

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2502 OF 2005

Dr. Saroja Dharmapal Patil
Age : 30 years, Occu.: Medical
Practitioner, R/o Dhanvantri
Hospital, Deoni, Tq. Deoni,
Dist. Latur

.. APPLICANT

VERSUS

1. The State of Maharashtra
Through The District Superintendent
of Police, Latur

(Copies to be served on Govt.
Pleader, High Court Bench at
Aurangabad)

2. Husain Tahersab Shaikh,
Age : 50 years, Occu.: Business,
R/o Deoni, Tq. : Deoni,
Dist. Latur

.. RESPONDENTS

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Mr. S.M. Godsay, Advocate for the Applicant
Mr. N.H. Borade, APP for the respondent-State
None present for the respondent no.2 though served

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CORAM : V.R. KINGAONKAR, J.

DATED : 11TH & 12TH OCTOBER, 2010

ORAL JUDGMENT:-

1. This is an Application under section 482 of
the Code of Criminal Procedure.

2. The Application is being finally disposed
of by consent of the learned Advocates for the

applicant and learned APP. For, this Application is pending since 2005 and interim relief was already granted while admitting the Application as per the order dated 20.10.2005.

3. The applicant is a Private Medical Practitioner. She is Gynecologist and Ayurvedic practitioner. She runs the private hospital styled as "Dhanvantri Hospital", Deoni. She is B.A.M.S. and commenced medical practice since 1998 at Deoni, which is a village under Udgir Tahsil. The applicant attended a patient by name Yasmin w/o Pasha Miya Gousuddin Momin during course of pregnancy of the latter. The pregnant woman used to frequently visit private hospital of the applicant for few months before the delivery. On 1.9.2003 the patient-Yasmin was brought to the hospital of the applicant. The clinical examination revealed that the patient was suffering from labour pains. The applicant informed the condition of the patient to her father and told him that as a first measure it would be appropriate to await for normal delivery and only in case it is so required delivery by

adopting caesarean method could be undertaken. The patient-Yasmin was taken to the labour room. The father of the patient gave consent to the treatment. By about 1.40 pm Yasmin delivered a male infant. It was normal delivery through vertex. Still, however, the applicant noticed that there was profuse bleeding from the private part of Yasmin after the placenta had come out from the vagina. In spite of immediate treatment, the bleeding could not be stopped. The applicant immediately instructed the father and other relatives of the patient-Yasmin to shift her to Civil Hospital at Udgir. Her relatives insisted to give a reference letter to Private Medical Practitioner by name Dr. Lohiya and, therefore, such letter was issued by the applicant. The applicant assisted the patient while shifting her to the private hospital of Dr. Lohiya by making suitable arrangement to provide the supply of saline and also making arrangement to depute Pathologist with her in the private vehicle. Though, the patient was shifted to the private hospital of Dr. Sandeep Lohiya at Udgir yet, the prognosis

continued and the flow of bleeding could not be controlled inspite of medical treatment given by Dr. Lohiya. He thereafter referred her to the Civil Hospital at Latur. In the same noon the patient-Yasmin was taken to the Civil Hospital at Latur. She was admitted in the Civil Hospital while she was unconscious. On clinical examination, the Medical Officer informed her father and other relatives that Yasmin was no more. The father thereafter gave statement to the Police to the effect that he had no grievance against anyone. It appears however that after couple of days on 3.9.2003 father of deceased Yasmin lodged a report at the Police Station, Deoni alleging that deceased Yasmin died as a result of negligence of the applicant while treating her. He alleged that the applicant had assured to attend the patient and to cure her by giving 100% guarantee. He further alleged that the applicant committed delay in informing that she was unable to give medical treatment to the patient-Yasmin and, therefore, due to excessive bleeding and the fact that there was inversion of the uterus, the patient-

Yasmin lost her life. It is this FIR lodged by the father of deceased Yasmin which is subject matter of challenge in the present Application. The applicant also seeks quashing of the chargesheet filed in pursuance of the said FIR.

4. Heard learned Advocate for the applicant and learned APP for the State. None appears for the respondent no.2 i.e. the complainant.

5. The question involved in this Application is as to whether the applicant can be held liable for commission of "gross negligence" on the face of the allegations made in the FIR? The question is whether the allegations in the FIR and the investigation papers, even if are considered to bearing of truth, would sufficiently provide for material to proceed against the applicant for the trial of offence punishable under section 304-A of the Indian Penal Code?

6. At the outset, it is pertinent to notice that the applicant was a treating doctor and was attending the pregnant woman i.e. Yasmin since much

before the date of her delivery. It is also important to notice that at the first blush the respondent no.2 gave statement to the Police that he had no grievance against anyone about the death of said Yasmin. In other words, the respondent no.2 (complainant) was not dis-satisfied in the context of medical treatment given to Yasmin at the time of her delivery. It was only after two days of her death that he lodged FIR on basis of his perception about the alleged negligence caused by the applicant. The FIR purports to show that the applicant informed him that a male infant was born but there was inversion of the uterus and, therefore, there was profuse bleeding. The applicant allegedly assured the respondent no.2 that he would give treatment and will cure the patient and, therefore, kept the patient as well as her relatives waiting for a considerable period till about 2:30 pm. There is no other allegation in respect of any malafide conduct of the applicant or lack of medical treatment to the patient.

7. The death of the patient is the ultimate result of the prognosis which occurred after the delivery. In such a case, it is very much essential to examine whether the medical practitioner is responsible for the death of the patient on account of his/her gross negligence committed by his act or omission. The expression "negligence" means lack of due care expected from an expert in the given circumstances. The provision of section 304-A does not specifically show that the negligence ought to be of any particular kind. What section 304-A, if considered in plain terms, would imply is that if by any rash or negligent act, the death has occurred then the author of such rash or negligent act may be held criminally liable.

8. There cannot be duality of opinion that the medical practitioners intend to cure the patients. However, section 304-A or section 279 of the I.P.C. do not require any mens-rea. Naturally, the intention of the medical practitioner hardly is of much significance in such a case.

9. The fact situation in the present case would make it amply clear that the deceased Yasmin gave natural birth to the male infant and there were no complications in the delivery. The applicant has filed copy of histo-pathological report (Annex 'D' to the Application). The functioning of the liver, spleen, kidney, brain, heart and uterus did not show any abnormality as such. The record does not show any specific reason for the hemorrhage caused after the delivery of the infant. The medical case papers drawn by the applicant would show that the necessary treatment was immediately given including the administration of pitocin drops required for stoppage of profuse bleeding. The applicant stated that since the bleeding was not being controlled, the relatives were informed that Yasmin was to be referred for further treatment alongwith IV heameecul drip. The record further shows that the Investigating Officer obtained opinion from the Civil Surgeon. The opinion of the independent medical authority purports to show that the

applicant gave necessary treatment to the patient-Yasmin while conducting the delivery. The opinion of independent medical expert purports to show that the applicant was duly trained for conducting delivery and, therefore, was competent to undertake the work of conducting delivery of deceased-Yasmin. The opinion further shows, in clear terms, that medicines administered by the applicant to the patient-Yasmin were proper and correct treatment was given by her. The opinion of the Civil Surgeon, Latur (Annex 'F' to the Application) further shows that there was no undue delay committed by the applicant in referring the patient to obtain treatment at the higher centre when the hemorrhagic flow could not be stopped inspite of the immediate treatment. Needless to say, the opinion of the medical expert, who is an independent authority attached to the District Civil Hospital supports the case of the applicant.

10. The post-mortem report goes to show that deceased-Yasmin was aged about 20 years and the cause of death was hemorrhagic shock. It was

noticed by the autopsy surgeon that there were no external injuries on the body of the patient. Both the lungs were pale. The excessive bleeding from the vaginal outlet was accompanied by inversion of the uterus and, therefore, there was prognosis in the condition of the patient-Yasmin.

11. The entire record and the investigation papers do not show any prima facie material to infer that the applicant committed overt act of negligence which is not expected from the ordinary and prudent Medical Practitioner in the given circumstances. The expression negligences means "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." The negligence may be caused due to inadvertence or heedlessness by which the negligent party is unaware of the results which may follow from the act. In case of criminal negligence, it must be proved that the negligence was of such a degree that it could be termed as recklessness. It must be proved to be a gross negligence so extreme that it can be made punishable as a crime. This is

particularly necessary when a criminal charge is levelled against the Medical Practitioner.

12. In "Dr. Suresh Gupta V. Govt. of N.C.T. of Delhi and anr. 2004 AIR SCW 4442" the Apex Court held that where the medical practitioner failed to take appropriate steps viz. "not putting a cuffed endotracheal tube of proper size" so as to prevent aspiration of blood blocking respiratory passage, the act attributed to him may be described as negligent act but not so reckless as to make him criminally liable. The Apex Court held that such criminal proceedings were liable to be quashed. The law regarding medical negligence is further elaborately clarified in case of "Jacob Mathew Vs. State of Punjab and anr. 2005 AIR SCW 2685". The Apex Court issued certain guidelines while dealing with the cases of criminal negligence attributed to Medical Practitioners. The test and guidelines may be reproduced 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 & 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 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'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."

The Apex Court categorically held that the word "gross" has not been used in section 304-A of the I.P.C., 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 Apex Court held that the expression "rash or negligent act" as used in section 304-A of the I.P.C. has to be read as qualified by word "gross". In other words, the word "grossly" is required to be prefixed with the words "rash or negligent act" while examining the case of medical negligence in the context of section 304-A of the I.P.C. The Apex Court further held that the maxim "Res Ipsa Loquitur" (Things speaks for itself) cannot be pressed in service for determining per-se liability for negligence within the domain of criminal law. It is held that the maxim has limited application in such a case.

13. In "Kusum Sharma and others Vs. Batra Hospital and Medical Research Centre and others (2010) 3 SCC 480", the Apex Court reiterated the legal position after taking survey of catena of case-law. In the context of issue pertaining to criminal liability of a medical practitioner, Hon'ble Mr. Justice Dalveer Bhandari speaking for the Bench, laid down that the prosecution of a medical practitioner would be liable to be quashed if the evidence on record does not project substratum enough to infer gross or excessive degree of negligence on his/her part. The observations may be usefully quoted as follows:-

"89. On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:

I. Negligence is the breach of a duty

exercised 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.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring 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.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional

doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. 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. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals."

14. The recent trend appearing from the authoratative pronouncements of the Apex Court is that the criminal liability cannot be fastened on

the Medical Practitioner unless the negligence is so obvious and of such high degree that it would be culpable by applying the settled norms. The Apex Court held that the Medical Practitioner would be liable only where his conduct falls below that of a reasonably competent doctor. It is further held that divergence of opinion with other doctors by itself is not sufficient to infer negligence. The Apex Court distinguished the concept of negligence as an ingredient of the offence under section 304-A of the I.P.C. and the negligence as breach of duty which may entail civil consequences. It is observed that the concept of negligence, in civil law and criminal law, are basically different. It is held that "simple lack of care" may attract civil liability, whereas "high degree of negligence" is required in criminal cases. It is further held that mere deviation from normal professional practice is not necessary evidence of negligence. The Apex Court held that protection is afforded to the Medical Practitioner by sections 88, 92 and 370 of the I.P.C. So, if it is shown that the act of the

Medical Practitioner is committed in good faith then the necessary protection is required to be given. The Apex Court noticed marked tendency on part of the complainants to look for a human factor to blame the doctor after happening of an untoward evil. The present case illustrates persecution of the applicant only on basis of surmises, guess-work of the complainant and inferences drawn by him. Needless to say, such a persecution would tantamount to the abuse of the process of law.

15. In the result, the Application is allowed. The FIR and the consequential chargesheet filed in pursuance thereof are quashed.

Sd/-

[V.R. KINGAONKAR, J.]

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