**(2015) 02 KL CK 0196**

**High Court Of Kerala**

**Case No:** Cri. M.C. No. 1008 of 2013

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| K.J. Marykutty and Others | APPELLANT |
| Vs | |
| State of Kerala | RESPONDENT |

**Date of Decision:** Feb. 3, 2015

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Penal Code, 1860 (IPC) - Section 338

**Citation:** (2015) CriLJ 1777 : (2015) 2 ILR Ker 560

**Hon'ble Judges:** K. Ramakrishnan, J

**Bench:** Single Bench

**Advocate:** S. Gopakumaran Nair, Senior Advocate, M. Chandra Bose and A. Rajasimhan, for the Appellant; V.H. Jasmine, Public Prosecutor and C.C. Padmakumar, Advocates for the Respondent

**Final Decision:** Allowed

**Judgement**

@JUDGMENTTAG-ORDER

K. Ramakrishnan, J.
Cri. M.C. No. 1008/2013 was filed by accused Nos. 2 and 3 while Cri. M.C. No. 1009/2013 was filed by first accused in S.T. No. 2108/2012 on the file of the Judicial First Class Magistrate Court, I, Kottayam to quash the proceedings under Section 482 of Code of Criminal Procedure. The case of the complainant in the complaint was that, the first accused in the case, namely, the petitioner in Cri. M.C. No. 1009/2013 was the hospital, in which, accused Nos. 2 and 3 who are the petitioners in Cri. M.C. No. 1008/2013 were working as Gynaecologist and Anesthesiologist. The case of the complainant was that, the second respondent''s wife was admitted in that hospital for second pregnancy. On 01.01.2010, she had underwent a caesarian operation for the delivery and the delivery was successful, but, while the abdomen was to be closed, she developed unexpected cardiac arrest and though she was

shifted to some other hospital, she became unconscious and fell in coma. On the basis of the complaint given by the second respondent, Ayarkunnam police had registered Annexure A7 First Information Report as Crime No. 62/2010 against the second accused thereon originally for the offence under Section 338 of Indian Penal Code alleging that due to the criminal negligence on the part of the doctor who conducted the caesarian operation, she sustained the injury, namely, cardiac arrest and secondly, consequential falling into coma. The investigating officer referred the matter to a Special Medical Board consists of Assistant Professor of Department of Anaesthesia, Medical College Hospital, Kottayam, Professor - Department of Obstetrics and Gynaecology, Medical College Hospital, Kottayam, doctor from Department of Cardiology of the same hospital and Associate Professor of Department of Medicine and Surgery of the same hospital and that Board gave Annexure A8 opinion stating that the management given to the patient after developing cardiac arrest was adequate. On that basis, Annexure A9 final report was filed stating that, there is no criminal negligence warranting filing of final report to proceed against the doctor who conducted the surgery and referring the matter as further action dropped and a notice was issued to the complainant and on that basis, Annexure A10 private complaint was filed by the second respondent including not only the doctor who conducted the surgery, but also the hospital and the Anaesthesiologist as accused Nos. 1 to 3. CWs 1 to 4 were examined on the side of the complainant and after considering this evidence, the learned Magistrate has taken the case as S.T. No. 2108/2012 under Section 338 of Indian Penal Code against all the accused persons and process was issued to the accused persons which is being challenged by the petitioners by filing these two cases seeking the following reliefs:

Cri. M.C. No. 1008/2013

''To secure the ends of justice this Hon''ble Court may be pleased to invoke the inherent jurisdiction under section 482 of Criminal Procedure Code and quash Annexure A10 against the petitioners."

Cri. M.C. No. 1009/2013

''To secure the ends of justice this Hon''ble Court may be pleased to invoke the inherent jurisdiction under section 482 of Criminal Procedure Code and quash Annexure A10 against the petitioner."

2. Heard the Counsel for the petitioners in both the cases - Senior Counsel Dr. S. Gopakumaran Nair and the Counsel appearing for the second respondent namely., Shri. C.C. Padmakumar and the Public Prosecutor, Smt. V.H. Jasmine.

3. Dr. S. Gopakumaran Nair, the Senior Counsel appearing for the petitioners in both the cases submitted that, even assuming that the entire allegations are accepted on the face value, there is no criminal negligence attracted. Not following certain guidelines alone is not sufficient to bring a doctor to face criminal prosecution if

something happens in conducting some surgery. In this case, the expert body''s opinion shows that, there was no negligence and it was not a normally expected thing when a caesarian operation is being done. Even the evidence adduced on the side of the complainant did not show that there was any negligence less criminal negligence on the part of the doctors or the hospital authorities so as to bring them to face a criminal action under Section 338 of Indian Penal Code. He had relied on the decisions reported in Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another, (2004) ACJ 1441 : AIR 2004 SC 4091 : (2004) 3 CompLJ 271 : (2004) CriLJ 3870 : (2004) 4 CTC 309 : (2004) 6 JT 238 : (2004) 138 PLR 375 : (2004) 6 SCALE 432 : (2004) 6 SCC 422 : (2004) 1 SCR 323 Supp : (2004) 2 UJ 1357 : (2004) AIRSCW 4442 : (2004) 5 Supreme 604 , Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp , Martin F. D''Souza Vs. Mohd. Ishfaq, (2009) ACJ 1695 : AIR 2009 SC 2049 : (2009) 2 CompLJ 417 : (2009) 2 JT 486 : (2009) 154 PLR 1 : (2009) 3 SCC 1 : (2009) 3 SCR 273 : (2009) 2 UJ 794 in support of his case.

4. Shri. C.C. Padmakumar, advocate appearing for the second respondent submitted that, the MRI report will go to show that the brain death caused on account of loss of oxygen in the brain and the evidence of P.Ws. 3 and 4 examined on the side of the complainant will go to show that it was due to loss of oxygen to the brain which resulted in brain death which lead to coma and prima facie there are allegations in the complaint regarding the negligence aspect and coupled with the evidence of the doctor, the court below was perfectly justified in taking cognizance of the case.

5. Heard the Public Prosecutor as well.

6. It is an unfortunate case in which, wife of the complainant who was admitted in the hospital for second delivery developed cardiac arrest after successful caesarian operation and ultimately resulted her in falling in coma. The allegations in the complaint are general in nature stating that certain guidelines were not strictly followed and that resulted in the injury to the wife of the complainant. It is also an admitted fact that a crime was registered originally against the doctor who is the second accused in the case alone as Crime No. 62/2010 of Ayarkunnam Police Station alleging offence under Section 338 of Indian Penal Code as Annexure A7. It is also an admitted fact that, on the basis of the request of the investigating officer, a Special Medical Board was constituted to go into the question of negligence on the part of the doctor and they submitted Annexure A8 report which reads as follows:

"The said patient underwent elective LSCS on 01.01.2010 at Christuraj Hospital under spinal anaesthesia. As per the records the patient developed sudden cardiac arrest at the time of closure of abdomen, immediate proper cardiac resuscitation was given and she was successfully revived. According to the case sheet her vitals were stable till she was transferred to the higher centre. Hence, we are of the opinion that the management given to the patient after developing cardiac arrest

was adequate."

7. The team was lead by Dr. Sunish, Assistant Professor, Department of Anaesthesia, Medical College Hospital, Kottayam, Dr. M.A. Kunjamma, Professor - Department of O and G, Medical College Hospital, Kottayam, Dr. Raihenefhul Misiriya K.J., Department of Cardiology, Medical College Hospital, Kottayam, Dr. P.K. Rajakumari, Associate Professor, Department of Medicine, MCH, Kottayam and Dr. Jose Gamalian, Associate Professor, Department of Surgery, MCH, Kottayam.

8. It is also an admitted fact that it is on this basis, Annexure A9 refer report was filed by the police stating that there is no criminal negligence established and further action dropped. It is also an admitted fact that it is pursuant to this refer report, after getting a refer notice, second respondent has filed Annexure A10 complaint implicating all the petitioners in these two cases as accused alleging commission of offence under Section 338 of the Indian Penal Code. C.Ws. 1 and 2 were examined who are none other than the husband and the father of the victim lady. C.Ws. 3 and 4 were the doctors. CW3 had produced Ext.X1(a) - case sheet and deposed that the patient suffered brain damage and cause of brain damage was due to non-availability of oxygen to the brain. CW4 also gave evidence only on the same aspect. The doctor also deposed that, it is quite improbable for the patient to come back to the original condition. The doctor also expressed that the patient sustained hypoxic ischemic injury. None of these doctors have deposed the nexus between the cause of injury and the act of the doctors resulting in the same. Unless the nexus between the cause and the causa are proved or established, it cannot be said that they were negligent in doing their act.

9. In the decision reported in Dr. Suresh Gupta Vs. Govt. of N.C.T. of Delhi and Another, (2004) ACJ 1441 : AIR 2004 SC 4091 : (2004) 3 CompLJ 271 : (2004) CriLJ 3870 : (2004) 4 CTC 309 : (2004) 6 JT 238 : (2004) 138 PLR 375 : (2004) 6 SCALE 432 : (2004) 6 SCC 422 : (2004) 1 SCR 323 Supp : (2004) 2 UJ 1357 : (2004) AIRSCW 4442 : (2004) 5 Supreme 604 , the Hon''ble Supreme Court has observed under what circumstances a doctor could be said to be criminally negligent so as to make him to face a criminal prosecution in paragraphs 20 to 27 which read as follows:

"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 relied upon on behalf of the doctor elucidates the said legal position and contains 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."

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.

22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to the risk of landing themselves in prison for alleged criminal negligence.

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.

24. No doubt, in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage." This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

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.

27. See the following concluding observations of the learned authors in their book on medical negligence under the title Errors, Medicine and the Law (by Alan Merry and Alexander McCall Smith at pp.247-48). The observations are apt on the subject and a useful guide to the courts in dealing with the doctors guilty of negligence leading to death of their patients:

"Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in every limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high - a standard traditionally described as gross negligence.

* * *

Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate uses, however, distorts tolerant and constructive relations between people. Some of life''s misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis."

10. Further, in the later decision of the Hon''ble Supreme Court in Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp and also in the decision reported in Martin F. D''Souza Vs. Mohd. Ishfaq, (2009) ACJ 1695 : AIR 2009 SC 2049 : (2009) 2 CompLJ 417 : (2009) 2 JT 486 : (2009) 154 PLR 1 : (2009) 3 SCC 1 : (2009) 3 SCR 273 : (2009) 2 UJ 794 , the Hon''ble Supreme Court has held that merely because there was some negligence or the treatment given was not responded by the patient alone is not sufficient to make a doctor liable for criminal prosecution. It must be established by evidence that he was reckless and culpably negligent in discharging his duties. There is no evidence adduced on the side of the complainant to prove these aspects. Even the evidence adduced as observed earlier did not prove the nexus between the cause and the causa which is a primary thing to be proved or established by the prosecution to proceed against a doctor for criminal negligence by initiating

criminal prosecution.

11. Lord Denning, while considering the doctors negligence in Roe v. Minister of Health [1954] 2 QB 66, observed as follows:

''One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.''

12. Further, in the decision reported in Hatcher v. Black and others [(1954) Times, 2nd July], Lord Denning had observed (in his book ''The Discipline of Law'' in the chapter Doctors at Law) as follows:

"It would be wrong, and, indeed, bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would be for ever looking over his shoulder to see if someone was coming up with a dagger - for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. You must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, one of the risks inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgment. You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man, in short, when he is deserving of censure - for negligence in a medical man is deserving of censure."

So, in view of the discussions made above and also on the basis of the evidence available on record, it cannot be said that the complainant had proved even a prima facie case to proceed against the petitioners that the act complained of was a culpable negligence which is liable to be prosecuted by initiating criminal prosecution against the petitioners. I am not expressing any opinion as to whether any of the act committed by them may amount to negligence in tort or not so as to award compensation ultimately in the civil proceedings already initiated by the parties in this regard. In view of the discussions made above, the court below was not justified in taking cognizance of the case against the petitioners for the offence under Section 338 of the Indian Penal Code which has not been made out prima

facie and allowing the case to continue to have its natural end will amount to abuse of process of court and the same is liable to be quashed invoking the power under Section 482 of the Code of Criminal Procedure. I do so.

In the result, the petition is allowed and further proceedings in S.T. No. 2108/2012 on the file of the Judicial First Class Magistrate Court, I, Kottayam as against the petitioners in both the cases is quashed.

Office is directed to communicate this order to the concerned court immediately.

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