

**A.F.R.**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLMC NO.1002 of 2017**

(In the matter of application under Section 482 of the Criminal Procedure Code, 1973).

**Dr. Biswa Mohan Mishra** ... **Petitioner**  
-versus-

**State of Orissa** ... **Opposite Party**

**For Petitioner** : **Mr. M.K.Mishra,**  
**Sr. Advocate**

**For Opposite Parties** : **Mr. S.S. Pradhan, AGA**

**CORAM:**

**JUSTICE G. SATAPATHY**

**DATE OF JUDGMENT :14.08.2023**

**G. Satapathy, J.**

This application U/S.482 of Cr.P.C. seeks to quash the criminal proceeding instituted against the petitioner in G.R. Case No. 1655 of 2009 arising out of Lingaraj P.S. Case No. 70

of 2009 pending in the file of learned S.D.J.M., Bhubaneswar.

**2.** The facts in precise are the petitioner was a Doctor and attached to Bhubaneswar Municipal Corporation Hospital (in short, "BMC Hospital") at Old Town, Bhubaneswar as a Medicine Specialist. At the relevant time of occurrence on 01.07.2009 at about 6 P.M., Madhusmita Sahoo (hereinafter referred to as the "deceased") was admitted at bed No. 36 in Medicine Ward of BMC Hospital and she was under the treatment of the petitioner. As the deceased was having low haemoglobin and her condition was getting worse, her uncle requested the petitioner and staff of BMC Hospital to give her blood transfusion immediately for her treatment, but although they assured to give the blood on 02.07.2009, her condition became serious at about 11 P.M. on 01.07.2009 and despite being requested by Doctor Sujata for several times, the petitioner did not

respond and thereby, the informant also requested the petitioner, but he refused and asked him to contact with Doctor B.N.Das Mohapatra Surgery Specialist to attend the patient and the said Doctor on being requested over phone assured to direct the petitioner to attend the patient immediately, but unfortunately the deceased died in the midnight due to negligence of the petitioner.

**3.** In order to pacify and manage the situation, Dr. Sujata shifted the deceased with Oxygen support by an Ambulance to Capital Hospital where the Doctor on duty declared the deceased as received dead. After this incident on 02.07.2009 at about 2 P.M. the uncle of the deceased namely Sanjay Kumar Sahoo lodged an FIR before IIC, Lingaraj Police Station who registered Lingaraj P.S. Case No. 70 of 2009 and entrusted the investigation to S.I. of Police Dullabha Patel who after completion of investigation, placed charge sheet against the petitioner. This is how the

present criminal proceeding came to be instituted against the petitioner who by way of this application prays to quash the criminal proceeding.

**4.** In the course of hearing of this application, Mr.M.K.Mishra, learned Senior Counsel by drawing the attention of the Court to the ingredients of Section 304-A of the IPC has submitted that there is absolutely no material against the petitioner to find out any prima facie case U/s. 304-A of IPC. It is also advanced for the Petitioner that had the Ultra Sonography(USG) of abdomen and pelvis of the deceased been done in time, the diagnosis would have been established and treatment could have been properly provided to the patient(deceased) as opined by the District Medical Board (DMB), but the informant being advised in this regard had failed to conduct the USG and thereby, the family members of the patient were negligent. It is further submitted that the petitioner had discharged his duty by

advising the patient to take her to Capital Hospital since there was no medical facility of USG at BMC Hospital. Mr.Mishra, learned Senior Counsel by relying upon the decisions in (1) **Jacob Mathew v. State of Punjab and another; (2005) 6 SCC 1** and (2) **A.S.V. Narayan Rao v. Ratnamala and another; (2013) 10 SCC 741** has prayed to quash the criminal proceeding instituted against the petitioner.

5. In repelling the above submissions, Mr.S.S.Pradhan, learned AGA by taking this Court to the relevant facts mentioned in the charge sheet has submitted that despite repeated telephone calls and requests made by Dr.Sujata Samanta, the petitioner refused to come to attend the patient, rather he replied to shift the patient to any private Nursing Home which was a clear-cut violation of public duty and constitute gross negligence and the above fact stands justified by the Call Details Report (CDR) of

mobile phone number of the petitioner and land phone number of the BMC Hospital and the petitioner having not found performed his duty is squarely liable for gross negligence and the present proceeding therefore, should not be quashed.

**6.** Adverting to the rival contentions, this Court considers it imperative to discuss what constitute negligence in terms of Section 304-A of the IPC. For the purpose of attracting U/S. 304-A of IPC, the following ingredients are required:-

- (i) There must be death of a person in question.*
- (ii) The accused must have caused such death, and*
- (iii) Lastly such act of the accused was rash and negligent and it did not amount to culpable homicide.*

A causal reference to the materials on hand would go to disclose the allegation of medical negligence against the Petitioner and accordingly, the Petitioner has been charge-sheeted for offence U/S. 304-A of IPC which prescribes punishment for causing death by negligence. Negligence is a breach of duty

imposed by law and it may be either civil or criminal depending upon the nature and gravity of the negligence. Criminal negligence, on the other hand is gross and culpable, neglect or failure to exercise, reasonable and proper care and precaution to guard against injury, either to the public generally or to an individual in particular. In criminal case, the magnitude and degree of negligence are determinative factors. Besides, there must be *mens rea* in criminal negligence, which shall be of such nature to the utter disregard to the life and safety of others so as to amount a crime.

7. In the wake of aforesaid, the legal position as has been explained by the Apex Court in the decision in ***Dr. Suresh Gupta Vrs. Government of NCT of Delhi and another; (2004) 6 SCC 422***, wherein in paragraph 12 it has been held that where a patient dies due to the negligent medical treatment of the Doctor, the Doctor can be made liable in civil

law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable for offence U/S. 304-A of IPC. In the aforesaid decision at paragraph 20, the Apex Court has further held that

20. For fixing criminal liability on a Doctor or Surgeon, the standard of negligence required to be proved should be so high as can be described as "Gross Negligence" or "Recklessness". It is not merely lack of necessary care attention and skill. The decision of the house of Lords in ***R.v.Adomako; (1994) 3 All ER 79 (HL)*** relied upon on behalf of the Doctor elucidates the said legal position and contained the following observations:-

*"Thus a Doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State."*



8. In this case, the attention of the Court was drawn by the Petitioner to the decision in **Jacob Mathew (supra)** wherein the Apex Court in paragraphs 18,41,48(1), 48(7) and 52, has made certain observation which are certainly very much relevant in the matter and the same are extracted as under:-

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18. *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 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.*

41. *The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, viz. a duty of care in deciding whether to undertake the case,*

*a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient.*

*48(1). 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".*

*48(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.*

*52. 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\* test to the facts collected in the investigation.***

*\*Bolam v. Friern Hospital Management Committee.(1957)1WLR 582:(1957)2 All ER 118 (QBD)*

9. On applying the strict parameters as enunciated by the Apex Court which are referred to above, to test the sustainability of the case at hand by keeping in mind the requirement of gross negligence to prosecute a Doctor, it appears that the IO had got a medical board consisting of a team of Doctors namely Dr. S.K. Dash, MD (Medicine), Dr. S.C. Jenamani, MS(Surgery) and Dr. S.S. Sarangi, MS (O&G) constituted to form an opinion in the matter, but neither the report of the medical board nor the Post Mortem Report of the deceased though available were produced by the Petitioner in this case, but there appears some adverse and negative opinion

by the medical board with respect to the treatment of the deceased in the charge-sheet. The certified copy of the charge-sheet also discloses the report of the Dr. Sujata Samanta who was on duty on the relevant night in following words "despite my (her) repeated telephone request between 10.45 PM to 12.25 AM on 01/02.07.2009 to take proper action, the Petitioner (Doctor B.M. Mishra) refused to come to attend the patient, rather replied over telephone only to shift the patient (deceased) to any private nursing home." The IO in the aforesaid charge-sheet had also disclosed that the CDR of Mobile of Petitioner (9437262710) and land Phone of BMC Hospital (0674-2590255) establishes that at 12.30 AM in the mid night of 01/02.07.2009 the location of the mobile of the Petitioner was at Sahidnagar, but he was found to have referred the patient to surgery specialist mentioning the time 12.30AM on 02.07.2009 in the bed head ticket. Although number of documents had

been seized by the IO as per the charge-sheet, but the Petitioner has not produced any of the documents such as Pathological Report of the deceased, blood requisition, report of CMMO, report of Dr. B.Das Mohapatra and report of Dr. Sujata Samanta for perusal of the Court.

**10.** It is true that no sensible professional, more particularly a Doctor would intentionally commit an act or omit to do an act which would result in loss of life. A medical practitioner faced with an emergency situation would definitely try his level best to treat the patient and ordinarily could not leave his patient to die. The position of Doctor in India as accepted by public generally is next to God, but there are certain instances/aberration of course a few in number, the medical practitioners are acting in utter disregard to human life in expectation of pecuniary advantage to malign in the noble profession. A Doctor is always expected to treat or provide assistance to the patient

to the best of his knowledge and ability without any material expectation which is why renders such profession as noble and they are considered as emissary of God in our country. Reverting back to the case at hand, it is of course true whether the deceased died on account of gross negligence of the Petitioner is a question of fact which can be answered in the trial after evidence is led, but the materials so collected by the Investigating Agency when tested on the touch stone of the parameters as laid down in **Jacob Mathew(supra)**, there appears some prima facie case against the Petitioner vindicating a trial in this case.

**11.** On a cumulative assessment and discussion of facts and law as indicated above, it appears to the Court that the Petitioner has not made out a case to show that the criminal proceeding instituted against him in the aforesaid case is an abuse of process of

Court and, thereby, is required to be quashed. Hence, it is ordered.

**12.** In the result, the CRLMC stands dismissed on contest, but in the circumstance, there is no order as to costs.

**13.** Since the criminal case in G.R. Case No. 1655 of 2009 is an year old case and 14 years has already been elapsed, the learned trial Court is requested to expedite the trial and dispose of the case within a period of six months of receipt of the copy of this order. A copy of this order be sent to learned trial Court forthwith.

**(G. Satapathy)**  
**Judge**

*Orissa High Court, Cuttack,  
Dated the 14<sup>th</sup> of August, 2023/kishore*