

(2017) 03 KAR CK 0176
In the Karnataka High Court
Case No : 101939 of 2015

Seema Manohar Gunjal

APPELLANT

Vs

State of Karnataka & another

RESPONDENT

Date of Decision : 09-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 436](#) - In what cases bail to be taken
[Indian Penal Code, 1860](#), [Section 304-A](#)

Citation : (2017) 03 KAR CK 0176

Hon'ble Judges : K. N. Phaneendra

Bench : SINGLE BENCH

Advocate : Nitin R. Bolabandi, Veena Hegde, T. M. Nadaf

Judgement

1. Heard the learned Counsel for the petitioner and the respondents. 2. This petition is filed seeking quashing of the order dated 17.6.2015 and the entire proceedings in C.C. No. 461/2015, wherein the learned Principal Civil Judge and Jmfc, Chikkodi, has taken cognizance of the offence under section 304(A) of I.P.C. against the petitioner. 3. The records disclose that a person by name Mujpar Shabbir Patel has lodged a complaint making allegations against the petitioner that, the petitioner has conducted surgery against the directions issued by the competent authority and also negligently caused severe damage to the wife of the complainant. On the basis of such complaint, the respondent-police have investigated the matter and submitted charge-sheet before the Court for the offence under section 304-A of I.P.C. and the learned Magistrate vide order dated 17.6.2015 has taken cognizance of the said offence and issued process against the petitioner herein. In fact, the petitioner also appeared before the Court on 5.11.2013 and she was enlarged on bail under section 436 of Cr. P.C, 4. Learned Counsel for the petitioner has strenuously argued before this Court that the Hon'ble Supreme Court has laid down certain guidelines in the case of Jacob Mathew v. State of Punjab, 2005(33) AIC 1(SC) : AIR 2005 SC 3685 with respect

to how the police officers have to deal with the offence/s alleged against the Doctors for the alleged negligence proceeding with a case registered against them or before investigating the matter and before filing any charge-sheet to the Court. The said portion of the guidelines of the Hon"ble Supreme Court is extracted herein below : "24. 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 emphasize 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. 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 practise 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." (Emphasis supplied) 5. It is the specific direction issued by the Hon"ble Apex Court by virtue of the above said guidelines, the Central and State Governments have to formulate certain rules or guidelines or by way of circulars incorporating the guidelines issued by the Hon"ble Apex Court. So long as it is not done, the Hon"ble Apex Court has also directed to follow the guidelines issued by it itself till such time, the Governments to take appropriate measures to issue such guidelines or circulars to the persons who are in the helm of affairs. 6. Learned Counsel for the petitioner also drawn my attention to the fact that, under what circumstances the preliminary enquiry has to be conducted by the police is also laid down by the Hon"ble Apex Court in the year 2014 which is in between Lalitha Kumari v. Government of Uttar Pradesh and others. 2014 (134) AIC 155 (SC) : (2014) 2 SCC 1. The said guidelines of the Hon"ble Apex Court regarding scope of preliminary enquiry are enumerated at para 120, which reads

thus : "Conclusion/Directions: (120) In view of the aforesaid discussion, we hold : (i) Registration of FIR is mandatory under section 154 of the Code, if the information discloses commission of a cognisable offence and no preliminary inquiry is permissible in such a situation. (ii) If the information received does not disclose a cognisable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognisable offence is disclosed or not. (iii) If the inquiry discloses the commission of a cognisable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further. (iv) The police officer cannot avoid his duty of registering offence if cognisable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognisable offence. (v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognisable offence. (vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under : (a) Matrimonial disputes/family disputes; (b) Commercial offences; (c) Medical negligence cases; (d) Corruption cases; (e) Cases where there is abnormal delay/laches in (f) initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry. (vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry. (viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognisable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above." 7. As could be seen from the above said guidelines particularly, in medical negligence cases, as adverted to in Lalitha Kumari's case (supra), the police have to make a preliminary enquiry before or immediately after registering a case and thereafter following the guidelines issued in the Jacob Mathew's case (supra), the police have to conduct investigation in accordance with the said guidelines and only after complying with the guidelines and on obtaining opinion of the expert, if the police still found that there was any negligence on the part of the doctors, against whom allegations are made, then only they have to submit final report to the Court. 8. As could be seen from the factual matrix of this particular case, immediately after filing of the FIR, the respondent-police have registered a case and without referring the complaint or the FIR, collecting necessary materials or doing preliminary enquiry by sending the same materials to the expert as

narrated in the above said Jacob Mathew's case and without obtaining any opinion from the expert, the police appears to have filed charge-sheet before the Trial Court. 9. At this juncture, Sri. Nadaf, learned Counsel appearing for the respondent submitted that, on plainly looking into the charge-sheet papers, it discloses that the Doctors have committed negligent act. Therefore, there is no need for any preliminary enquiry. Even it is made clear that, neither the Advocate nor the Court can step into the shoes of an expert in order to analyse on facts whether there was any negligent act on the part of the Doctor nor it is the domain of another expert to examine the material on record to find-out on facts whether there was any negligent act on the part of the petitioner or not. 10. In view of the above facts and circumstances, the learned Magistrate has also not bestowed his attention before taking cognizance whether such guidelines issued by the Hon'ble Apex Court in the above said two cases have been complied with by the jurisdictional police before submitting the charge-sheet before the Court. Therefore, when the entire proceedings i.e., registration of the FIR, investigation, filing of the charge-sheet before the Court and taking cognizance are vitiated by serious procedural irregularity, which amounts to illegality, which is not curable in nature. Hence, all those proceedings deserves to be quashed with liberty to the police to comply with the guidelines issued by the Hon'ble Apex Court in the above said two cases and if need arises, then only to submit appropriate report to the jurisdictional Court. 11. Though the Hon'ble Apex Court has set down certain guidelines in the case of Jacob Mathew v. State of Punjab and another, 2005 (33) AIC 1 (SC) : AIR 2005 SCW 3685. the State Government appears to have not. been issued any statutory Rules or executive instructions incorporating certain guidelines as noted in the above said decision. Particularly, the learned High Court Government Pleader, appearing for the State has not brought any guidelines, Rules or executive instructions issued by the State Government, in pursuance of the judgment of the Hon'ble Apex Court. 12. Likewise, the Medical Council of India or the Medical Board in Karnataka State have also not taken care to issue any guidelines or executive instructions in this regard. 13. The persons who are in the helm of affairs like Police Officers who are the Investigating Officers and also the Public Prosecutors, Judicial Magistrates, Central Government and the State Government have to take appropriate steps in this regard to take care of the guidelines issued by the Hon'ble Apex Court in the above said case. The Government at least now has to wake up and issue proper guidelines or executive instructions or-frame any Rules as per the directions of the Hon'ble Apex Court and all the jurisdictional Magistrates before taking cognizance of the offence against a Medical Officer have to follow the guidelines narrated in the above said decision to ascertain whether there is any breach of the guidelines issued by the Hon'ble Apex Court by the Investigating Officer. If so, the learned Magistrates have to return such charge-sheets for following the guidelines issued by the Hon'ble Apex Court in the case and it Should be done before taking cognizance of the offence. 14. The Investigating Officers as noted in the above said decision have to very strictly follow the guidelines while registering a case against the doctors, under the specific provisions of the penal

laws and at the time of investigation before submitting a final report to the Court. If the Public Prosecutors or the Addl. Public Prosecutors are entrusted with the work of scrutiny of the charge-sheet, they also shall take care before permitting the investigating agency to submit final report to the Court. 15. In view of the above said facts and circumstances and the guidelines issued by the Hon''ble Apex Court and the duty cast upon the Government and other departments, it is just and necessary to direct the registry to circulate or send copy of this order to the concerned departments as well as Officers for strict compliance of the guidelines. 16. With these observations, the following order is passed : ORDER The petition is allowed. The entire proceedings in C.C. No. 461/2015 pending on the file of the Principal Civil Judge and JMFC, Chikkodi, Belagavi District, is hereby quashed. However, liberty is given to the respondent-Police that if need be to initiate proceedings, after complying strictly the guidelines/directions of the Hon''ble Apex Court in the above said two decisions narrated in the body of this order and if need arises to file appropriate report to the Competent Court in accordance with law. Further, the learned Magistrate is directed to return the entire case papers filed by the police for compliance of the guidelines issued by the Hon''ble Apex Court. Office is hereby directed to send a copy of this order to comply with the directions issued by the Hon''ble Apex Court as narrated in the order to : (1) The Registrar (General), with a direction to circulate this order to all the Judicial Officers in the State. (2) (i) The Chief Secretary to the Government of Karnataka; (ii) The Principal Secretary to Home Department; (iii) The Principal Secretary to Medical Department; (iv) The Director, Medical Board; with a direction to them that in consultation with each other to take appropriate steps to alert the Government to take steps to frame any Rules or issue instructions or circulars or guidelines in pursuance of the directions of the Hon''ble Apex Court in Jacob's case. (3) To the Director General of Police to circulate this order to all the Investigating Officers. (4) To the Director of Prosecution to circulate this order to all the Public Prosecutors and Asst. Public Prosecutors. (5) To the Registrar, The Karnataka law Commission to take steps to recommend for framing or amending appropriate Law or Rules in pursuance of the Apex Court guidelines in Jacob's case. Ordered Accordingly.