IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 729 OF 2021

Dr. Balgonda S. Patil ..Petitioner

Versus

Prakash Patil & Ors. ..Respondents

WITH
CRIMINAL WRIT PETITION NO. 700 OF 2021

Dr. Vikramsinha Kakasaheb Jadhav & Anr. ..Petitioners

Versus

Major Prakash Rajgonda Patil & Anr. ..Respondents

Mr. Niteen Pradhan a/w. Shubhada Khot, Shahen Pradhan, Ms. Ameeta Kuttikrishnan, Danish Patel and Shambhavi Desai for Petitioner in WP/700/2021.

Mr. Saurabh M. Railkar for Petitioners in WP/729/2021.

Major Prakash R. Patil (Respondent No.1 in person) in both WPs. present.

Mr. Karansingh Rajput, appointed as an *Amicus Curiae* present.

Mr. Shrikant H. Yadav, APP for State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 20 AUGUST 2024

PC :

1. In both these writ petitions, today a common order is passed because the complaint, the impugned order of issuance of process and the Revisional Court's order are common.

2. The Petitioners Dr. Vikramsinha Kakasaheb Jadhav and Dr. Ramakant Bhimrao Kamble in Criminal Writ Petition No.700 of 2021 are the original Accused Nos.1 and 3 and the Petitioner Dr. B. S. Patil in Criminal W. P. No.729 of 2021 was the original Accused No.2 in R.C.C.No.36 of 2013 before the learned J.M.F.C., Miraj; initiated through a private complaint by the Respondent No.1 herein.

3. Heard Mr. Niteen Pradhan, learned counsel for the Petitioners in W.P. No. 700 of 2021, Mr. Saurabh Railkar, learned counsel for the Petitioners in W.P. No.729 of 2021, Major Prakash R. Patil, Respondent No.1, party-in-person, Mr. Karansingh Rajput, *Amicus Curiae* and Mr. Shrikant Yadav, learned APP for the State.

4. The complaint was filed for taking action against the accused for commission of offences punishable under sections

304(A), 192, 464 and 201 of the I.P.C. The learned Magistrate issued process only U/s.304(A) of the I.P.C. vide the order dated 10.05.2017. The Petitioners challenged that order before the Sessions Judge, Sangli by two separate Revision Applications i.e. Revision Application No.82 of 2017 and Revision Application No.85 of 2017. Those two revision applications were rejected by a common order dated 11.01.2021. Challenging both these orders, the petitioners have approached this Court.

5. The complaint was in respect of an unfortunate death of the complainant's nephew Shital Patil. At the end of December 2009 and in the initial week of January 2010, Shital suffered from fever and common cold. Initially, he took the medicines from a local doctor of village Dudhgaon. But since he developed other complications like loss of energy, tingling sensation, numbness in lower limbs and general weakness etc; therefore, he took treatment from the petitioner Dr. B. S. Patil from 05.01.2010 to 24.01.2010. The numbness in the limbs aggravated and, therefore, on the advice of the accused No.2 Dr. B. S. Patil he was taken to the hospital of the accused No.1 Dr. Vikramsinha Jadhav at Miraj.

The Accused No.3 Dr. Ramakant Kamble was working under Dr. Jadhav who gave initial treatment by making provisional diagnosis. In short, the case of the complainant is that, because of the negligence of all these three doctors, Shital died on 09.02.2010. There are various allegations in the complaint under the different heads viz. i) Delay in diagnosis and specific treatment, ii) Negligence, causing death and initial correspondence, iii) frequent extended absence of Dr. Jadhav, iv) no follow up action after tracheostomy, v) prescriptions given from 08.02.2010 up to 11.02.2010 though, the patient had died on 09.02.2010, vi) over pricing of the medicines, vii) advice to shift the patient to Pune/Mumbai, viii) not prescribing generic medicines, ix) modification and making wrong entries in the documents.

6. Apart from these main allegations, there were other allegations of employing professionally unqualified doctors, non supply of CCTV footage, delay in issuing medical documents etc. The gist of the allegations against the petitioners made by the complainant was that, firstly, Dr. Jadhav did not arrive at proper

diagnosis. Ultimately when he was convinced that the patient should be treated for G. B. syndrome, it was felt necessary to carryout surgery for tracheostomy. It was performed by Dr. Dorkar. The allegations are made by the complainant that the instructions given by Dr. Dorkar were not followed. The Respondent No.1, who appears as a party in person, submitted that the immediate cause of death was, not taking proper care after tracheostomy surgery. On these aspects, the allegations were made and the complaint was filed.

7. The learned Magistrate recorded verification on 21.02.2013. Vide the order dated 18.04.2013, the learned Magistrate directed the Miraj city police station to conduct an enquiry U/s.202 of the Cr.p.c. and submit its report. The learned Magistrate was of the opinion that, prior to issuance of process, such enquiry would serve the interest of justice. Accordingly, P. I. Miraj City police station submitted his report on 10.03.2015. It is annexed at Exhibit-F to the W. P. No.700 of 2021. It refers to the various issues raised in the complaint and the answers given by the accused. The police officers sought opinion from the office of the

Civil Surgeon, Sangli. The Civil Surgeon along with other three doctors i.e. Dr. A. N. Sase, Dr. B. S. Koli and Dr. S. M. Patankar gave a report that, Shital was suffering from weakness in the limbs because of fever. Accordingly, the medical tests were conducted and the diagnosis was made that he was suffering from G. B. Syndrome. In that direction, the treatment of immunoglobulin, endotracheal intubation, respiration support, tracheostomy, cardiac resuscitation was given. It was opined by the committee that the patient died because of the complications created resulting from G.B. syndrome in the nature of autonomic disturbances. It was categorically mentioned that there was no medical negligence seen and that the medical record was properly kept. The police submitted their own report U/s.202 of the Cr.p.c. along with the committee's report.

8. The learned Magistrate was not satisfied with the scope of the enquiry made by the committee and, therefore, vide the order dated 26.07.2016, relying on the Judgment of the Hon'ble Supreme Court in the case of *Jacob Mathew Vs. State of Punjab*

and others[1], formed a committee consisting of Civil Surgeon, Government Hospital, Sangli and Dean of Medical College and Government Hospital, Miraj, to enquire into the facts of the case and the questions raised by the police inspector, Miraj City police station and to submit their report. After that order, the committee was formed and, a fresh report was submitted to the Court and again it was specifically opined that, none of the petitioners had committed any medical negligence resulting in the death of the deceased. Only it was observed that, there were some short comings in the noting made by Dr. Jadhav, but that particular aspect did not fall within the scope of enquiry conducted by the said committee. After this committee's report was submitted, the learned Magistrate passed his impugned order dated 10.05.2017 issuing summons against the petitioners U/s.304(A) of the I.P.C.

9. In paragraph-8 of that impugned order, the learned Magistrate observed that, from perusal of the documents on record, it seemed that accused Nos.1 to 3 were reckless or negligent in some procedures of the treatment. It was further

1 2005 SCC 1

observed that, after perusal of the report of the committee, it revealed that the accused were negligent in doing the treatment to Shital Patil, though, the committee reached to conclusion that accused were not negligent.

10. This particular order was challenged before the revisional court, as mentioned earlier and the Revisional Court dismissed the revision applications. However, in paragraph-21, the learned Revisional Judge mentioned thus:

> "To sum up, without going to the merits and demerits of the complaint filed by respondent No.1, I hold that to interfere the order of issue process passed by the learned Magistrate would be illegality, as such I hold that the impugned order needs no interference by this Court while exercising the powers u/s. 397(1) of Cr.P.C."

The petitioners have challenged both these orders before this Court.

11. The learned counsel appearing for the petitioners submitted that the complaint could not have been filed without there being an expert's opinion as required by the guidelines issued by the Hon'ble Supreme Court in the case of Jacob Mathew

(supra). They relied on paragraphs-48 to 52 of the said Judgment; which read thus:

> "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 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 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*[2] W.L.R. at p. 586 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

2 Bolam v. Frien Hospital Management Committee

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.

49. In view of the principles laid down herein above and the preceding discussion, we agree with the principles of law laid down in *Dr. Suresh Gupta's case*[3] and re-affirm 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's 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's case* (noted vide para 27 of the report).

3 Suresh Gupta (Dr.) v. Govt. Of NCT of Delhi, (2004) 6 SCC 422

Guidelines - Re: prosecuting medical professionals

50. As we have noticed herein above 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 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 rash or negligent act within the domain of criminal law under Section 304-A of 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 in 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 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 prefers recourse to criminal process as a tool for pressurizing 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 *Bolam's* 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 investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

12. They submitted that, in the present case, not once, but on two separate occasions, two separate committees have given their independent opinion that there was no negligence attributable to either of these petitioners and, therefore, according to the learned counsel, the order of issuance of process was not correct. The learned counsel also referred to the facts mentioned in the complaint to contend that, all these facts on the face of it do not show any offence committed by the petitioners. Though, there

are large number of allegations, process was issued only U/s.304(A) of the I.P.C. and in that behalf, the committees' reports were not against the accused/petitioners.

13. As against these submissions, the Respondent No.1 who appeared as a party in person, submitted that the negligence referred to in Jacob's case (supra) is about the negligence attributable to the doctors. The discussion is in respect of the medical negligence. However, in the present complaint, the allegations are in respect of occupational negligence. He submitted that the petitioners had failed to take the basic precautions which any person of ordinary prudence would take in such cases. The petitioners were directly responsible for the death of his nephew Shital Patil. He submitted that, he made a lot of efforts before filing of the complaint. He approached the Civil Surgeon, he approached the Medical Council, but nobody gave any response to his request to give report. Therefore, he was helpless and in such situation he filed this complaint based on his own study and making out a case of medical negligence. He submitted that, immediate cause of death was not taking precaution in

tracheostomy procedure performed by Dr. Dorkar. According to the complainant, Dr. Dorkar had instructed to deflate the balloon for five minutes, every four hours and there had to be regular suction. But it was not done. Dr. Dorkar had also instructed that he should be informed immediately in case of complication, but even that was not done; ultimately leading to death of Shital. He submitted that steroids were given to the patient and insulin's high dose was given which was not required. No tests were performed to determine the level of sugar. He submitted that, all this is nothing but the case of medical negligence.

14. Mr. Rajput, the learned *amicus curiae* submitted that, though the learned Magistrate has opined that, according to the committee, there was no negligence, this has to be read in the context of other paragraphs of the impugned order passed by the learned Magistrate. There is a reference to the committee's report and the observation made by the learned Magistrate holding that the accused were responsible for committing the offence of negligence amounting to Section 304(A) of the I.P.C. was correct. He submitted that, though, in the last paragraph of the revisional

Court's order there is mention that, without going to the merits and demerits of the case, he was passing that order, the entire discussion shows that the revisional court had applied his mind.

15. I have considered these submissions. At this stage, there are two reports of two separate independent committees assuming importance. The respondent No.1 wants to refer various literature in the medical field in respect of symptoms, syndromes, and complications resulting into death of his nephew Shital. At this stage, there is substance in the submissions on behalf of the petitioners that the learned Magistrate's order of issuance of process runs contrary to the specific opinions expressed by the committees. The Revisional Court has expressed that he was passing the order without going to the merits and demerits of the complaint. That approach will have to be tested. Considering the above discussion, it is clear that the matter requires consideration. The petitioners have made out a case for admission of these writ petitions. The contentions raised by both the parties will have to be decided at the final hearing stage. Therefore, beyond the above discussion, at this stage, it is not necessary to give positive findings

on the arguments advanced by both the parties.

16. Hence, the following order:

O R D E R

i) Issue Rule in both these writ petitions.

ii) Call record and proceedings.

iii) Hearing of the petitions is expedited.

iv) Till the decision of these petitions, there shall be ad-interim relief in terms of prayer clause (e) in Criminal W. P .No.700 of 2021 and prayer clause (b) in Criminal W. P .No.729 of 2021.

(SARANG V. KOTWAL, J.)