IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE FIR/ORDER) NO. 23773 of 2022

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PRERAK GOVINDBHAI PATEL

Versus

STATE OF GUJARAT

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Appearance:
MS VIDITA D JAYSWAL(6730) for the Applicant(s) No. 1
MR RJ GOSWAMI(1102) for the Respondent(s) No. 2
MS CM SHAH, APP for the Respondent(s) No. 1
RULE SERVED for the Respondent(s) No. 3,4

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**

Date : 14/02/2024

ORAL ORDER

1. By way of this application, under Section 482 of the Code of Criminal Procedure, 1973, the applicant Dr.Prerak Govindbhai Patel – original accused no.3 of Criminal Case No.82656 of 2018, by invoking inherent powers of this Court, seeks to quash the said criminal proceedings.

2. This Court has heard learned counsels Ms.Vidita Jaiswal, Mr.R.J. Goswami and Ms.C.M. Shah, learned APP for the respective parties.

3. Brief facts leading to file present application are that after completion of MBBS Course, the applicant was pursuing his post graduate course in B.J. Medical College, Ahmedabad. In the year 2012, he was first year student of department of general surgery. The wife of second respondent viz. Jiviben was operated on 14.03.2012 as she was having tumor in the stomach. The

operation was performed by Dr.Hardik Bhatt, accused no.1. The applicant along with accused no.2 Salil Patil being a resident doctor were present in the operation room for learning as well as academic purpose and their presence would be a part of syllabus. The operation was successful. After five years of the operation, the wife of the second respondent was examined by Dr.Chauhan as she had complained of acute pain in the stomach. The sonography was done. In the report, she was having forceps in her stomach. She was advised to get treatment for the Civil Hospital, Ahmedabad. On 01.04.2017, she was admitted in the Civil Hospital for the necessary treatment and was taken to operation theater to take out the forceps which was negligently left during the first operation. However, on 03.09.2017, she died in the hospital.

4. In the aforesaid facts and circumstances, the second respondent lodged an FIR against Dr.Hardik Bhatt, Dr.Salil Patil and the applicant Dr.Prerak Patel for causing death of Jeviben by act of negligence. After the investigation, the applicant and other two doctors as referred above having chargesheeted and the same has been culminated into C.C.No.82656 of 2018.

5. The accused no.2 Salil Patil had filed a quashing petition being Cr.M.A.No.15926 of 2018 and the same was allowed on 18.07.2019.

6. Ms.Vidita Jaiswal, learned counsel has raised the following contentions:

(I) That the applicant doctor has been charged for

causing death by negligence under Section 304(A) of the Indian Penal Code. The first operation for removal of tumor was done in the year 2012 and the same was performed by Dr.H.B. Bhatt in the presence of the applicant and co-accused who were junior doctors. The junior residence doctors cannot perform any surgery. Thus, therefore, she would urge that under no circumstances, the applicant could have operated the surgery of the deceased as he was not qualified to do the said surgery. In such circumstances, the contents of the FIR, if accepted in entirety do not *prima facie* make out a case against the applicant.

(II) That the applicant was present as a part of syllabus of the postgraduate course, in such circumstances, the presence of the applicant doctor at the time of first operation would not fall under the mischief of negligence and therefore, when there was no any existence of any duty or breach of the duty, the criminal proceedings by invoking Section 304(A) of the Indian Penal Code would amount to misuse of process of law and Court.

7. In view of the aforesaid contentions and relying on the order passed in the matter of co-accused, learned counsel Ms.Vidita Jaiswal, has submitted that the case is made out for exercising inherent powers to quash the criminal proceedings.

8. On the other hand, Mr.R.J. Goswami, learned counsel and Ms.C.M. Shah, learned APP have jointly opposed the application and contended that the Court should not exercise its jurisdiction as no any exceptional and extraordinary circumstances exists for

exercising the powers. They would further urge that in the facts of present case, *prima facie* case is made out for the offence under Section 304(A) of the Indian Penal Code and therefore, the issue raised by the applicant to be tried by the Court concerned and at this stage, the Court may not examine the genuineness or otherwise of the allegations made in the FIR.

9. Having regard to the facts and circumstances of present case and on perusal of the allegations made in the FIR and chargesheet case papers, the issue falls for my consideration whether the case is made out to quash the criminal case by exercising inherent powers under Section 482 of the Code of Criminal Procedure, 1973.

10. The applicant herein being a doctor is facing the charge of medical negligence as provided under Section 304A of the Indian Penal Code. It is necessary to reproduce Section 304A of the Indian Penal Code which reads thus:

> ***"Section 304A.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."*

11. A bare perusal of the provision says that, a person causes the death of another by such acts as are rash or negligent, but there is no intention to cause death and no knowledge, the act will cause death shall be punished with the imprisonment as prescribed.

12. In the case of ***Malay Kumar Ganguly vs. Sukumar Mukherjee*** reported in ***(2009) 9 SCC 221***, the Apex Court while dealing with the case of medical negligence, prescribed three criteria to prove negligence under the criminal law and held that, in order to prove negligence, the prosecution must prove (i) the existence of duty; (ii) a breach of the duty causing death and (iii) the breach of the duty must be characterized as gross negligence. The Apex Court further held that, what is or is not negligence involves a consideration of what which reasonable man would or would not have done in these circumstances. For negligence, to amount an offence, the element of *mensrea* must be shown to exist. A negligence which is not such high degree may provide a ground for action in civil law, but cannot form basis of prosecution. The criteria to prosecute a medical professional for which in the given facts and circumstances, require to be proved that, no medical professional in his ordinary senses and prudence would have done or failed to do so.

13. In the case of ***Dr. Suresh Gupta vs. Government of NCT of Delhi & Anr.,*** reported in ***AIR (2004) SC 4091***, the Supreme Court observed that, for fixing liability on a Doctor or a Surgeon, the stand of negligence require to be proved should be so high as can be described "gross negligence". To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence, enough to fasten liability in civil law.

14. In the case of ***P.B. Desai vs. State of Maharashtra,*** reported in ***AIR (2014) SC 795***, the Apex Court examined the term negligence so far medical professionals are concerned and

held that, where negligence is an essential ingredients 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. The only state of mind which is deserving of punishment is that, which demonstrates an intention to cause harm to others or where there is deliberate willingness to subject others to the risk of harm. The negligent conduct does not entail an intention to cause harm, but, only involves a deliberate act subjecting another to the risk of harm where the actor is aware of the existence of the risk and, nonetheless, proceeds in the face of the risk.

15. While deciding whether the medical professional is guilty of medical negligence, the Apex Court in the case of ***Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others,*** reported in ***AIR (2010) SC 1050***, laid down following principles namely:

> *"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.*
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> *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 unnecessary 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."*

16. In the case of ***Bombay Hospital and Medical Research Centre vs. Asha Jayswal,*** reported in ***(2021) 0 AIJEL-SC 68074***, the Supreme Court while dealing with the civil appeal against the order of the National Consumer Forum examine the scope of medical negligence and after considering the celebrated judgment reported as *Jacob Mathew (supra),* held that, simple lack of care, an error of judgment or an accident is not proof of negligence on the part of the medical professional. It is further held by the Supreme Court that, in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that, the medical professional was negligent.

17. Recently, in the case of ***Dr. (MRS.) Chanda Rani Akhouri &Ors. vs. Dr. M.A. Methusethupathi & Ors.,*** reported in ***(2022 LiveLaw (SC) 391)***, the Apex Court in para-31 while examining the medical negligence of the hospital and its doctors, observed that, the doctors as expected to take reasonable care, but no professional can assure that the patient will come back home after overcoming the crisis. In para-27, it is observed that, a medical practitioner is not to be held liable simply things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable cause of treatment in preference to another. In the practice of medicine, there could be varying approaches of treatment. There could be a genuine

difference of opinion. However, while adopting a course of treatment, the duty caste upon the medical practitioner is that, he must ensure that medical protocol being followed by him is to the best of his skill and with competence at his command. At the given time, a medical practitioner would be liable only where his conduct fell below that of the standards of reasonably competent practitioner in his field.

18. In light of the settled law on the subject fixing the liability of the medical profession enunciated by the Apex Court in its various judgments and applying the same to the facts and circumstances of present case, it emerges from the record that the wife of the second respondent was operated on 14.03.2012 at Civil Hospital and in the year 2017, due to complaint of stomach pain, the sonography test was done and in the stomach, forceps was found. The wife of the second respondent Jiviben admitted in the hospital again on 01.04.2017 and after removal of forceps, she died on 03.09.2017. In the year 2012, the applicant was pursuing postgraduate course in B.J. Medical College in the department of surgery and it was compulsory for him to attend the hospital. Thus, therefore, the applicant and Dr.Salil Patil were present in the operation theater with senior doctors, who had performed the first surgery of deceased Jeviben. In such circumstances, it is an admitted fact that the applicant did not have performed the surgery of the deceased. In order to prove the negligence under the criminal law, the prosecution must prove the existence of duty and its breach causing the death and the same must be gross negligence.

19. In the aforesaid admitted facts, when the applicant was not on duty as a surgeon and did not have performed any operation upon the deceased, he cannot be prosecuted for the offence under Section 304(A) of the Indian Penal Code and therefore, this Court is of *prima facie* view that the FIR and the chargesheet case papers lacks ingredients of the offence alleged and allegations do not disclose commission of the alleged offence nor made out a case of causing death by negligence.

20. For the reasons aforementioned, this Court is convinced that the continuation of the proceedings qua the applicant would amount to misuse of the process of the law and Court. It is settled principle of law that it would be an abuse of process of the law and Court to allow any action which result in injustice and prevent promotion of justice.

21. Resultently, present application is **allowed** and proceedings of Criminal Case No.82656 of 2018 qua the applicant is quashed and set aside. The observations made hereinabove are *prima facie* in nature and confined to the adjudication of present application. The Trial Court shall not get influence by the aforesaid observations during the course of the trial.

(ILESH J. VORA,J)

Rakesh