A.F.R.
Judgment Reserved on : 21.08.2019
Judgment Delivered on : 12.09.2019

Court No. - 65

Case :- APPLICATION U/S 482 No. - 8541 of 2013

Applicant :- Dr. Mohd. Azam Hasin
Opposite Party :- State Of U.P.
Counsel for Applicant :- Bhanu Bhushan Jauhari
Counsel for Opposite Party :- Govt. Advocate,S.P.S. Chauhan

Connected with

Case :- APPLICATION U/S 482 No. - 8558 of 2013

Applicant :- Dr. Adil Mahmud Ali @ Dr. Ali Adil Mahmud
Opposite Party :- State Of U.P.
Counsel for Applicant :- Bhanu Bhushan Jauhari
Counsel for Opposite Party :- Govt. Advocate,S.P.S. Chauhan

Hon'ble Dinesh Kumar Singh-I,J.

Since both these applications relate to the same crime number, hence, they are being taken up together.

1. Heard the arguments advanced by Shri Bhanu Bhushan Jauhari, learned counsel appearing on behalf of the applicants and in opposition, Shri S.P.S. Chauhan, learned counsel, is appearing on behalf of opposite party no. 2 and Shri G.P. Singh, learned Additional Government Advocate, is appearing on behalf of the State of Uttar Pradesh. Perused the record.

2. By way of instant applications under Section 482 of the Code of Criminal Procedure, 1973 (for short “Code”), prayer has been made on behalf of the accused-applicants to quash the entire proceedings of Criminal Case No. 5426 of 2012 (State v. Dr. Adil and others), arising out of Case Crime No. 506 of 2012, under Section 304A of the Indian

Penal Code, 1860 (for short "I.P.C."), Police Station - Civil Lines, District - Aligarh, pending in the court of Additional Chief Judcial Magistrate, Court No. 3, Aligarh as well as the summoning order dated 09.10.2012 passed by Chief Judicial Magistrate, Aligarh.

3. In order to appreciate the arguments advanced by the respective learned counsel, it would be appropriate to give in a nutshell facts of the case, which are as follows :

The opposite party no. 2/informant had lodged an F.I.R. at Police Station - Civil Lines, District - Aligarh, stating therein that his brother Syed Parvez Ali, who was working in the Land and Garden Department of Aligarh Muslim University (for short "A.M.U.") on the post of Lower Division Clerk (L.D.C.), remained admitted for about 23 days in Special Ward No. 28 and had a tube installed in his chest. He was to be discharged on 16.06.2012 as he had become quite fit and was also in walking condition. His treatment was being given under the supervision of Dr. Hanif Beg and few other junior doctors also used to come to see him. On 16.06.2012 at about 09.00 A.M., the accused-applicant Dr. Adil Mahmud Ali @ Dr. Ali Adil Mahmud (hereinafter referred to as "Dr. Adil") along with a nurse came there and asked his mother and sister to go out of the room and when it was asked as to why they should got out, in front of them, the said doctor started cutting the tube which was installed in the chest of the patient with the assistance of a blade and as soon as the same was cut, blood oozed out profusely. The said doctor, with a lot of pressure, pressed the chest of the patient, as a result of which, blood started coming out of mouth of his brother and within 20

minutes' time, the whole room including the bed sheet, etc. got soaked in blood. The sister of opposite party no. 2, namely, Ashafiya opposed this act of the doctor, at which the doctor fled away from there. Soon thereafter, the persons taking care of the patient rushed to the emergency in order to give information and after that, one or two persons came there running and tried to stop the blood. Thereafter, the doctors started a drama for about one hour to revive the patient and ultimately, pronounced him dead. Thus, it was prayed that a case under Section 302 of I.P.C. be registered against the accused doctor.

4. On the said information, a case was registered against the accused in aforesaid case crime number, under the aforesaid section. After investigating into the matter, the police submitted charge-sheet against the accused-applicants.

5. The main argument advanced by learned counsel for the applicants is that there was no role assigned to the accused-applicant Dr. Mohd. Azam Hasin (hereinafter referred to as “Dr. Hasin”) and yet, he has been charge-sheeted by the police. As regards the other accused-applicant Dr. Adil, it was argued that he had made his best effort to take care of the patient/deceased, but he could not succeed in his effort, which resulted into the death of the deceased. At the most, he could be subjected to only civil liability and not criminal liability. With respect to accused-applicant Dr. Hasin, it was further argued that he could not be held accountable for the said death vicariously, as there is no such concept in criminal case of imposing liability vicariously. The police has submitted

charge-sheet in routine manner, without making thorough investigation and therefore, the prosecution of the accused-applicant should be quashed, the same being malicious.

6. Attention of the Court was drawn by learned counsel for the applicants towards the statement of the eye-witnesses of this case, namely, Ashafiya and Aisha Begum, sister and wife, respectively of opposite party no. 2, which are annexed at page nos. 42 and 43 of the paper book. Both these witnesses, who were taking care of the patient/deceased in the hospital, had submitted their affidavits before the Investigating Officer (hereinafter referred to as "I.O."), which was believed by the I.O. and the averments made therein were made part of the case diary by him. In those statements by both the witnesses the prosecution version as given in the F.I.R. has been corroborated and it was argued that the statements of the said witnesses would actually be not treated to have been recorded under Section 161 of the Code as they were only the affidavits given in respect of the present case. Attention was also drawn towards the report of the Inquiry Committee, which was constituted by the Vice-Chancellor (for short "V.C.") of A.M.U. *vide* letter dated 18.06.2012, in which the following observations were made by the Committee :

Observations of the Inquiry Committee

1. Such procedures (in this case ICTD) should have been performed in minor OT/dressing room available in general ward instead of a private ward.

2. It is preferable to undertake such steps in presence of senior colleague, nursing/paramedical staff.

3. Before performing such procedures, the availability of necessary life saving drugs or equipments should be ensured to face any such eventuality.

4. The attending Doctors should keep in mind all consequences, including the rarest one and should explain the same to the patient/his attendant.

7. On the basis of this report, it was argued that in the said report it was mentioned that in a case of rare complication, it would be unfair on the part of the junior doctor (Dr. Adil) to expect of him to think of such an uncommon procedural complication. This would suggest that the accused-applicant Dr. Adil was a junior doctor and he could not be, therefore, held liable for any intentional negligence, which resulted into the death of the deceased.

8. Further attention of the Court was drawn to the order dated 23.11.2012 passed by the Uttar Pradesh Medical Council to the following effect:

Order

The Ethical Committee observed that the causes of death as per post mortem report is Septicemia. Removal of ICD can not be held as cause of death. Bleeding can occur in few case from the site of ICD after removal which is not under control. Dr. Ali Adil has also done ATLS. He did his best to save the patient life under the circumstances.

The Ethical Committee is the opinion that Dr. Ali Adil can not be held guilty of medical negligence.

9. Pointing out the above order, it was argued that even the Ethical Committee had tendered its opinion that Dr. Adil could not be held guilty of medical negligence and in view of that report, the prosecution of the said doctor needs to be quashed.

10. On the other hand, learned counsel for opposite party

no. 2 vehemently defended the charge-sheet as well as the criminal prosecution of the applicants, citing the same report of the Inquiry Committee, which have been quoted above, that it clearly revealed that there was negligence on the part of the said doctor (Dr. Adil) because he conducted the procedure of Inter-coastal chest drain (for short "I.C.T.D.") without taking proper care, in a private ward, in the absence of any nurse/para-medical staff and without there being any life-saving drugs with him to face any such eventuality. He ought to have kept in mind the consequences in such kind of cases and should have explained them to the attendants of the patient. It was, therefore, through and through, a case of criminal negligence, which would be covered for offence under Section 304A of I.P.C.

11. As regards the other accused-applicant Dr. Hasin, it was vehemently argued by learned counsel that it was Dr. Hasin under whose supervision, the patient/deceased was being treated and it was he who had sent the junior doctor (Dr. Adil) to remove the said tube from the chest of the patient/deceased and therefore, it cannot be denied that even he was rightly charge-sheeted for criminal negligence.

12. In the affidavit filed in support of this application, it was mentioned by the applicants that the patient/deceased Syed Parvez Ali was admitted on 24.05.2012 in J.N. Medical Hospital in a case of road accident with blood trauma chest with right pneumothorax with fracture of multiple ribs on the right side and right clavicle. At the time of admission, he was in respiratory

distress and was diagnosed clinically as a patient of right side pneumothorax and I.C.T.D. He was placed under the supervision of senior resident on duty. The patient's condition had stabilized and was conservatively managed on the advice of Professor M.H. Beg. The first-year junior resident in the Department of General Surgery Dr. Adil Mahmood Ali Jr.-I (accused-applicant) was taking care of the patient and the other accused (doctor) Dr. Hasin was also a member of the said team, which was taking care of the said patient. The patient had radiologically improved on 15.06.2012. On 16.06.2012, he was examined by him (Dr. Hasin) and Prof. M.H. Beg and it was declared that clinically and radiologically, he had improved and his I.C.T.D. should be removed. Dr. Adil had to perform the said job and accordingly, he removed the same on 16.06.2012. He cut the suture attached to the skin with a sterile surgical blade and pulled out the tube. Thereafter, some complication developed and Dr. Adil did his best, but the life of the patient could not be saved and he was declared dead by the R.O.C. Anesthesia at 10.30 A.M. on 16.06.2012. After the death of the patient, a first information report was lodged by his brother Zakir Ali, opposite party no. 2 against Dr. Adil Mahmud Ali @ Dr. Ali Adil Mahmud alone. There was no allegation against the accused-applicant Dr. Hasin.

13. After investigation, the police submitted charge-sheet in the said case under Section 304A of I.P.C. against both the applicants and cognizance has been taken by learned Chief Judicial Magistrate, Aligarh. The patient had died due to removal of chest tube, as per first information report

dated 16.06.2012, while the cause of death has been mentioned to be septicemic shock in the post-mortem report, as such, there is major material contradiction between the first information report and post-mortem report, which is annexed as Annexure 5. The patient died during treatment in A.M.U., as such, the V.C. of A.M.U. *vide* Office Memorandum dated 17.06.2012, ordered an inquiry into the whole matter of the demise of Syed Parvez Ali, who was admitted in Ward No. 28 of the J.N. Medical College Hospital. During inquiry, opposite party no. 2, the mother and the sister of patient/deceased were also present with him on 16.06.2012 and were examined by the Inquiry Committee. In the Inquiry Committee report, it has been mentioned that such death occurs in very rare cases and it should not be expected from a junior doctor to think of such an uncommon procedural complication. No adverse finding has been given against the accused-applicant Dr. Hasin. The I.O. had requested the S.P. City, Aligarh to request the C.M.O., Aligarh to submit a report regarding the aforesaid incident and accordingly, the S.S.P., Aligarh had sent a letter to C.M.O., Aligarh on 19.07.2012 for constituting a panel of doctors for submitting its report on the technical aspect of the matter. In reply to the said letter, the C.M.O. sent a letter dated 21.07.2012, saying that specialized doctors were not available and that the matter had been inquired by the committee of experts, which was constituted by the V.C. of A.M.U. and the said reply was accordingly sent to the I.O. from the office of S.S.P., Aligarh on 02.08.2012, copy of which is Annexure 7.

14. The I.O. has recorded the statement of Ashfiya and Aisha Begum under Section 161 of the Code, but none of them has stated anything against the accused Dr. Hasin. The I.O. has submitted charge-sheet without considering the report of the Committee constituted by the V.C. of A.M.U. as well as the statement of the eye-witnesses and has included his name in the charge-sheet. The learned C.J.M. has passed summoning order and has failed to consider the law laid down by Hon'ble Apex Court in ***Martin F. D'Souza v. Mohd Ishfaq***[1] which says that no court, either consumer forum or criminal court, shall issue any process against a doctor before referring the matter to a competent doctor or a committee of doctors specialized in the field, relating to which the medical negligence is attributed. In this case, the C.M.O. has not constituted any committee of experts and the Inquiry Committee constituted by the order of V.C. of A.M.U. has not said anywhere that the accused Dr. Hasin could be held liable for criminal negligence, therefore, the entire proceedings against the accused needs to be quashed.

15. Further, it is mentioned that for fixing criminal liability on a doctor or a surgeon, the standard of negligence required to be proved should be so high as can be described as “gross negligence” or “recklessness”. Merely, lack of necessary care, attention or skill or mere inadequacy of some degree or want of adequate care and caution would not suffice to hold him criminally liable. Reliance is also placed upon the judgment of Hon'ble Apex Court in ***Dr. Suresh Gupta v. Govt. of NCT of Delhi and***

1 **(2009) 3 SCC 1**

Another[2] in view of which, the present proceedings need to be quashed.

16. In rebuttal, from the side of opposite party no. 2, through filing a counter affidavit, it is stated that the patient/deceased was regularly being given treatment under the supervision of Prof. M.H. Beg and he had clinically and radiologically improved. The senior doctors had advised the patient to be discharged after removal of I.C.T.D. under their supervision, but it is clear from the Inquiry Report dated 17.06.2012 that the accused doctor (Dr. Adil) removed the I.C.T.D. of the patient without consulting the other supervisors, in private ward itself and did not take the patient to even minor operation theatre (for short "O.T.") for the same nor did he adopt any procedure for removal of the same and without adequate usage of any emergency equipments/life-saving drugs. The said act was committed by Dr. Adil taking a big risk, without consulting the superiors. The mother and the sister of the deceased were also present at the time of this occurrence and had seen the occurrence with their own eyes and made their best effort to stop Dr. Adil from removing the I.C.T.D. without any assistance and also made a hue and cry for assistance, but all in vain. Dr. Adil did not stop until the patient died. Although the accused Dr. Hasin was not present at that time because of which he was not named in the F.I.R., but during investigation, he was also found to be involved rightly by the I.O. Further, it is mentioned that the S.S.P., Aligarh *vide* letter dated 19.07.2012, had requested C.M.O., Aligarh to constitute a

2 **(2004) 6 SCC 422**

panel of doctors for submitting its report on the technical aspect of the matter, but because the accused-applicants were in collusion with C.M.O., Aligarh, the said request was refused and hence, no technical aspect of the matter is found on record. Dr. Adil did not adopt the adequate procedure for removal of the I.C.T.D. of the patient/deceased, which clearly suggests that there was gross negligence on his part, which resulted into the death of the patient/deceased.

17. After having heard the arguments advanced by learned counsel for both the parties as well as having perused the record of the case, I find that it is undisputed that the patient/deceased was got admitted in the said hospital - J.N. Medical College Hospital on 24.05.2012 in a serious condition as he had met with road accident, but after having been treated for about 20 odd days, he had improved a lot and was about to be discharged after removal of I.C.T.D. The said removal of I.C.T.D. was conducted in this case by Dr. Adil (accused-applicant), who is stated to have removed the same without taking the patient to the O.T. and without taking proper care, which resulted into profuse bleeding of the patient and ultimately, into his death. The two eye-witnesses, namely, the sister and the mother of the deceased have deposed that the accused-applicant Dr. Adil had cut the tube installed in the chest of the deceased in a very rough manner, despite their opposition and in front of them, when the patient started bleeding profusely, the doctor fled away from there and by the time these witnesses rushed to the emergency to call someone to take care of

the patient, he died. It also emerges from the record that an Inquiry Report has come on record, which has been submitted by the committee constituted by the V.C. of the said institution (A.M.U.), which has given above-mentioned opinion, which clearly shows that Dr. Adil should have performed the said act/operation in the O.T./dressing room instead of private ward and that the same should have been done in the presence of a senior colleague/nurse/para-medical staff and at that time, he ought to have made adequate usage of life-saving drugs or equipments, which could be needed to meet any such eventuality and the risks involved ought to have been intimated to the attendants of the patient in advance, but all this was not done in this case, which clearly suggests the careless approach/negligence on the part of the said doctor, who went about this job in a very lackadaisical manner, which has resulted into the death of the deceased.

18. From the side of the accused-applicants, reliance has been placed upon the judgment of Hon'ble Apex Court in ***Dr. Suresh Gupta's case (supra)***. In the said judgment, facts of the case were that a doctor (plastic surgeon) was facing charge under Section 304A of I.P.C. for causing death of his patient on 18.04.1994, who was operated by him for removal of his nasal deformity. The anaesthetist who was assisting the said surgeon in the operation was also made co-accused, but he was reported to have died pending trial. The appellant urged before the Magistrate that the medical evidence produced by the prosecution did not make out any case against him to proceed with the

trial, but the learned Magistrate decided to proceed against him, giving the following reasons in the impugned order dated 28.11.1998 :

> *"Post-mortem report is very categorical and very clear and it has been clearly mentioned therein that death was due to the complication arising out of the operation. That operation was conducted by both the accused persons. It is also clear from the material on record that the deceased was a young man of 38 years having no cardiac problem at all and because of the negligence of the doctors while conducting minor operation for removing nasal deformity, gave incision at wrong part due to that blood seeped into the respiratory passage and because of that patient immediately collapsed and died and it was also attempted to show by the accused persons that he was alive at that time and was taken to Ganga Ram Hospital for further medical attention.*

19. It was clear from record that the patient had already died in the clinic of the accused and therefore, there was sufficient ground on record to make out *prima facie* a case against both the accused under Section 304A of I.P.C. The matter came up before the High Court in proceedings under Section 482 of the Code, which too refused to quash the criminal proceedings, although it recorded that the Metropolitan Magistrate was obviously wrong, in the absence of any medical opinion, in coming to a conclusion that the surgeon had given a cut at wrong place of the body of the patient at the time of operation leading to blood seeping into the respiratory passage and blocking it, resulting into his death. The High Court while refusing to quash the impugned order dated 01.04.2003 recorded its reasons as under :

> *In the present case two doctors who conducted the post-mortem examination have taken an emphatic stand which they have reiterated even after the Special Medical Board opinion, that death in this case was due to'asphyxia resulting*

from blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum'. This indicates that adequate care was not taken to prevent seepage of blood down the respiratory passage which resulted in asphyxia. The opinion of the Special Medical Board is not free from ambiguity for the reasons already given. Such ambiguity can be explained by the doctors concerned when they are examined during the trial.

20. Allowing the appeal and quashing the criminal proceedings against the accused, the Honb'le Apex Court held as follows :

The legal position is almost firmly established 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 under Section 304-A IPC.

(Para 12)

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 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."*

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.

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.

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.

(Paras 20 to 23, 25 and 26)

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.

(Para 24)

After examining all the medical papers accompanying the complaint, we find that no case of recklessness or gross negligence has been made out against the doctor to compel him to face trial for offence under Section 304-A IPC. As a result of the discussion aforesaid on the factual and legal aspect, we allow this appeal and by setting aside the impugned orders of the Magistrate and of the High Court, quash the criminal proceedings pending against the present doctor who is the accused and appellant before us.

(Para 28)

21. Reliance has also been placed upon the judgment of

Hon'ble Apex Court in the case of ***A.S.V. Narayanan Rao v. Ratnamala and Another***[3]. In the said case, the appellant cardiologist conducted an angiogram on the deceased and finding three blocks in the coronary arteries, conducted an angioplasty around 1.30 p.m. The appellant thereafter informed the respondent (wife of deceased patient) that the angioplasty failed and the blocks of her husband had calcified. The same day around 3.30 p.m., a bypass surgery was conducted in the same hospital. Various complications arose and eventually the said patient died. The Magistrate took cognizance by *prima facie* concluding that there was material to try the appellant for offences under Section 304A of I.P.C. and the matter came up before the High Court. It too declined to quash the proceedings, giving the following reasons :

(1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hrs in conducting bypass after the angioplasty failed; and

(2) that the appellant did not consult a cardio anaesthesian before conducting an angioplasty.

and held that both the abovementioned lapses on the part of the appellant clearly show the negligence of the appellant.

22. Hon'ble Apex Court, allowing the appeal, held as follows :

> ***13.*** *The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr Surajit Dan given before the A.P. State Consumer Disputes Redressal Commission in CD No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a*

3 **(2013) 10 SCC 741**

consumer dispute against the appellant and others. It is in the said proceedings, the abovementioned Dr Dan's evidence was recorded wherein Dr Dan in his cross-examination stated as follows:

> *"... Whenever cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. It was not put on standby in the instant case...."*

He further stated:

> *"... The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery...."*

However, the same doctor also stated:

> *"... The time gap between the angioplasty failure and the surgery is not the factor for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."*

14. *Unfortunately, the last of the above-extracted statements of Dr Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.*

15. *The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the negligence, if any, on the part of the appellant cannot be said to be "gross". We, therefore, set aside the judgment [Criminal Petition No. 6506 of 2007, order dated 28-10-2010 (AP) sub nom Surjit Dan v. State of A.P., Criminal Petition No. 6368 of 2007] under appeal and also the proceedings of the trial court dated 11-12-2006.*

23. This Court would like to rely upon the law laid down by Hon'ble Apex Court in the case of ***Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others***[4]. In this case, Hon'ble Apex Court has summarized the principles to be applied in a case of criminal negligence, which are as follows :

> ***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*

4 **(2010) 3 SCC 480**

medical professional is guilty of medical negligence following well-known principles must be kept in view:

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 pressurising 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.*
>
> ***90.*** *In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.*

24. In view of the above position of law, this Court will have to analyze facts of the present case.

The patient/deceased in the present case had been admitted in the hospital of the accused-applicant, after the former met with an accident and remained hospitalized for about 23 days in a special ward. He was on the verge of getting discharged as he had been cured, as has been mentioned in the first information report. Further, it is mentioned in the F.I.R. that on 16.06.2012, Dr. Adil came with a nurse to disconnect the tube which was installed in the chest, blood oozed out profusely and thereafter, the doctor fled away from the said ward and when the informant gave information about this occurrence in the emergency, one or two people came and tried to stop the blood. Thereafter, the doctors feigned to revive the

patient/deceased for about one hour and thereafter, declared him dead. As per post-mortem, cause of death is reported to be due to septicemic shock. The following ante-mortem injuries were recorded :

1. Right side chest tube incertion mark 1.5 x 1.5 cm on right side chest 7.00 cm. lateral to Rt nipple.

2. Cut open mark for yv canula on Rt. side on medial aspect 0.5 cm x 0.2 cm

25. In the report of the Inquiry Committee which was constituted by the V.C., dated 18.06.2012, the following observations were made :

Observations of the Inquiry Committee

1. Such procedures (in this case ICTD) should have been performed in minor OT/dressing room available in general ward instead of a private ward.

2. It is preferable to undertake such steps in presence of senior colleague, nursing/paramedical staff.

3. Before performing such procedures, the availability of necessary life saving drugs or equipments should be ensured to face any such eventuality.

4. The attending Doctors should keep in mind all consequences, including the rarest one and should explain the same to the patient/his attendant.

Fixing the responsibility on the erring official(s) and role of Prof. M.H. Beg

1. The patient from the date of his admission was taken care of by the team and the patient and his attendants were fully satisfied with this progress prior to the incidence that occurred on 16th of June 2012 and this is also reflected in their statements made after this incidence before the IC.

2. The resident Doctor (Dr. Adil JR-2), on the advice of the COC, as recorded in the case sheet on 15.6.2012 and also put on records in his statement submitted to the IC. a decision was made to remove the ICT on 16th June 2012. He acted accordingly the next day without realizing the consequences, however remote it could be. During his maneuvering for removal of ICT, it seems that the situation has gone out of his control as he was not mentally prepared to face such a situation. Had he been accompanied by any one of his colleagues, he could have been in a better position to handle such a situation in a better way.

3. As a rarest complication, even not perceived by a senior person of Dr. Beg's stature, it would be unfair on the part of a junior Doctor (Dr. Adil) to expect from him to think of such an uncommon procedural complication.

26. The matter was taken up before the Uttar Pradesh Medical Council, which passed the following order on 23.11.2012 :

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The Ethical Committee observed that the causes of death as per post mortem report is Septicemia. Removal of ICD can not be held as cause of death. Bleeding can occur in few case from the site of ICD after removal which is not under control. Dr. Ali Adil has also done ATLS. He did his best to save the patient life under the circumstances.

The Ethical Committee is the opinion that Dr. Ali Adil can not be held guilty of medical negligence.

27. I have gone through the statements of the witnesses which have been annexed in support of the prosecution version, namely, Ashfiya and Aisha Begum. Both of them have supported the version as mentioned in the F.I.R. I find that if we apply the principles as laid down above in the case of ***Dr. Suresh Gupta (supra)***, it is apparent that for thrusting 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 or skill which would make him liable criminally. In this very case, reliance was placed upon the judgment delivered by the House of Lords decision in the case of ***R.v. Adomako***[5] in which it was held that a doctor cannot be held criminally responsible for patient's death unless his

5 **(1994) 3 All ER 79 (HL)**

negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State. There is no doubt that when a patient agrees to undergo 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.

28. In this case, there is no doubt that the patient was a young man who had met simply with an accident and was recovering also, but due to removal of the tube inserted in the chest during treatment, something appears to have gone wrong, which resulted into his death. The family members of the deceased have given an opinion of a layman that it was gross negligence on the part of the accused doctor (Dr. Adil) who did not take full precaution despite their resistance to take out the said tube in such a manner and hence, in their opinion, the doctor committed gross negligence, which resulted into the death of the deceased. But the said layman's opinion is not strong enough to hold the accused criminally liable. As per the opinion expressed by the Ethical Committee of the U.P. Medical Council, the death of the deceased was found to

have occurred due to septicemic shock. It cannot be ruled out that some lack of preparation has also been found on the part of the accused doctor while removing the said tube from the chest as he ought to have done so in the presence of some senior doctor and that too, in an O.T. and having all other medical aids in ready condition and in standby mode, but that certainly shows the negligence on the part of the doctor, but I do not find that the same would qualify to be called as “criminal negligence” as it may at the most be treated to be negligence for which civil liability would lie. It may also not be ruled out that the accused doctor was having overconfidence that he would be able to handle the situation himself, but it turned out to be otherwise and it can also be inferred that it may have resulted into accidental death of the deceased. I do not find any such reckless attitude on the part of the doctor because the patient was given treatment for about 23 days and he was recovering gradually, but as luck would have it, he died on account of this mishandling on the part of the doctor concerned. Life and death are all in the hands of God. A doctor in the Indian society is the most revered person, who is given status of God in case the patient survives. But we all know that in cases like the present one, risk is always involved and when the patient/family members give consent for being operated, they give consent for such kind of operation to be conducted and to bear the consequences. It is also noticed in the recent past that the cases to implicate the doctors after demise of the patient have increased, some on account of extortion of illegal money from the doctors and some due to other

reasons, only to harass the doctors, out of frustration and because of these factors, the guidelines have been laid down by Hon'ble Apex Court in the case of ***Jacob Mathew v. State of Punjab and Another***[6] and also recently, in the case of ***Kusum Sharma (supra)***, which have been narrated above. Keeping in view those guidelines, I am of the view that in the present case, no criminal liability appears to be made out against the accused-applicants. In view of the material placed before this Court, at the most, civil liability would arise.

29. In view of the aforesaid, the prayer to quash the entire criminal proceedings as well as the impugned summoning order passed by the court below is hereby accepted and accordingly, the entire proceedings as well as the impugned summoning order passed in the present case are hereby quashed.

30. Resultantly, the instant applications stand **allowed**.

Order Date :- September 12, 2019.
I. Batabyal

[Dinesh Kumar Singh-I, J.]

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6 **(2005) 6 SCC 1**