preferred to visit the Magadh Hospital out of his own free-will and on its refusal further to go to other doctors such as Dr. Srawan and after getting similar, advice from Dr. Srawan, to Dr. Kamal, where the child was treated for more than a week and lastly the leg was amputated and consequently, in all these exercises he spent money for which neither the petitioners nor the Mahavir Vatsalya Hospital can be held responsible.

9. Per contra, Mrs. Kumari Jyoti, learned counsel for the opposite party No. 2 has submitted that there is no illegality in the impugned order by which the learned Magistrate has summoned the petitioners and two others to face trial for the offences punishable under Sections 269 and 338 of the Indian Penal Code. She has submitted that the complainant has fully supported the allegations made in the complaint in his statement made on oath and the statement of the complainant has duly been corroborated by the two enquiry witnesses in course of enquiry. She has contended that the petitioners were negligent in treatment of the child as a result of which right leg upto the knee of the child got infected and ultimately in order to save the life of the child his right leg upto the knee had to be amputated. She has submitted that due to the negligent act of the accused persons, neo-natal patient developed a new disease instead of the disease for which the patient was admitted in the Mahavir Vatsalya Hospital. She has further contended that when the right leg of the child became blue and the problem became serious, the petitioners, in order to save their skin, referred the child to the Magadh Hospital where no such type of treatment was available. The contention is that the conduct of the petitioners was clearly in violation of the established practice of the medical profession and, therefore, a clear case of gross negligence warranting punishment for the offences under Sections 269 and 338 of the Indian Penal Code is made out in the present case.

10. Mrs. Rita Verma, learned Additional Public Prosecutor has adopted the arguments advanced by the learned counsel for the opposite party No. 2.

11. I have heard respective counsel for the parties and perused the evidence on record.

12. I find that the complainant has alleged in the complaint petition that the accused persons extracted about Rs. 1.25 lakhs from him on the pretext of special, personal care to the child as well as specific and particular treatment of the ailment of the said child. However, when the complainant was examined on oath, he has categorically stated that initially the child was born at a different place and after two days of birth, the neo-natal patient was taken to Mahavir Vatsalya Hospital. After receiving treatment for some time, the child was referred to the Magadh Hospital but when he reached the Magadh Hospital, he came to know that neo-natal patients are not being treated there. Thereafter, he went to the Nursing Home of one Dr. Srawan Kumar. The child was admitted there for

seven days. Dr. Srawan Kumar also advised him that the condition of right leg of the child was precarious and hence it has to be amputated. Thereafter, he went to Dr. Kamal where ultimately the right leg upto knee of the child fell off by itself. He has further contended that in the entire process of treatment at different places he had to spend Rs. 1.25 lakhs.

13. Thus, I find two apparent contradictions in the statement of the complainant from the allegations made in the complaint. The first contradiction is that in the complaint petition he has alleged that Dr. Kamal amputated the right leg upto knee of the child but in his statement on oath, the complainant has alleged that the right leg upto knee of the child fell off by itself at the clinic of Dr. Kamal.

14. The second contradiction is that in the complaint petition it has been alleged that the accused persons extracted about Rs. 1.25 lakhs from the complainant in the name of treatment but in his statement on oath, the complainant has stated that in the entire process of treatment of the child he had spent Rs. 1.25 lakhs.

15. I further find that the enquiry witness No. 1 Vinod Kumar has also supported the case in his statement that the right leg of the child upto knee fell down at the clinic of Dr. Kamal in course of treatment without any surgical interference. I also find that he has stated in reply to the court question that the child was born in the clinic of Dr. Shanti Rai at Fatuha. He has expressed his complete ignorance about the fact as to how many days his sister (mother of the child) remained in the hospital.

16. The only other enquiry witness, namely Sushma Devi, mother of the child has stated in course of enquiry that the child was ill from the time of birth itself. When the neo-natal patient was two days old, he was taken to the Mahavir Vatsalya Hospital. At that time he was suffering from Jaundice. He was treated at the Mahavir Vatsalya Hospital by the petitioners. His condition worsened and therefore he was taken to Intensive Care Unit. However, in course of treatment, his right leg got infected and, accordingly, he was referred to the Magadh Hospital but since there was no facility of treatment of neonatal patient, the child was taken to the Nursing Home of Dr. Srawan Kumar and then to Dr. Kamal. In reply to the court question, she has admitted that she had not gone to the Mahavir Vatsalya Hospital along with the child.

17. Thus, I find from the evidence collected in course of enquiry that no specific allegation of any payment made to the petitioners or to the Mahavir Vatsalya Hospital has been leveled in the present case. Further, the complainant has materially changed his version from the allegation made in the complaint petition. The mother of the child has tried to support the case of the complainant to some extent but in reply to the court question, she has admitted that she did not visit the Mahavir Vatsalya Hospital along with the child. I further find that there is a vague and omnibus allegation of negligence against the petitioners which has not been supported by any concerned medical expert report. There is also no report of the doctors, who treated the child later, that any wrong

treatment was even given to the patient by the petitioners. In absence of any expert report or any report of the doctors, who treated the patient subsequently, it cannot be said that the conduct of the petitioners or any other accused made in the complaint was in violation of the established practice of medical profession.

18. In view of the nature of dispute involved in the present case, I think it apt to consider the ratio laid down by the Apex Court in leading cases of medical negligence. In Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp , a three Judges Bench of the Apex Court headed by Hon"ble the Chief Justice R.C. Lahoti held as under:--

"28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

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 can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the 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 society.

xxxx xxxx

47. xxxx xxxx Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to society."

19. The Apex Court in Jacob Mathew (supra) considered exhaustively various aspects of negligence on the part of a doctor and laid down in paragraph 48 as under:--

"48. We sum up our conclusions as under:--

(1) xxxx xxxx

(2) xxxx xxxx

(3) xxxx xxxx

(4) xxxx xxxx

(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".

20. The Apex Court further opined that though the doctors are not immune from the legal proceedings in the event of their negligence in discharging their professional duties, in the interest of society, it is necessary to protect the doctors from frivolous and unjust prosecution. In paragraph 52 it has been held as under:--

"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 [Bolam vs. Friern Hospital Management Committee (1957) 1 WLR 582] 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 leveled 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."

21. In *Martin F. D'Souza Vs. Mohd. Ishfaq*, (2009) ACJ 1695 : AIR 2009 SC 2049 : (2009) 2 CompLJ 417 : (2009) 2 JT 486 : (2009) 154 PLR 1 : (2009) 3 SCC 1 : (2009) 3 SCR 273 : (2009) 2 UJ 794 , a two-Judges Bench of the Apex Court has lucidly and elaborately explained the subject of medial negligence and held in paragraph 106 as under:--

"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, specialized 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 [Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp], otherwise the policemen will themselves have to face legal action."

22. Regard being had to the facts of the present case as also the ratio laid down by the Apex Court, the impugned order dated 4.10.2010 passed by the learned Judicial Magistrate, 1st Class, Patna cannot be sustained. Admitted position in the present case is that there is no report of any expert or doctor that wrong treatment was given by the petitioners or the hospital administration of Mahavir Vatsalya Hospital. In absence of such report, the question would arise as to whether the learned Magistrate has exercised his discretion judicially while issuing summons to the accused persons. In the present case, though the learned Magistrate has recorded that from perusal of the complaint petition, statement of the complainant on solemn affirmation and deposition of enquiry witnesses, he is satisfied that prima facie case is made out under Sections 269 and 338 of the Indian Penal Code and directed for issuance of summons against the accused persons but, while doing so, he has failed to take into consideration the guidelines issued by the Apex Court in the matters of Jacob Mathew (supra) and Martin F. D'Souza (supra), which mandates that a private complainant need not be entertained unless the complainant has placed prima facie evidence in the form of credible information given by another doctor to support the charge of rashness or negligence on the part of the accused doctor. In the result, the application is allowed and the entire criminal prosecution arising out of Complaint Case No. 1743(C) of 2010 including the order dated 4.10.2010 passed by the learned Judicial Magistrate, 1st Class, Patna is quashed.