DR. SOU JAYSHREE UJWAL INGOLE

v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal No.636 of 2017)

APRIL 06, 2017

[MADAN B. LOKUR AND DEEPAK GUPTA, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Criminal proceedings u/s.304-A against medical professional – Petition for quashing the proceedings – In the instant case, deceased was admitted in hospital for treatment of Haemophilia and attended upon by doctors – After a week, emergency medical officer attended upon the deceased and found that he was suffering from abdominal pain and sent a call to appellant who was surgeon on call – Appellant went to hospital on being called and attended upon the deceased and made a note that a physician be called and thereafter she left the hospital – Next morning the condition of deceased worsened and he died – Criminal complaint filed against appellant alleging that after having called a physician she did not wait in the hospital and did not attend upon the patient especially when the patient was suffering from Haemophilia – Charge of negligence – Petition for quashing not allowed mainly on the ground that question whether inaction of the appellant in leaving the deceased and not waiting for the physician to turn up amounted to rash and negligent act on her behalf was to be decided during trial – On appeal, held: The only allegation against the appellant was that she left the patient – Appellant was a surgeon on call – She came to the hospital when she was called and examined the patient – As per her judgment, she could find no evidence of bleeding or injury and, therefore, she noted that a physician be called – Thereafter, she left the hospital at about 11.00 p.m. – True it is that she did not wait for the physician to come, but it can be assumed that she would have expected that the physician would come soon – This may be an error in judgment but definitely not a rash and negligent act contemplated u/s.304-A IPC – Criminal proceedings quashed – Penal Code, 1860 – s.304-A.

A **Allowing the appeal, the Court**

HELD: 1. This is not a case where the appellant should face trial especially when 20 years have already elapsed. The only allegation against the appellant was that she left the patient. It was nobody's case that she was called again by the Nursing B **staff on duty. If the condition of the patient had worsened between 11.00 p.m. and 5.00 a.m., the next morning, the Nursing staff could have again called for the appellant, but they did not do so. Next morning, the doctor on Emergency Duty attended upon the patient but, unfortunately, he died. In the facts and circumstance** C **of this case, it cannot be said that the appellant is guilty of criminal negligence. At best it is an error of judgment. No case of committing a rash and negligent act contemplated under Section 304-A IPC is made out against the appellant. Her case is similar to that of the Emergency Medical Officer, who has been discharged. [Paras 9, 10 and 11] [872-D-H; 873-A]**

D

Jacob Mathew v. State of Punjab & Anr. **(2005) 6 SCC 1 : [2005] 2 Suppl. SCR 307 – relied on.**

Case Law Reference

E **[2005] 2 Suppl. SCR 307 relied on Para 8**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 636 of 2017.

From the Judgment and Order dated 18.06.2014 of the High Court F of Judicature of Bombay, Nagpur Bench at Nagpur in Criminal Application (APL) No. 354 of 2012.

Anil Mardikar, Sr. Adv., Shirish K. Deshpande, Adv. for the Appellant.

G Gagan Sanghi, Rameshwar Prasad Goyal, Amol Nirmal Kumar Suryawanshi, Nishant Ramakantrao Katneshwarkar, Advs. for the Respondents.

The Judgment of the Court was delivered by

H

DEEPAK GUPTA, J. 1. Leave granted. A

2. The appellant herein is a doctor and has challenged the Order dated 18.06.2014 passed by the High Court of Judicature of Bombay, Nagpur Bench in Criminal Application (APL) No. 354 of 2012, whereby the petition filed by the appellant under Section 482 CrPC for quashing the criminal proceedings initiated against her under Section 304-A IPC B was dismissed.

3. Briefly stated the facts of the case are that one Shrikrishna Gawai (hereinafter referred to as the 'deceased') was admitted on account of injuries suffered in a road accident, in the Irvin Hospital, Amravati on 29.08.1997 for medical treatment. It is the admitted case C of the parties that the deceased was suffering from Haemophilia, a disease in which there is impairment of blood clotting. Therefore, special attention was required to be paid during the treatment of the patient. It is not disputed that one Dr. Manohar Mohod was on duty as an Emergency Medical Officer. On 29.08.1997 the patient was treated both by the appellant and Dr. Mohod. On 30 & 31.08.1997, the deceased was D attended upon by Dr. Dhirendra Wagh. Thereafter also, the deceased remained in the Hospital under the treatment of the appellant and Dr. Mohod.

4. Dr. Mohod, the Emergency Medical Officer attended upon the deceased on 05.09.1997 at 9.00 p.m. and found that he was suffering E from abdominal pain and, thereafter, a call was sent to the appellant, who was Surgeon on Call. It is not disputed that the appellant went to the Hospital on being called. She attended upon the deceased and made a note that a Physician be called. Thereafter, she left the Hospital. In the morning on 06.09.1997, the condition of the deceased worsened and F he died.

5. The main allegation against the appellant is that after having called for a Physician, she did not wait in the hospital and did not attend upon the patient, especially when the patient was suffering from Haemophilia. The Physician, Dr. Avinash Choudhary, who is accused G No. 1, did not turn up in the hospital. Even next morning on 06.09.1997, when Dr. Mohod again attended upon the deceased, the Physician Dr. Choudhary was not present and, unfortunately, the patient died. Thereafter, a complaint was lodged in the police station, wherein it was alleged by the brother of the deceased that the deceased died as a result

H

A of negligence of the three doctors. The complaint was investigated as Crime No. 317 of 1997 which was initially filed against Dr. Avinash Choudhary only but, later on, the names of the appellant Dr. Jayshree Ujwal Ingole and Dr. Manohar Mohod were also included.

6. A separate Departmental Enquiry was also carried out and, in B that enquiry, all the three doctors were held negligent in performing their duties. Dr. Mohod was debarred from an annual increment as penalty; the appellant Dr. Jayshree Ingole was permanently prohibited from entering Irvin Hospital, Amravati, and Dr. Avinash Choudhary was transferred. It would be pertinent to mention that Dr. Mohod was C discharged in the criminal case on the ground that no case of negligence was made out against him.

7. The appellant herein filed a petition for quashing the charge against her, but this petition was rejected by the learned Single Judge of the High Court of Bombay at Nagpur mainly on the ground that the question whether inaction of the appellant in leaving the deceased at D about 11.00 p.m. and not waiting for the Physician to turn up, amounted to a rash and negligent act on her behalf, would be decided during trial.

8. We have heard learned counsel for the parties. Learned counsel for the appellant has placed reliance on the judgment of this Court in ***Jacob Mathew v. State of Punjab & Anr.***[1], wherein this Court held that E the court should be circumspect before instituting criminal proceedings against a medical professional. This Court has held that negligence comprises of (i) a legal duty to exercise due care on the part of the party complained of; (ii) breach of the said duty ; and (iii) consequential damage. It was held that in cases where negligence is alleged against professionals F like doctors the court should be careful before instituting criminal proceedings. It is not possible for any doctor to assure or guarantee that the result of treatment would invariably be positive. The only assurance which a professional can give is that he is professionally competent, has requisite skill and has undertaken the task entrusted to him with reasonable care. It would be pertinent to quote the following relevant observations G made in ***Jacob Mathew's*** case (supra):

> **26.** No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure

H [1] (2005) 6 SCC 1

may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.

xxx xxx xxx

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.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth

A understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

After discussing the entire law on the subject, this Court concluded as follows:

B

"**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".

C

D

(*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

E

F

G

H

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. A

(*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. B C D

(*4*) The test for determining medical negligence as laid down in *Bolam vs. Friern Hospital Management Committee* (1957) 1 WLR 582 at p. 586 holds good in its applicability in India. E

(*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. F

(*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". G

H

A (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."

9. Applying the law laid down in *Jacob Mathew's case* (supra), we are of the view that this is not a case where the appellant should face trial especially when 20 years have already elapsed. The only allegation against the appellant is that she left the patient. We must remember that the appellant was a Surgeon on Call. She came to the hospital when she was called and examined the patient. As per her judgment, she could find no evidence of bleeding or injury and, therefore, she had noted that a Physician be called. Thereafter, she left the hospital at about 11.00 p.m. True it is that she did not wait for the Physician to come, but it can be assumed that she would have expected that the Physician would come soon. This may be an error in judgment but is definitely not a rash and negligent act contemplated under Section 304-A IPC. It is nobody's case that she was called again by the Nursing staff on duty. If the condition of the patient had worsened between 11.00 p.m. and 5.00 a.m., the next morning, the Nursing staff could have again called for the appellant, but they did not do so. Next morning, the doctor on Emergency Duty, Dr. Mohod attended upon the patient but, unfortunately, he died.

10. In the facts and circumstance of this case, it cannot be said that the appellant is guilty of criminal negligence. At best it is an error of judgment.

11. In view of the above discussion, we are of the view that no case of committing a rash and negligent act contemplated under Section

304-A IPC is made out against the appellant. Her case is similar to that of Dr. Mohod who has been discharged. We, accordingly, allow the appeal, set aside the judgment dated 18.06.2014, passed by the learned Single Judge of the High Court of Bombay, Nagpur Bench in Criminal Application (APL) No.354 of 2012 and quash the criminal proceedings initiated against the appellant vide order dated 28.02.2001, passed by the Judicial Magistrate, First Class, Court No.6, Amravati in Regular Criminal Case No. 310 of 1999 in FIR Crime No.317 of 1997. Pending application(s), if any, stand(s) disposed of.

Devika Gujral

Appeal allowed.