Jabalpur, Dated : 07/02/2018

Dr. Anuvad Shrivastava, Counsel for the applicant.

Shri S.D. Khan, Public Prosecutor for the respondent no.1/State.

Heard on the question of admission.

This application under Section 482 of Cr.P.C. has been filed seeking quashment of F.I.R. No.714/2017 registered by Police Station Gadarwara, Distt. Narsinghpur under Section 304-A of I.P.C. read with Section 24 of M.P. State Ayurvigyan Parishad Act.

The necessary facts for the disposal of the present application in short are that the applicant is a Homeopathic Doctor having his Hospital at Gadarwara, Distt. Narsingpur. An information was given by the respondent no.2 to the police that although the applicant is a Homoeopathy Doctor, but he is practicing in Allopathy and had given Allopathy medicines to his father, who was admitted in his hospital as he was having high fever, and thereafter his father died during treatment. On this complaint, the police started Merg enquiry against the applicant and ultimately registered an offence under Section 304-A of I.P.C. and under Section 24 of M.P. State Ayurvigyan Parishad Act.

The police during investigation collected certificate from the Chief Medical and Health Officer, Narsingpur, who opined that the applicant is a Homoeopathy Doctor and is not competent to treat the patients in Allopathy. The dead body of the deceased was sent for post-mortem and his viscera was preserved. Methyl Cobalamin Aciclophinic Paracetamol and Dyclophin medicine was found in the Viscera. However, the doctors could not give any specific finding with regard to the

cause of death. They could not give any finding that whether the death was natural or he had died because of overdose of the medicines. The police after completing the investigation, filed the charge sheet for offence under Section 304-A of I.P.C. and under Section 24 of M.P. State Ayurvigyan Parishad Act.

Challenging the charge sheet filed by the police, it is submitted by the Counsel for the applicant that although the applicant is an Ayurvedacharya, but he is eligible to practice in Allopathy and the cause of death could not be ascertained. It is further submitted that before registration of offence, the police did not obtain the report of a Committee or an independent Doctor of a Government Hospital with regard to the medical negligence of the applicant.

Per contra, it is submitted by the Counsel for the State that the applicant is an Ayurvedacharya and he is not eligible to practice in Allopathy and in spite of that he had treated the deceased by giving Allopathy medicines. Further, Allopathy medicines were found in the viscera and since the death of the deceased was not found natural, therefore, under these circumstances, it cannot be said that there is no *prima facie* material against the applicant. It is further submitted that since the applicant is not competent to practice in Allopathy, therefore, there was no need to constitute a Committee or refer the matter to a Doctor of a Govt. Hospital, to find out that whether there was any medical negligence on the part of the applicant or not?

Heard the learned Counsel for the parties.

The first contention of the applicant is that the applicant is an Ayurvedacharya and is competent to practice in Allopathy. To buttress his contentions, the applicant has relied upon his

Graduate Degree of Ayurvedacharya. Since the prosecution has not challenged the Ayurvedacharya Degree obtained by the applicant, therefore, it is held that the applicant is an Ayurvedacharya (Bachelor of Ayurvedic Medicine and Surgery) having obtained the degree in the year 2006 from Rani Durgavati University, Jabalpur. The applicant has further relied upon the certificate of training issued by the Principal Govt. Ayurved College, Jabalpur, which is to the effect that the applicant has obtained training in Allopathy for three months i.e., from 1-12-2006 to 2-3-2007. It is further submitted that as per Section 24(ia) of M.P. Ayurvigyan Parishad Adhiniyam, which was incorporated by M.P. Ayurvigyan Parishad (Sanshodhan) Adhiniyam, 2016, it is clear that the trained Ayurved Doctors have been declared eligible to prescribe medicines under modern scientific medicines, which is also known as “Allopathy” and such other medical procedures to the extent of training provided under the Madhya Pradesh Ayurvedic, Unani Tatha Prakritic Chikitsa Vyavsayi Adhiniyam, 1970, and shall not be punishable for prescribing allopathy medicines.

The submission made by the applicant with regard to the competence of the applicant to prescribe Allopathy Medicines is misconceived and is liable to rejected.

The applicant has relied upon the M.P. Ayurvigyan Parishad (Sanshodhan) Adhiniyam, 2016, which reads as under :

> 24(ia) the persons posted in the Government Health Institutions or centers of allopathic system of medicine and possessing graduate degree in Ayurvedic

> System and Unani System included in Second Schedule of the Indian Medicine Central Council Act, 1970 (No. 48 of 1970) and registered with the Madhya Pradesh Board of Ayurvedic and Unani Systems of Medicine and Naturopathy and have undergone training specified by the Government, from time to time, shall also be eligible to prescribe medicines under modern scientific medicine which is also known as "Allopathy" and such other medical procedures to the extent of training provided under the Madhya Pradesh Ayurvedic, Unani Tatha Prakritik Chikitsa Vyavsayi Adhiniyam, 1970 (No. 5 of 1971) and shall not be punishable under this Section for prescribing allopathic medicines."

From the plain reading of this provision, it is clear that this provision does not apply to all trained Doctors who are graduates in Ayurved. The opening words of Section 24(ia) of the M.P. Ayurvigyan Parishad (Sanshodhan) Adhiniyam, 2016 makes it clear that it applies only to those persons who are posted in the Government Health Institutions or centers of allopathic system of medicine. Undisputedly, the applicant is running his own private hospital and is not posted in the Government Health Institutions or centre of allopathic system of medicine. Therefore, the applicant is not protected or is not eligible to prescribe allopathic medicines. Thus, it is held that although the applicant is an Ayurvedacharya and has taken training in allopathy for a period of three months, but he is not eligible to prescribe allopathic medicines.

It is next contended by the Counsel for the applicant that in order to ascertain the medical negligence of a Doctor, the police before registration of a criminal case, should obtain a

report from the medical board or a Doctor of a Govt. Hospital, and only in the case of "Gross Negligence", a criminal case should be registered against a Doctor. To buttress his contentions, the Counsel for the applicant has relied upon the judgment of the Supreme Court passed in the case of **Jacob Mathew Vs. State of Punjab** reported in **(2005) 6 SCC 1** and **Martin F. D'Souza Vs. Mohd. Ishfaq** reported in **(2009) 3 SCC 1.**

The Supreme Court in the case of **Jacob Mathew (Supra)** has held as under :

> **48. We sum up our conclusions as under:**
> (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: “duty”, “breach” and “resulting damage”.
> (2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a

practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick

for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam case, WLR at p. 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word “gross” has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be “gross”. The expression “rash or negligent act” as occurring in Section 304-A IPC has to be read as qualified by the word “grossly”.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability

for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

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51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in

> that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam9 test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

The moot question for determination is that -

> "whether a person, who is not competent to prescribe allopathic medicines, is entitled for protection against prosecution unless and until a report with regard to his "gross negligence" is given by a Medical Board or not?"

Right to practice in Allopathic System is regulated by Indian Medical Council Act, 1956.

Section 2 of the Indian Medical Council Act, 1956, defines "Medical Practitioner", which reads as under :

> 2. (d) 'medical practitioner' or 'practitioner' means a person who is engaged in the practice of modern scientific medicine in any of its branches including surgery and obstetrics, but not including veterinary medicine or surgery or the Ayurvedic, Unani, Homoeopathic or Biochemic system of medicine."

Section 15 of Indian Medical Council Act, 1956 reads as under :

> "15. (2) Save as provided in Section 25, no person other than a medical practitioner enrolled on a State Medical Register,—

> (a) shall hold office as physician or surgeon or any other office (by whatever designation called) in Government or in any institution maintained by a local or other authority;
> (b) shall practise medicine in any State;
> (c) shall be entitled to sign or authenticate a medical or fitness certificate or any other certificate required by any law to be signed or authenticated by a duly qualified medical practitioner;
> (d) shall be entitled to give evidence at any inquest or in any court of law as an expert under Section 45 of the Indian Evidence Act, 1872 on any matter relating to medicine.
> (3) Any person who acts in contravention of any provision of sub-section (2) shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Thus, it is clear that unless and until a person is possessive of requisite degree and is enrolled as a medical practitioner on the State Medical Register, he cannot practice in Allopathic System.

In the present case, the applicant cannot be said to be a Medical Practitioner or Practitioner as per Section 2 of the Indian Medical Council Act, 1956, therefore, he is not entitled to practice in Allopathic System.

The Supreme Court in the case of **Poonam Verma Vs. Ashwin Patel** reported in **(1996) 4 SCC 332** has held as under:

> 41. Since the law, under which Respondent 1 was registered as a medical practitioner, required him to practise in HOMOEOPATHY ONLY, he was under a statutory duty not to enter the field of any other system of

> medicine as, admittedly, he was not qualified in the other system, Allopathy, to be precise. He trespassed into a prohibited field and was liable to be prosecuted under Section 15(3) of the Indian Medical Council Act, 1956. His conduct amounted to an actionable negligence particularly as the duty of care indicated by this Court in Dr Laxman Joshi case (AIR 1969 SC 128) WAS BREACHED BY HIM ON ALL THE THREE COUNTS INDICATED THEREIN.

Since the applicant is not possessive of knowledge of Allopathic Medicines and is also not possessive of requisite qualification for treating the patients in Allopathic System and since he had treated the patient in Allopathic System and had prescribed Allopathic Medicines, therefore, not only he is liable to be punished for an offence under Section 15(3) of the Indian Medical Council Act, 1956, but prima facie there is sufficient material to show that he was negligent. Once the negligence is proved, then nothing more is required to be proved.

As already found that the applicant was not eligible to practice in Allopathy System, therefore, he cannot be held to be a Doctor competent to prescribe Allopathic Medicines and the act of the applicant in prescribing Allopathic Medicines to a patient, by itself amount to gross negligence. Further, in the present case, the investigating officer has obtained an information from the Chief Medical and Health Officer, Narsingpur, who has specifically opined that the applicant is not competent to prescribe allopathic medicines and under these circumstances, it is held that it was not necessary for the investigating officer to obtain an opinion from an independent Doctor/Medical Board with regard to the medical negligence of

the applicant. Hence, it is held that the directions issued by the Supreme Court in the case of **Jacob Mathew (Supra)** are not applicable to the facts of the case.

It is next contended by the Counsel for the applicant that since no specific opinion could be given by the Doctors with regard to the actual cause of death, therefore, at this stage, it cannot be said that the deceased had died because of medical negligence of the applicant. The submission made by the Counsel for the applicant cannot be accepted and, hence, liable to be rejected.

A specific query was raised by the investigating officer and it was replied by the Doctor that it is not possible to say that whether the deceased had died natural death or had died due to overdose of the medicines. Thus, where the Doctor has not given a specific finding to the effect that the deceased had died a natural death, then under the facts and circumstances of the case, at this stage, it cannot be said that there is no sufficient *prima facie* material on record to suggest that the deceased had died because of medical negligence of the applicant.

Considering the submissions made by the Counsel for the applicant and considering the totality of the allegations against the applicant as well as the circumstances of the case, this Court is of the considered opinion that there is sufficient evidence to show the medical negligence on the part of the applicant and, therefore, it cannot be said that he is not liable to be prosecuted.

Hence, the charge sheet filed against the applicant for offence under Section 304-A of I.P.C. read with Section 24 of M.P. Ayurvigyan Parishad Adhiniyam, 1987, cannot be

quashed.

However, by way of word of caution, the Trial Court is directed, to decide the trial, in accordance with the evidence which would ultimately come on record, without getting prejudiced by any of the observations made in the order, as they have been made in the light of the limited scope of interference at this stage.

As the charge sheet has already been filed and it has come on record that although the applicant is merely an Ayurvedacharya, but still he is running a hospital with indoor treatment facilities and he is also treating the patients in Allopathy System, therefore, the Trial Court is directed to conclude the Trial, as early as possible, preferably within a period of 9 months from today.

The application fails and is hereby dismissed.

The office is directed to send a copy of this order, to the Trial Court, for necessary information and compliance.

(G.S. Ahluwalia)
Judge

Arun*