IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 12th OF MARCH, 2024

MISC. CRIMINAL CASE No. 8190 of 2020

BETWEEN:-

DR. RAJESH BATRA

.....PETITIONER

(BY SHRI VAIBHAV TIWARI - ADVOCATE)

AND

1. THE STATE OF MADHYA PRADESH THR. P.S. KOTWALI P.S. KOTWALI DISTRICT KATNI (MADHYA PRADESH)

2. VINAY HALDAR

.....RESPONDENTS

(SHRI MOHAN SAUSARKAR – GOVERNMENT ADVOCATE FOR RESPONDENT NO.1 / STATE)

This application coming on for admission this day, the court passed the following:

ORDER

1. Case diary is available.
2. This application under Section 482 of Cr.P.C. has been filed seeking the following reliefs :-

(i) To allow this application.

(ii)To quash the FIR registered against the applicant at Police Station Kotwali, District Katni in Crime No. 818/2019 for offence under Section 338 of IPC.

(iii) To quash the criminal case pending before the Chief Judicial Magistrate, Katni in Criminal case RCT No. 86/2020, against the applicant, in the interest of justice.

3. It is submitted by counsel for the State that the Police after completing the investigation has filed charge sheet. Even the copy of charge sheet has been placed on record.

4. Notices to the complainant by RAD mode were sent. However, the service report has not been returned back. Thus, in the light of provisions of Section 27 of the General Clauses Act and Rule 11(1), Chapter XV of the High Court Rules, Respondent no. 2 is treated to be deemed served.

5. It is the case of the applicant that respondent no. 2 lodged an FIR against the applicant on the allegations that he had stomach pain and he went to Dharmlok Hospital for treatment on 21.4.2019. He was treated by Dr. Rajesh Batra (applicant) who informed that there is a stone which is required to be removed and operation expenses of Rs.27,000/- apart from other expenses were informed. The amount was deposited by respondent no. 2 and respondent no. 2 was operated upon by the applicant on 23.4.2019. During his treatment by adopting a wrong method of medical treatment, an injection was given on his right leg. On 28.4.2019 when he reached home, he released that his right leg

was senseless and accordingly, he immediately went back to Dharmlok Hospital on 28.4.2019 where he was kept hospitalized for two days and thereafter, he was referred to Nagpur where he remained hospitalized from 1.5.2019 to 3.5.2019. He was treated in the said hospital and he was required to spend Rs.1 lac for treatment. Again on 3.5.2019 he was referred back to Dharmlok Hospital, Katni and he remained hospitalized in Dharmlok Hospital, Katni from 3.5.2019 to 6.5.2019. However, as his condition did not improve, therefore, he remained hospitalized in Netaji Subhash Chandra Bose Government Medical College, Jabalpur from 6.5.2019 to 20.5.2019 where his right leg was amputated on account of improper treatment given to him in Dharmlok Hospital. Accordingly, it was alleged that on account of improper treatment given by the applicant, his right leg was amputated and his life has spoiled and accordingly, a prayer was made that action be taken against the applicant.

6. On the basis of the said complaint, FIR in Crime No. 818/2019 was registered at Police Station Kotwali, District Katni.
7. Challenging the FIR, a solitary contention has been raised by counsel for the applicant that the police had not obtained report from the expert committee and, therefore, the registration of an FIR on the ground of medical negligence is bad in law.
8. Per contra, the application is vehemently opposed by counsel for the State. It is submitted that the complainant had suffered amputation of his right leg on account of medical negligence of the applicant; therefore, the FIR has been registered.
9. Heard learned counsel for the parties.

10. Moot question for consideration is as to whether the Police can conduct an investigation into the alleged medical negligence of the doctor or not.

11. The question involved in the present case is no more *res integra.*

12. The Supreme Court in the case of **Jacob Mathew Vs. State of Punjab reported in (2005) 6 SCC 1** has held as under:-

> **"48.** We sum up our conclusions as under:-
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> (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'.
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> (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 v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582, 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 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.

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 [1957] 1 W.L.R. 582, 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."

13. The Supreme Court in the case of **Kusum Sharma and others vs. Batra Hospital and Medical Research Center and Others** reported in **(2010) 3 SCC 480** has held as under:-

> **89.** On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:
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> *I.* Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily

regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

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

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. *V.* In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

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

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

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

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

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

14. The Supreme Court in the case of **Martin F. D'Souza v. Mohd. Ishfaq** reported in **(2009) 3 SCC 1** has held as under:-

31. As already stated above, the broad general principles of medical negligence have been laid down in the Supreme Court judgment in *Jacob Mathew v. State of Punjab* [(1957) 1 WLR 582 : (1957) 2 All ER 118] . However, these principles can be indicated briefly here:

The basic principle relating to medical negligence is known as the Bolam Rule. This was laid down in the judgment of *McNair, J. in Bolam v. Friern Hospital* [(1957) 1 WLR 582 : (1957) 2 All ER 118] as follows : (WLR p. 586)

"… 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 the 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."

(emphasis supplied)

Bolam test has been approved by the Supreme Court in *Jacob Mathew cas*e.

65. From the aforementioned principles and decisions relating to medical negligence, with which we agree, it is evident that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions. *The law is a watchdog, and not a bloodhound*, and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20-A read with Section 3(m) of the Indian Medical Council Act, 1956.

66. Having mentioned the principles and some decisions relating to medical negligence (with which we respectfully agree), we may now consider whether the impugned judgment of the Commission is sustainable. In our opinion the judgment of the Commission cannot be sustained and deserves to be set aside.

67. The basic principle relating to the law of medical negligence is the Bolam Rule which has been quoted above. The test in fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill. Considering the facts of the case we

cannot hold that the appellant was guilty of medical negligence.

104. Hence courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in *Indian Medical Assn. v. V.P. Shantha* [(1995) 6 SCC 651] should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide SCC para 22) : (*V.P. Shantha case* [(1995) 6 SCC 651] , SCC p. 665)

> *"22.* In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."

105. It may be mentioned that All India Institute of Medical Sciences has been doing outstanding research in stem cell therapy for the last eight years or so for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc. though not yet with very notable success. This does not mean that the work of stem cell therapy should stop, otherwise science cannot progress.

106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie

> case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew case* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369], otherwise the policemen will themselves have to face legal action."

15. The Supreme Court in the case of **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others** reported in **(2009) 9 SCC 221** has held as under :-

> **133.** It is noteworthy that standard of proof as also culpability requirements under Section 304-A of the Penal Code, 1860 stand on an altogether different footing. On comparison of the provisions of the Penal Code with the thresholds under the tort law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under civil and criminal branches of medical negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to the same under Section 304-A.
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> **175.** Criminal medical negligence is governed by Section 304-A of the Penal Code. Section 304-A of the Penal Code reads as under:
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> "304-A. *Causing death by negligence*.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."
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> **176.** The essential ingredients of Section 304-A are as under:

(i) Death of a person.

(ii) Death was caused by the accused during any rash or negligent act.

(iii) Act does not amount to culpable homicide.

And to prove negligence under criminal law, the prosecution must prove:

(i) The existence of a duty.
(ii) A breach of the duty causing death.
(iii) The breach of the duty must be characterised as gross negligence.

(See *R. v. Prentice* [1994 QB 302 : (1993) 3 WLR 927 : (1993) 4 All ER 935] .)

177. The question in the instant case would be whether the respondents are guilty of criminal negligence.

178. Criminal negligence is the failure to exercise duty with reasonable and proper care and employing precautions guarding against injury to the public generally or to any individual in particular. It is, however, well settled that so far as the negligence alleged to have been caused by medical practitioner is concerned, to constitute negligence, simple lack of care or an error of judgment is not sufficient. Negligence must be of a gross or a very high degree to amount to criminal negligence.

179. Medical science is a complex science. Before an inference of medical negligence is drawn, the court must hold not only the existence of negligence but also omission or commission on his part upon going into the depth of the working of the professional as also the nature of the job. The cause of death should be direct or proximate. A distinction must be borne in mind between civil action and the criminal action.

180. 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 (sic of a) much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.
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> **181.** 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."

16. The Supreme Court in the case of **S. K. Jhunjhunwala v. Dhanwanti Kaur and another** reported in **(2019) 2 SCC 282** has held as under:-

> **21.** So far as this Court is concerned, a three-Judge Bench in *Jacob Mathew v. State of Punjab [Jacob Mathew v. State of Punjab,* (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] examined this issue. R.C. Lahoti, C.J. (as he then was) speaking for the Bench extensively referred to the law laid down in Bolam case [*Bolam v. Friern Hospital Management Committee,* (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] and in *Eckersley case [Eckersley v. Binnie*, (1988) 18 Con LR 1 (CA)] and placing reliance on these two decisions observed in his distinctive style of writing that the classical statement of law in *Bolam case* [*Bolam v. Friern Hospital Management Committee*, (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] has been widely accepted as decisive of the standard of care required by both of professional men generally and medical practitioner in particular and it is invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence.
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> **22**. It was held in *Jacob Mathew case [Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369]

that a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is what the entire person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 not possess.

23. It was further observed in *Jacob Mathew case [Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the fact that a defendant charged with negligence who acted in accord with the general and approved practice is enough to clear him of the charge. It was held that the standard of care, when 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. It was held that 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 practises. His Lordship quoted with approval the subtle observations of Lord Denning made in *Hucks v. Cole [Hucks v. Cole*, (1968) 118 New LJ 469], namely,

"a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in

> *choosing one reasonable course of treatment in preference of another. A medical practitioner would be held liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field".*
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> (emphasis supplied)
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> **24.** In our view, the facts of the case at hand have to be examined in the light of the aforesaid principle of law with a view to find out as to whether the appellant, a doctor by profession and who treated Respondent 1 and performed surgery on her could be held negligent in performing the general surgery of her gall bladder on 8-8-1996."

17. A similar law has been laid down by the Supreme Court in the case of **Kalyani Rajan vs. Indraprastha Apollo Hospital and others, reported in 2024 (1) MPLJ Page 1.**
18. Thus, it is clear that unless and until the committee constituted as per the directions given by the Supreme Court in the case of **Jacob Mathew (supra)** gives its report about the medical negligence of the doctors, the doctors should not be prosecuted.
19. Admittedly, respondent no.2 has not approached the Committee of Experts to prove medical negligence of the applicant. Accordingly, prosecution of the applicant on account of medical negligence cannot be allowed to continue.
20. Resultantly, charge sheet as well as further proceedings in RCT No. 86/2020 pending in the Court of Chief Judicial Magistrate, Katni against the applicant are hereby **set-aside.**
21. However, liberty is granted to respondent no. 2 that if he so desires, he can approach the Expert Committee to establish the medical negligence

of the applicant doctor. It is made clear that if the Expert Committee comes to a conclusion that there was a medical negligence on the part of the applicant doctor, then respondent no. 2 shall be free to take legal remedy which may be available to him.

22. With aforesaid observation, the petition is **allowed**.

(G.S. AHLUWALIA)
JUDGE