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Dr. Sujoy Das Vs. State

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Court : Mumbai

Decided On : Oct-05-2005

Reported in : 2006CriLJ1148

Judge : N.A. Britto, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 482; Indian Penal Code (IPC), 1860 - Sections 88, 92, 93 and 304A

Appeal No. : Crl. Misc. Appln. No. 189 of 2005

Appellant : Dr. Sujoy Das

Respondent : State

Advocate for Def. : W. Coutinho, P.P.

Advocate for Pet/Ap. : S.M. Sonak, Adv.

Disposition : Application allowed

Judgement :
ORDER

N.A. Britto, J.

1. The applicant, a part time General Surgeon working for E.S.I. Hospital in Margao, Goa has invoked the extraordinary jurisdiction of this Court under Section

482 of the Code of Criminal Procedure, 1973 to quash and set aside the process issued against him under Section 304-A, I.P.C. for having caused the death of Ganpati Keni.

2. The undisputed facts are as follows: The said Ganpati Keni, 26 years of age, was examined by the applicant on 25.3.03 and the examination disclosed that the said Ganpati Keni was having right inguinal hernia after the anesthetist certified the said patient was fit to undergo surgery, the said patient was advised admission on 26.6.03 for operation/surgery on 27.6.03. After admission the patient was pre-operatively examined by Dr. Martha Fernandes and on 27.6.03 the said patient was operated by the applicant under spinal anesthesia for right hernioplasty and after about half an hour the patient was shifted to the ward. At about 2.30 p.m. the patient's B.P. was 110/80 but at about 4.30 p.m. the patient's mother complained to the nurse on duty Mrs. Ninnette that her son was complaining of pain and she was told that the said pain was due to surgery but as the pain did not subside, the matter was reported to Dr. Vijayraj Desai, the Medical Officer on duty and Dr. Desai found that the patient was in severe pain, bleeding at the side of the surgery and there was swelling of scrotum and penis. Dr. Desai, therefore, informed the patient's mother that he was unable to do anything. The patient also complained to Dr. Desai about the pain in the abdomen but Dr. Desai found that his pulse and blood pressure were normal but since he found that there was a deep haematoma at the site of operation, Dr. Desai ordered a hemoglobin test to be done and he also told the mother of the patient that there was bleeding inside and the patient might have to undergo a second surgery. Coming back to the doctor's room, Dr. Vijayraj Desai informed the applicant and the applicant told Dr. Desai that nothing would go wrong because the haemotoma was self-limiting i.e. the bleeding would stop on its own and the applicant instructed Dr. Vijayraj to give compression bandage over the incision site, give injection and two more bottles of IV fluid which instructions he passed on to the staff nurse. He again examined the patient at about 11.00 p.m. and found that the patient's pulse rate was rising and since he felt that the bleedings was continuing, he requested the applicant to come to the hospital and that he would send an ambulance to fetch him, if required, but the applicant told him that he was a bit busy and could not come and the applicant also told Dr. Desai that the patient need not be transferred anywhere else and that

he would come in the morning and examine the patient. Probably because the patient's mother was a bit apprehensive, Dr. Desai informed the applicant to speak to her but the applicant chose not to speak to her. Dr. Desai examined the patient at about 12.00 midnight and found his blood pressure was normal and the pulse was 116/min. Dr. Desai examined the patient again the next morning i.e. at 6.00 a.m. on 28.6.03 and his condition was the same as it was found at midnight. He examined him again at 8.00 a.m. and at this time the pulse had increased to 120/min. and the blood pressure was lower than what it was at 6.00 a.m. Dr. Pravin Bhat joined duty and replaced Dr. Desai and by then the hemoglobin report of the patient was received and was found to be normal. It appears that the applicant after having spoken to Dr. Vijayraj Desai at about 11.00 p.m., spoke to Dr. Anita Naik, the anesthetist and informed her that there might be a need for opening the operation of the patient Ganpati Keni and that she should be ready to come to the hospital if required, in case he received another call from the hospital.

3. The applicant examined the patient at about 10.00 a.m. on 28.6.03 and at about 10.50 a.m. the patient was operated again and Dr. Anita Naik was the anesthetist at the time. As the patient was conscious but sedated and responded to oral commands, he was shifted from the recovery ward to the male ward. The patient was monitored and blood transfusion was started at about 12.45 noon. At about 6.45. p.m. Dr. Francis Pereira informed the anesthetist Dr. Anita Naik that the patient was not conscious although he was put on oxygen and by 8.00 p.m. or so the patient was also not responding to deep painful stimuli and his pulse was 109 beats/ min., respiratory rate was 24/ min but the blood pressure was 110/80 and the applicant as well as the physician Dr. Vibhav Gude were informed. The patient had an episode of convulsion and it appears that the applicant as well as the physician were unable to understand why the condition of the patient was deteriorating. By 9.30 p.m. the patient was diagnosed as a case of intra-cerebral haemorrhage and advised CT Scan and as this facility was unavailable he was sent to Goa Medical College, Bambolim accompanied by the said Dr. Anita Naik and the nurse Mrs. Ninnette. On admission, the patient was examined by the casualty Medical Officer and the Senior Residents in Surgery and Medical, a CT Scan was taken which disclosed that the patient had bilateral symmetrical hyposensitizes in both high parietal areas suggestive of ischemia. An ultrasound

was done which was normal. The patient was provided with conservative treatment but at about 9.00 a.m. on 29.6.03, the patient's was found not to be recordable, beating was laborious and the condition of the patient deteriorated further. At about 4.00 p.m. on 29.6.03, the patient was referred to anesthesia resident for transferring to ICU and to be put on the ventilator but there was no vacant ventilator available. The conservative treatment continued and the condition of the patient continued to deteriorate gradually and ultimately the end came at 5.55 a.m. on 30.6.03 The patient's body was shifted to the mortuary for autopsy which was performed by Dr. Silvano Sapeco and who opined that the death of the patient was due to hemorrhagic shock as a sequel to planned operation for repair of right inguinal scrotal hernia.

4. On 9.7.03, the father of the patient-deceased filed a complaint to Police Inspector, Margao Town Police Station, alleging that his son had died due to gross negligence of the doctors, nurses and other concerned staff of the said E.S.I. Hospital, Margao. In the said complaint the father of the deceased stated that after his son had complained regarding severe pain in his stomach to the attending nurses who had contacted the doctor and after the doctor had contacted the applicant, the applicant had told that be was unable to come and that he would see the patient on the next day. As a result of the said complaint the police authorities requested the Dean of Goa Medical College, to conduct an inquiry into the death of deceased so as to ascertain medical negligence by the attending doctor/ s, nurse/s and any other staff of the hospital. Consequently a Committee headed by four doctors under the Chairmanship of Dr, Oswald D'sa, (Professor and Head of the Department of Surgery) and including Dr. S.D. Sapeco, (Professor and Head of the Department of Forensic Medicine) was constituted who examined all the medical case papers and came to the conclusion that the applicant was negligent during the discharge of his duty as Surgeon after operating the said patient Ganpati Keni on 27.6.03 as he declined/refused to examine the patient post-operatively in the said hospital on 27.6.03.

5. A charge-sheet having been filed against the applicant, the learned Judicial Magistrate, First Class, Margao issued process against the applicant and on or about 31.1.05 explained the substance of accusation to him. As can be seen from

the said substance of accusation, the allegation against the applicant is that after the operation the condition of the applicant had become serious and the applicant declined/ refused to examine the patient post-operatively in the said hospital. It further states that the said Committee of four doctors had held him responsible for committing negligence in the discharge of his duties as a Surgeon, after operating the said patient.

6. The applicant filed a revision to the Court of Sessions and the learned Additional Sessions Judge, was of the view that only because the said Committee of doctors had not used the expression 'grossly negligent' it could not be said that the learned Judicial Magistrate, First Class could not have taken cognizance of the case. The learned Additional Sessions Judge was of the view that prima facie evidence showed that there were post-operative complications which had to be timely attended but were not attended by the applicant and therefore, the non-attendance was but prima facie gross negligence on the part of the applicant and therefore, proceeded to dismiss the revision application.

7. Shri Sonak, the learned Counsel on behalf of the applicant has relied upon the case of Jacob Mathew v. State of Punjab : 2005 CriLJ3710 and has submitted that the facts alleged against the applicant do not disclose prima facie that the applicant can be prosecuted for criminal negligence of for gross negligence. Shri Sonak submits, and in my view rightly, that it is not the case of the prosecution that the applicant had made any mistake either in the first or second surgery which he performed on the deceased and that the proximate cause of the death of the deceased could not be due to the fact that the applicant did not visit the patient when his presence was called for by Dr. Vijayraj Desai as the condition of the patient was not good. Shri Sonak submits that negligence in medical profession has got to be of much higher degree and only because the applicant did not attend to the patient in time cannot be considered as gross negligence on his part to be prosecuted criminally. Shri Sonak submits that so many intervening circumstances took place which ultimately resulted in the death of the deceased and if at all the applicant would be liable, the liability of the applicant would be under civil law. On the other hand, Ms. Coutinho, the learned P.P. has submitted that inherent jurisdiction of this Court cannot be invoked to stifle a just prosecution. As per Ms.

Coutinho what is stated by the Supreme Court in the case of Jacob Mathew : 2005 CriLJ3710 (supra) was inapplicable to the case at hand because the Supreme Court was considering a case of a person who suffering of cancer.

8. The submissions of learned P.P. are totally misplaced. The jurisdiction of this Court can certainly be allowed to be invoked in appropriate cases where even if the facts alleged are accepted as true, no offence is disclosed from the said facts. It can be allowed to be invoked, interalia, to prevent abuse of the process of Court and to secure the ends of justice. It would be an abuse of process of the Court to allow any action, which would result in injustice and prevent promotion of justice. The Court is always justified to quash any proceedings if it finds that the continuation of such proceedings will amount of abuse of the process of Court or quashing of such proceedings would otherwise serve the ends of justice. Court is duty bound to examine facts find out whether the stated facts disclose an offence or not even if all the allegations are accepted in toto. The Apex Court in the case of Jacob Mathew AIR 2005 SSC 3108 has analysed the law on the subject of medical negligence and has stated that the subject of negligence in the context of medical profession necessarily calls for treatment with a difference and therefore, the submission that the ratio of that case is inapplicable has got to be rejected outright.

9. Although some other submissions have also been made by learned Advocate Shri Sonak namely that the report of hemoglobin test being normal did not indicate that there was excessive bleeding; that the records do not show that Dr. Desai had informed the applicant of the patient, etc. these in my view cannot be considered at this stage. What has to be considered at this stage is whether the facts stated against the applicant and reproduced hereinabove even if they are taken on the face value and which in fact are required to be taken on face value, at this stage prima facie disclose commission offence punishable under Section 304-A I.P.C against the applicant ?

10. As already stated, from whatever angle one looks at the case of prosecution, the gravamen of the charge against the applicant is that the applicant did not attend to the patient on 27.6.03 at around 11.00 p.m. in spite of being told by Dr.

Vijayraj Desai about the condition of patient and that he should come to the hospital to visit him as he felt that the patient had required repair surgery. Would that amount to criminal negligence as now defined? Or in other words was that act or conduct so rash or negligent that it caused the death of the patient?

11. The entire law on the subject of medical negligence and the prosecution of the doctors for criminal negligence has been reconsidered by the Supreme Court in the case of Jacob Mathew v. State of Punjab AIR 2005 SC 3108 (supra). The Supreme Court in the case of Jacob Mathew referred to Alan Marry and Alexander McCall Smith in their Book 'Errors, Medicine and the Law' and observed that there is marked tendency to look a human actor to blame for an untoward event a tendency which is closely linked with the desire to punish. Things have gone wrong, and therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of mens rea has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. Human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpression, misgivings and misplaced allegations against the operator i.e. the doctor be ruled out. One may have notions of best or ideal practice, which are different from the reality of how medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine. Could be said in this case that the patient would have lived in case the applicant had come at 11.00 p.m. On 27.6.03 and done the repair surgery? It cannot be said that the patient would have ultimately survived in case he was provided with a ventilator in Goa Medical College? It is difficult to tell and in case a ventilator was provided and the patient has lived then that would have not

been nay blame on the applicant.

12. The Supreme Court further stated that the criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. Then the Supreme Court referred to Sections 88,92,93 of the Indian Penal Code, 1860 which deal with general exceptions in relation to surgeons which save surgeons from criminal action. The Supreme Court then made a review of the decisions of the Privy Council as well as of the Supreme Court and summed up what the Privy Council had stated in John Oni Akerele v. The King AIR 1943 PC 72 as follows :

i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.;

ii) That the degree of negligence required is that is that is should be gross, and that neither a jury nor court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion.... The most favorable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.

(Emphasis supplied)

and observed that Their Lordships of the Privy Council had refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with finding that a high degree of care was not exercised. There the Court further observed that Their Lordships also refused to agree with the thought that

merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved. It was a case where a qualified medical practitioner had given to his patient the injection Sobita which consisted of sodium bismuth tart rate as given in British Pharmacopoeia but what was administered was an overdose of Sobita and the patient had died. The Supreme Court then referred to the case of Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra : [1965]2SCR622 which was a case under Section 304-A of I.P.C. wherein the Supreme Court was approved a statement of law by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap (1902) 4 Bom LR 679 which read as follows:

To impose criminal liability under Section 304-A, India Penal Code, it is necessary that the death should be the direct result of a rash and negligent act of the accused, and that act must be proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non.

and further observed that the said statement of law by Sir Lawrence Jenkins was generally followed in fact by High Courts and was correct view to be taken of the meaning of Section 304-A I.P.C. and the same view was also reiterated in the case of Kishan Chand v. The State of Haryana : (1970)3SCC904 . The Supreme Court also referred to some cases, which dealt with civil liability and summed up the conclusions as follows:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guide 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 a 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 of 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 case, 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 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, 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 304-A of IPC, yet it is settled that in criminal law negligence or reckless, 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 medial 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.

13. The Supreme Court accepted the law laid down in the case of Dr. Suresh Gupta : 2004 CriLJ3870 and re-affirmed the same making it clear that they were also affirming the legal principles laid down therein and not whether on the facts of that case the accused could or could not have been held guilty of criminal negligence. The Supreme Court also approved the passage from 'Errors, Medicine and Law' by Alan Merry and Alexander McCall Smith which were cited with approval in Dr. Suresh Gupta's case (supra) and proceeded to place certain guidelines for the prosecution of medical professionals, which needless to observe, in the case at hand have been followed even before the said guidelines

were laid down by the Supreme Court. The Supreme Court also accepted the passage defining negligence by professionals, generally and not necessarily confined to doctors, in the famous case of Bolam v. Friern Hospital Management Committee 1957 (1) W.L.R. 582 in the following words:

Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill....A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

14. Reverting to the case of Suresh Gupta : 2004 CriLJ3870 it may be stated that the cause of death was stated to be non introduction of cuffed endotracheal tube of proper size to prevent aspiration of blood from the wound in respiratory passage. The Supreme Court held that even if the said act attributed to be true could be described as negligence as there was lack of due care and precaution, it may only attract liability in tort but could not be described as so reckless or grossly negligent as to attract criminal liability.

15. Admittedly, the deceased patient was operated by the applicant as a routing case of right inguinal hernia and it is nobody's case that there was any rashness or negligence on the party of the applicant in conducting the said operation on 27.6.03 or for that matter at the time of repair surgery on 28.6.03. As stated herein repeatedly, the main and only charge against the applicant is that the applicant did not attend to the patient at about 11.00 p.m. on 27.6.03 when Dr. Vijayraj Desai informed the applicant about the condition of the patient namely that when the patient was stated to have been found bleeding from inside, which in the opinion of the applicant would have stopped on its own after the patient was given the treatment which he prescribed over the telephone to Dr. Vijayraj Desai. It is certainly nobody's case that the patient would have lived in case the patient was immediately attended to and operated by the applicant at about 11.00 p.m. and in case the operation was not delayed by another 12 hours or so. Likewise it is

nobody's case that the patient might have survived even in case deceased was provided with a ventilator in Goa Medical College since that appears to be the straw which brought an end to the life of the deceased at an early age. The non-attendance of the applicant when he was required by Dr. Vijayraj Desai to come and examine the said patient may at the most be lack of care or breach of duty. It must also be noted that the non-attendance could have been due to error of judgment because the applicant then thought that bleeding would stop by the treatment he prescribed though Dr. Desai. Under no circumstances could it be said that the patient died because he was not attended to by the applicant. The non-attendance is not Causa causans i.e. to say the direct result of the negligent act on the part of the applicant resulting into the death of the patient. Even in case the patient was operated by the applicant again in case he had come to the hospital as required by Dr. Vijayraj Desai, nobody could say whether the patient would have ultimately survived. Causa Causans is nothing but the immediate cause or in other words the last link in the chain of causation. Causa sine qua non is a cause without which the effect in question would not have happened or in other words a necessary or invariable cause. It would be too much to say that the patient died because he was not operated by the applicant immediately when told by Dr. Vijayraj Desai to come to the hospital. In other words, the non-attendance by the applicant on the said patient on the evening of 27.6.03, on being told by Dr. Vijayraj Desai about the condition of the patient cannot be said to be the direct of the proximate cause which led to the death of the deceased. In any event, that part of alleged negligence of non-attending to the patient in time cannot be said to be so reckless of grossly negligent act so as to invite prosecution of the applicant for criminal negligence under Section 304 I.P.C. The facts stated by the prosecution the reproduced hereinabove even if accepted on the whole and on their face value do not make out a case of criminal rashness or negligence. As observed by the Supreme Court in the case of Jacob Mathew : 2005 CriLJ3710 (supra) criminal process once initiated subjects the medical professionals to serious embarrassment and sometime harassment and at the end he may be exonerated by acquittal of discharge. That will be the end result in case the trial of the case is continued. Suffice it to say that the facts stated do not disclose a high degree of negligence to be described as gross negligence to invite his criminal

prosecution.

16. In the light of the above, the application is bound to succeed. The orders of both the Court below are liable to be quashed and set aside. As a. result the applicant shall discharged under Section 304-A I.P.C.

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