Jharkhand High Court
Dr.S.R.Malusare vs State Of Jharkhand & Anr on 15 June, 2012

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P (Cr.). No. 372 of 2004

Dr. S.R.Malusare .... Petitioner

-Versus-

The State of Jharkhand & Anr. ..... Respondents

For the Petitioner : Mr.D.Jerath, Sr.Advocate.
M/s Abhinash Kumar, Vineet Kr.Vasisth,
V.V.Pradhan, Advocates.

For the State : J.C to G.P.-II.
For the Respondent No.2 :Mr.K.Sarkhel, Advocate.

PRESENT
HON'BLE MR. JUSTICE H.C.MISHRA

CAV On 15.06.2012 Pronounced On 02/07/2012

H. C. Mishra, J. This writ application has been filed for issuance of an appropriate writ, order or direction quashing the entire criminal proceeding against the petitioner in Complaint Case No. 807 of 2001, then pending in the Court of Shri A. K. Tiwari, learned Judicial Magistrate, 1st class, Ranchi, including the order dated 7.9.2004 passed therein, whereby, the application filed by the petitioner under Section 258 of the Cr.P.C. was rejected by the Court below.

2. The petitioner is a dentist by profession, against whom, the complaint petition was filed by the respondent No. 2 Basanti Devi @ Budhi Devi, alleging therein that on 18th March 1998, the complainant respondent No. 2 contacted the petitioner as she was feeling serious pain in her upper left side tooth and the petitioner advised her that the tooth was required to be taken out, which she agreed. It is alleged in the complaint petition that the petitioner gave her an injection in her upper left side gum and also prescribed some medicines and asked her to come after few days. It is alleged that after few hours the face of the complainant started swelling and she started feeling pain in her head, whereupon, she again visited the petitioner and was assured by him that nothing had happened to her and everything would be normal. However, the pain in the head and face of the complainant increased with the swelling, whereupon she went to HEC hospital on the next day and she was told that the injection given by the petitioner had reacted. It is alleged

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that thereafter the complainant started loosing her vision in both eyes and also started developing severe pain in her head. Ultimately, the petitioner

visited Shankar Netralaya, Chennai, in the month of November 1998 where the treatment continued till the year 2000 and thereafter, there was slight improvement in her right eye but her left eye became completely blind.

3. That the complainant again visited the accused petitioner on 8th July 2000, whereupon she was asked to bring all her papers of treatment including the prescription given by him. The complainant brought her papers of treatment on the next day which was taken by the petitioner and she was asked to visit again after a week, during which, the petitioner assured her to go through the papers and to consult other doctors also. After a week, when the complainant met the petitioner, the petitioner told her that there was nothing that could be done for her eyes and her papers were returned back, but the prescription which was given by the petitioner, had been retained by him. Alleging that the complainant lost her sight due to rash and negligent act of the petitioner, the complaint petition was filed in the Court of the learned Chief Judicial Magistrate, Ranchi, which was registered as Complaint Case No. 807 of 2001.

4. It appears that the statement of the complainant was recorded on solemn affirmation and upon enquiry, the prima facie case was found against the petitioner for the offence under Sections 338 of the I.P.C., by order dated 7.9.2002. It further appears that the petitioner had challenged the said order in this Court in Cr.M.P No. 916 of 2003, which was disposed of by this Court by order dated 29th April 2004, without recording the points taken by the petitioner and given him the liberty to raise the points of limitation and also other points by filing a petition under Section 258 of the Cr.P.C., which was directed to be adjudicated upon as a preliminary issue. The petitioner accordingly, filed a petition under Section 258 of the Cr.P.C., which was rejected by order dated 7.9.2004

passed in the said Complaint Case No.807 of 2001, holding inter alia that the same was not maintainable in a complaint case. The petitioner has thereafter filed this application under Article 226 of the Constitution of India, for quashing the entire criminal proceeding against him.

5. Learned counsel for the petitioner has submitted that the institution of the criminal case against the petitioner and the orders passed therein are absolutely illegal, inasmuch as, the petitioner is a dentist by profession and when the complainant came to the petitioner for the first time with the problem in her tooth, the petitioner had administered medicine to her. It is further submitted that it is not at all mentioned in the complaint petition that what was the medicine which was administered to the complainant by the petitioner and as such, it cannot be said that there was any negligence in prescribing the said medicine to her by the petitioner, resulting in the ailments of the complainant as alleged in the complaint petition. Learned counsel for the petitioner submitted that there is no such injection which could have resulted in the blindness of the petitioner and accordingly, no case can be made out against the petitioner for the offence under Section 338 of the Indian Penal Code.

6. In support of his contention, learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court of India in Dr.Suresh Gupta Vs. Govt. of NCT of Delhi and Anr., reported in 2004 (6) SCC 422, wherein the standard of negligence required to be proved for fixing the criminal liability on a doctor or on a surgeon was considered by the Apex Court. In the said case,

the patient was operated upon for removing his nasal deformity and the operation was so minor that the patient was not accompanied by anybody, even by his wife, but the patient died. From the post mortem report of the patient, it was apparent that the death was due to asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum, which indicated that adequate care was not taken to prevent seepage of blood down the respiratory passage which resulted in asphyxia. In this backdrop, the law has been laid down by the Apex Court as follows:-

> "21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as "criminal". It can be termed "criminal" only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.
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> 23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment.

Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

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25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrongdoing i.e. a higher degree of morally blameworthy conduct.

26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against the doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. (Emphasis supplied).

7. The question was again decided by the Supreme Court in yet another case in Jacob Mathew Vs State of Punjab and Another, reported in 2005 (6) SCC 1, in which also, the Supreme Court had an occasion to consider the question in a case of death of the patient in the hospital due to negligence. In this case, as the correctness of the law laid down in Suresh Gupta's case (supra) was doubted, the matter was referred to a larger bench of three Judges for consideration. The matter was again considered in detail by the Apex Court taking into consideration the different aspects of negligence, namely, Negligence as a tort; Negligence- as a tort and as a crime; Negligence by professionals; and Medical professionals in criminal law and the matter was discussed in detail from different angles and the conclusions were detailed in paragraph 48 of the said Judgment as follows:-

> "48. We sum up our conclusions as under:-
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> 1. ---------- .
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> 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. ---------- .

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. ---------- .

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".

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. " (Emphasis supplied).

The ratio in Suresh Gupta's case (supra) was thus, upheld by the larger bench of Apex Court in Jacob Mathew's case (supra).

8. Learned counsel has further submitted that from the complaint petition, it is apparent that the injection was given by the petitioner to the complainant on 18th March 1998, whereas the complaint petition was filed on 5.12.2001 i.e., after more than three and half years of the cause of action. Learned counsel submitted that the offence under Section 338 of the I.P.C is punishable with an imprisonment of either description for a term which may extend to two years, or with fine or with both. Section 468(2)(c) of the Criminal Procedure Code prescribes limitation of three years for taking cognizance in such cases and accordingly, the cognizance was absolutely barred after the period of limitation. Learned counsel submitted that though it is alleged in the complaint petition that the complainant started suffering soon after getting the injection from the petitioner and she suffered severe pain in her head and face with swelling and ultimately, she started loosing vision of both her eyes, but it is apparent that the complainant continued the treatment at Shankar Netralaya, Chennai, till the mid of the year, 2000. Thereafter, it is alleged that the complainant visited the petitioner on 8th July 2000 when the papers were allegedly demanded by the petitioner and she was asked to come after a week and when she visited after a week, she was told by the petitioner that nothing could be done for her eyes and the petitioner returned back her medical documents, keeping back the prescription which was given by him. It is submitted that even thereafter, the complainant had filed the complaint case only in the month of December 2001 after inordinate delay and much beyond the prescribed period of three years. Learned counsel accordingly, submitted that the order taking cognizance against the petitioner was clearly hit by Section 468(2)(c) of the Cr.P.C. and the entire proceeding thereafter is vitiated and same cannot be sustained in the eyes of law.

9. In this connection, learned counsel has placed reliance upon the decision of the Apex Court in V. N. Shrikhande (Dr.) Vs Anita Sena Fernandes, reported in 2011 (1) SCC 53. In the said case, Anita Sena Fernandes, who was a nurse had undergone a surgical operation for removal of her gall bladder by Dr. V. N. Shrikhande. After the operation, she was feeling pain in her abdomen which persisted for almost about nine years and when the pain became unbearable, she underwent the second operation on 25.10.2002, in which, some pieces of gauze were removed from her abdomen. Thereafter, she filed her complaint before the Consumer Disputes Redressal Forum, claiming compensation of Rs 50 lakhs for criminal negligence of Dr. V. R. Shrikhande and the matter

ultimately came up before the Supreme Court. In the said case, the Apex Court held that the action brought by Anita Sena Fernandes in the Consumer Forum was clearly barred by limitation. The Supreme Court took note of the fact that the cause of action had accrued to the respondent on 26.11.1993 i.e. the date on which the appellant performed the "Cholecystectomy" when the pieces of gauze had been left in her abdomen, or in November 2002, when she received the histopathology report from Lilavati Hospital, Mumbai. If the respondent had not suffered pain, restlessness or any other discomfort till September 2002, it could reasonably be said that the cause of action accrued to her only on discovery of the pieces of gauze which were found embedded in the mass taken out of her abdomen, as a result of surgery performed on 25.10.2002. In that case, the complaint filed by her on 19.10.2004 would have been within limitation, but as the respondent kept quite for about nine years despite pain and agony, the action brought by the respondent was held to be clearly barred by limitation.

10. Placing reliance on these decisions, learned counsel submitted that the entire criminal proceeding, including the order dated 7.9.2004 passed by the learned Judicial Magistrate in the said Complaint Case No.807 of 2001 are absolutely illegal, as in the facts of the case no offence is made out against the petitioner under Section 338 of the I.P.C., and in any event, the cognizance was absolutely barred by limitation and it is a fit case in which the entire criminal proceeding against the petitioner should be quashed.

11. Learned counsel for the complainant respondent No.2, as also learned counsel for the State have opposed the prayer and submitted that in view of the allegations made against the petitioner, the offence is clearly made out under Section 338 of the I.P.C., as due to the negligent act of the petitioner, the complainant had suffered grievous injury leading to loss of her sight. It is further submitted that the agony of the complainant is still continuing and accordingly, the offence committed by the petitioner is a continuing offence and as such, the limitation prescribed under Section 468(2)(c) of the Code of Criminal Procedure shall not stand in the way of taking cognizance of the offence. Learned counsels further submitted that the application filed under Section 258 of the Cr.P.C was rightly dismissed as not maintainable by the Court below. As the earlier Cr.M.P No. 916 of 2003, filed by the petitioner was disposed of by this Court by order dated 29th April 2004, the present application cannot be maintained.

12. After having heard the learned counsels for both the sides and upon going through the record, I find that the first application filed by the petitioner was disposed of, giving certain directions to the petitioner, which the petitioner followed and after rejection of his application by the Court below, the petitioner has again moved this Court in writ jurisdiction, which is quite maintainable. I further find from the complaint petition, that only allegation against the petitioner is that when the complainant approached the petitioner with the complain of pain in her tooth, she was given an injection by the petitioner in the gum and some medicines were also prescribed, but what injection was given and what were the medicines prescribed by the petitioner, have not been disclosed in the complaint petition. In absence thereof, it cannot be ascertained that the treatment given by the petitioner was such that it could not have been given at all in the ailment complained of by the complainant. As such, whether the action of the petitioner could be described as 'gross' negligent or reckless, cannot be decided on the basis of the allegations made in the complaint petition. There is

nothing on the record to show that the course of treatment adopted by the petitioner was the one, no medical professional would have taken had he been acting with ordinary care, nor there is anything to show that this petitioner 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.

13. In my considered view, the case of the petitioner is fully covered by the decision of the Apex Court in Dr.Suresh Gupta's case (supra), which clearly lays down that the act complained against the doctor must show negligence or rashness of such a highest degree so as to indicate a mental state which can be described as totally apathetic towards the patient and such 'gross' negligence is only punishable, which ratio has been fully approved by the Apex Court in Jacob Mathew's case (supra). Accordingly, the complaint case filed against the petitioner, including the subsequent orders therein cannot be maintained in the eyes of law and are only fit to be quashed.

14. I further find force in the submission of the learned counsel for the petitioner that the complaint petition was absolutely barred by limitation, inasmuch as the offence under Section 338 of the I.P.C is punishable by the maximum imprisonment of two years and the limitation prescribed under Section 468(2)(c) of the Cr.P.C., for taking cognizance for the said offence is only three years. From the complaint petition, it is apparent that soon after taking injection, the complainant started feeling pain with swelling which led to the virtual blindness of the complainant and even though the treatment was given by the petitioner on 18.3.1998, the complaint was filed only in the month of December 2001 after an inordinate delay of more than three and half years and accordingly, the cognizance was clearly barred under Section 468(2)(c) of the Cr.P.C.

15. For the foregoing reasons, the criminal proceeding against the petitioner in Complaint Case No. 807 of 2001 then pending before Shri A. K. Tiwari, learned Judicial Magistrate, 1st class, Ranchi, including the order dated 7.9.2002 whereby, cognizance was taken against the petitioner, as also the order dated 7.9.2004 passed therein, are hereby, quashed. This application is accordingly, allowed.

(H.C.Mishra, J.) Jharkhand High Court, Ranchi.

Date : 02/07/2012 N.A.F.R/ BS