Cr.Misc. No.7051 of 2005
With
Cr. Misc. no. 1666 of 2007

Against the order dated 7.2.2002 passed by Sri S. K. Pandey, Judicial Magistrate, Ist class, Patna in Complaint case no. 2335 (c) of 2001.

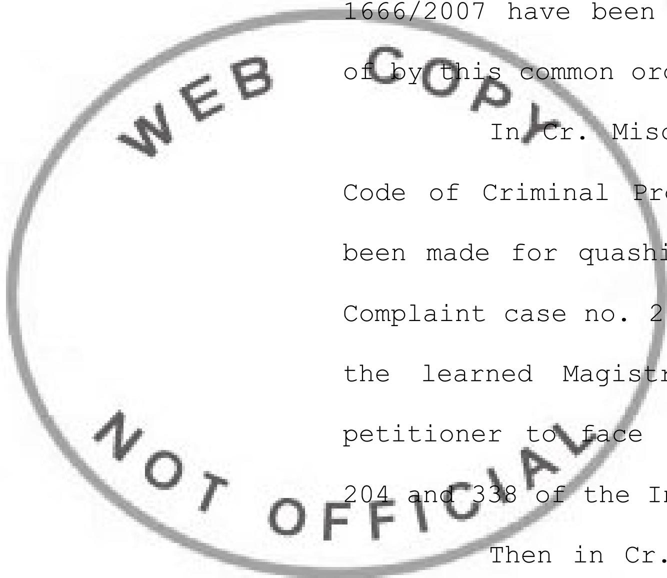
DR.V.R.SINHA @ VINOD RANJAN SINHA
(Petitioner in Cr. Misc. no. 7051/2005)
Kailash Prasad Singh (petitioner in Cr. Misc. No. 1666 of 2007)

Versus

STATE OF BIHAR & ANR(Opposite parties in both the cases)

For the petitioner:- Mr. Rana Pratap Singh, Sr. Advocate.
Mr. Chitranjan Sinha, Sr. Advocate.
Mr. Anirban Kundu, Adv.
For the Opposite Party: - Mr. Kailash Prasad Singh (in person)

M. Saran,J. Cr. Misc. no. 7051 of 2005 and Cr. Misc. no. 1666/2007 have been heard together and are being disposed of by this common order.



In Cr. Misc. no. 7051/2005 filed u/s 482 of the Code of Criminal Procedure (in short as Code) prayer has been made for quashing the order dated 7.2.2002 passed in Complaint case no. 2335 (C) of 2001 whereby and where under the learned Magistrate has issued process against the petitioner to face trial for the offence punishable u/ss 204 and 338 of the Indian Penal Code.

Then in Cr. Misc. no. 1666/2007 filed u/s 340 of the Code prayer has been made to make enquiry into false submission made by the accused and proceed against him in accordance with law.

The case of O.P. no.2/ complainant, in short, as per petition of complaint filed before the learned Chief Judicial Magistrate, Patna on 22.12.2001 is that he is a registered Advocate and prior to his registration as an

Advocate he was retired Principal of B.R.M. College, Muzaffarpur. The complainant underwent a surgery on 21.12.1995 for removal of his Gall Bladder and Appendix by the petitioner/accused who was a qualified doctor having degree of F.R.C.S from United Kingdom. Thereafter on 26.3.1999 the complainant was again operated by the petitioner for repair of incisional Hernia and Appendix. It is alleged that accused left his forcep and as such on 5.8.1999 the complainant was again operated for removal of forcep which according to complainant the accused had left negligently in his abdomen on 26.3.1999 during the course of second operation.

It appears from the impugned order that the complainant was examined on solemn affirmation and during enquiry u/s 202 of the Code three witnesses were examined and some papers were also filed. Learned Magistrate after being satisfied that there was sufficient material to proceed further against the accused petitioner u/ss 338 and 204 of the Penal Code issued summon against him.

It has been mentioned in the quashing application that the complainant had also filed complaint case no. 25/2000 on 27.3.2000 before the State Consumer Dispute Redressal Commission, Bihar, Patna alleging that petitioner had negligently left forcep in his abdomen which caused physical suffering, mental agony and huge monetary loss to the tune of Rs. 20 lacs. The State Consumer Commission by a reasoned order dated 17.10.2003 dismissed the complaint. It is further stated that the complainant had also filed a petition before Bihar Council of Medical Registration, Patna alleging the same thing, that is, the petitioner had left his forcep in the abdomen of the complainant

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negligently and as such he may be debarred from practice. The Bihar council of Medical Registration issued notice to the petitioner and constituted a team of experts to examine the allegation and material and after hearing the parties dismissed the complaint.

It appears from the supplementary affidavit that the complainant preferred an appeal against the order dated 30.6.2004 passed by the Bihar Medical Council to Medical Council of India and after notice the parties appeared and the matter was heard in detail and Medical Council of India vide letter no. MCI-211(2) (162)/2006 (Ethics) informed the petitioner as follows:-

"Ethics Committee considered the appeal against the order dated 30.6.2004 passed by the Bihar Medical Council on the complaint made by Mr. Kailash Prasad Singh against Dr. V.R. Sinha."

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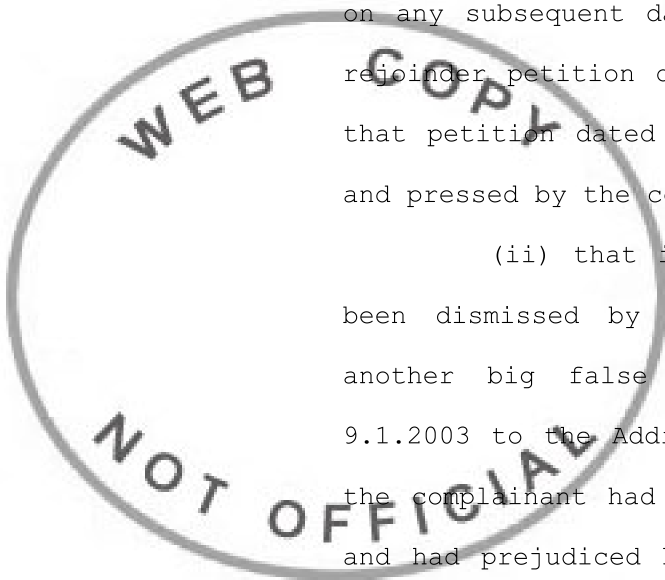
The Ethics Committee considered the expert opinion received from Dr. Professor V.K. Ramateke, H.O.D. department of Surgery, Maulana Azad Medical College, New Delhi wherein he has opined that "there is no definitive proof of negligence in the form of leaving foreign body in side peritoneal cavity, as only A.P view of X- ray of abdomen was available as evidence and no lateral film was taken. As a result it is not possible to comment whether the shadow seen on X-ray is lying inside the peritoneal cavity or not. Further ultra sonography done on the same day does not mention about any foreign body in the abdomen.

The Ethics Committee after detailed deliberation and taking into consideration the appeal made by Kailash Prasad Singh , order passed by Bihar Medical Council dated 30.6.2004, deposition of Mr. Kailash Prasad

Singh and Dr. V. R. Sinha submitted before the Ethics Committee, the expert opinion of Dr. Ramteke and all other documents, investigation reports kept in the file the Ethics Committee was of the unanimous opinion that no negligence could be substantiated on the part of Dr. V. R. Sinha and hence decided to uphold the decision of Bihar Medical Council" .

Then in Cr. Misc. no. 1666/07 it has been stated that accused, in short, made the following false statement in the court of Additional Session Judge, XII, Patna that:-

(i) the petitioner/complainant filed a petition dated 12.6.2002 in complaint case no. 2335(C)/ 2001 which was not moved by him on that date. The Presiding Officer of the court stood transferred on that date. It was not moved on any subsequent date but the accused has stated in his rejoinder petition dated 20.8.2002 in paragraphs 2 and 13 that petition dated 12.6.2002 was moved, argued at length and pressed by the complainant;



(ii) that in Cr. Revision no. 619/2002 which has been dismissed by order dated 2.2.05 the accused made another big false statement in his application dated 9.1.2003 to the Additional Session Judge, XII, Patna that the complainant had entered into chamber of learned Judge and had prejudiced him and so he cannot get justice from him and on this ground he got his case transferred to another court and then he never come forward to plead his case in spite of repeated calls of the court and thus prolonged the hearing of the case for some three years;

(iii) then the accused made another false statement that on the issue of summons he appeared before the court but the truth is that he did not appear on issue

of summons and when warrants were issued against him then he appeared before the court;

(iv) then it is said that the accused has made other false statements in the quashing application by asserting that on the basis of affidavit of Dr. J.P. Sinha, the A.P view of the abdomen is not conclusive proof to show that any foreign body was inside the abdomen. It is alleged that Dr. J.P. Sinha never gave any such opinion. In short prayer has been made by the complainant to file complaint against the accused as provided u/s 340 of the Code and the complainant be paid cost as provided u/s 342 of the Code.

As mentioned above, the petitioner has been summoned to face trial for the offence punishable u/ss 204 and 338 of the Penal Code.

Section 204 runs as follows:-

Destruction of document [or electronic record] to prevent its production as evidence- Whoever secrets or destroys any document [or electronic record] which he may be lawfully compelled to produce as evidence in a court of justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document [or electronic record] with the intention of preventing the same from being produced or used as evidence before such court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for the purpose, shall be punished with imprisonment of either description or a term which may extend to two years, or with fine, or with both.

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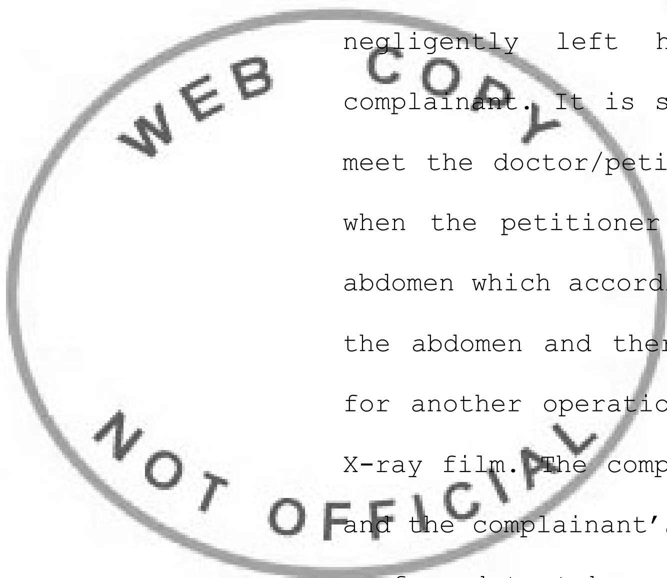
This section applies where the proceeding is of a civil or criminal nature and the act must have been done with the intention of preventing the document from being produced or used as evidence. Evidence, therefore, has to be given that the accused was legally bound to produce or deliver the document in question to such Public servant or court of justice.

Then Section 338 runs as follows:-

Causing grievous hurt by act endangering life or personal safety of others: - Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

This section applies only to acts done without any criminal intent apart from the rashness or negligence, which is its essential requirement.

From what has been mentioned above it appears that complainant is a well educated person. After being fully satisfied with the competence and professional ability and after being operated upon by the petitioner on 21.2.95 he again approached the petitioner out of his free will for further treatment. He was again operated upon by the accused on 26.3.1999 when it is said that petitioner negligently left his forcep in the abdomen of the complainant. It is said that the complainant again went to meet the doctor/petitioner on 4.8.99 for further treatment when the petitioner had advised him to get X-ray of the abdomen which according to the complainant showed forcep in the abdomen and thereafter the petitioner had advised him for another operation on 5.8.99 but he did not return the X-ray film. The complainant was again operated upon 5.8.99 and the complainant’s allegation is that this operation was performed to take out forcep which was left negligently by the petitioner. It further appears that in the year 2000 the complainant filed complaint case no. 25/2000 before the State Consumer Commission alleging negligently leaving forcep in the abdomen of the complainant by the petitioner/accused. The State Commission examined the matter and by a well reasoned order dated 7.10.2003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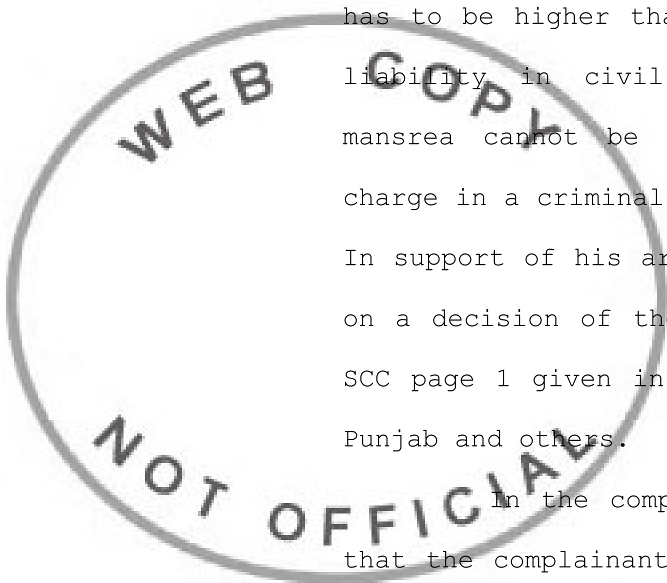
dismissed the complaint. The Bihar Council of Medical Registration has also dismissed the complainant of the complainant. As stated above in appeal also the same has been dismissed.

It was argued on behalf of the petitioner that there is no legal evidence to show that the petitioner acted negligently. It was further argued that even if the allegations are taken on its face value and accepted in its entirety the same does not constitute any offence. It was pointed out that materials so produced before the learned Magistrate during enquiry u/s 202 of the Code were not sufficient to make out prima facie case against the petitioner. Learned counsel further pointed out that to fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability in civil law. The essential ingredients of mansrea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In support of his argument learned counsel placed reliance on a decision of the Supreme Court reported in 2005 (6) SCC page 1 given in the case of Jacob Mathew vs State of Punjab and others.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In the complaint petition it has not been stated that the complainant obtained opinion of another competent doctor to support the charge of rashness or negligence on the part of accused doctor. It is also not the case of the complainant that Dr. J.P. Sinha gave evidence during enquiry u/s 202 of the Code that the X-ray film demonstrated that doctor had left his forcep in the abdomen of the complainant.

Now coming to the decision as relied upon by the

petitioner the Apex Court in paragraphs 50, 51 and 52 has given following guidelines regarding prosecuting medical practioners.

50. As we have noticed hereinabove that the case of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complaints and sometimes by the police on an FIR being lodged and cognizance taken. The Investigating officer and the private complaint cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of Criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

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 complaint prefer recourse to criminal process as a tool for pressurizing 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 credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of accused doctor. The investigation 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 Bolam 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 leveled 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

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make himself available to face the prosecution unless arrested, the arrest may be withheld.

The Apex court in para 52 of the judgment has said in clear words that private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of credible opinion given by another competent doctor to support the charge of rashness and negligence on the part of accused. It has been argued that though the complainant knew the purpose of the 3rd operation which was to take out forcep from the abdomen but it appears that he never obtained opinion of another competent doctor to support the allegation of rashness or negligence on the part accused petitioner. If the complainant knew the purpose of 3rd operation then why he surrendered before the accused petitioner for the same. He could have gone to another doctor for the third operation.

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On the other hand O.P. no.2/ complainant appearing in person vehemently argued that complaint case nos. 25/2000 and 2335 (C)/2000 are on two different issues. He contended that he is ready to produce the two X-ray film showing forcep in the abdomen along with certificate of radiologist. He also pointed out that the accused petitioner was in so hurry to take out the forcep from abdomen that he operated upon the complainant without obtaining his consent. He also pointed out that accused did not return the X-ray film showing forcep in the abdomen but the complainant some how got the two X-ray film of his abdomen taken from X-ray Research Institute, Rajendra Nagar, Patna which showed shadow of forcep in the abdomen.

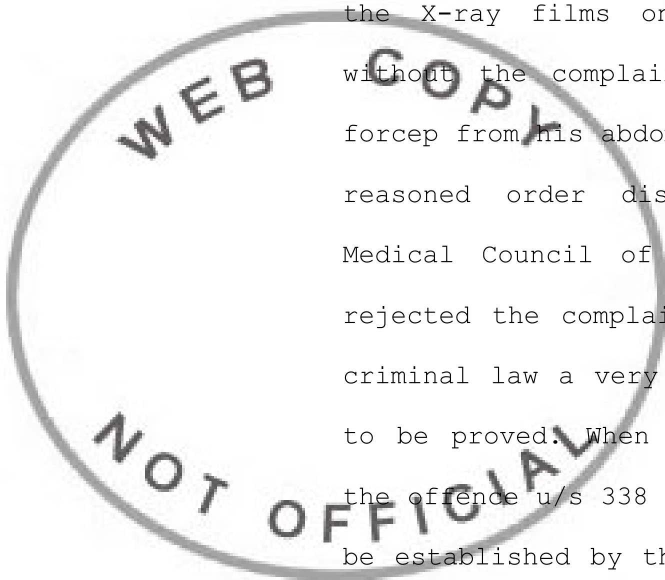
There is no clinical finding or other

investigative modalities to show that on 5.8.99 shadow of forcep was seen in the abdomen of complainant Mr. Kailash Prasad Singh.

There is also no scientific evidence to show that forcep in fact was taken out from the abdomen of the complainant.

To prosecute a medical professional for negligence under criminal law it has to be shown that he did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary sense and prudence would have done or failed to do.

Coming to the argument of the complainant I find that there is no paper on record to support the argument of the complainant that the accused/petitioner after seeing the X-ray films on 5.8.99 performed the 3rd operation without the complainant's consent with a view to remove forcep from his abdomen. The State Consumer Commission by a reasoned order dismissed the complainant's case. The Medical Council of India, as mentioned above, has also rejected the complainant's contention. For the purpose of criminal law a very high degree of negligence is required to be proved. When negligence is essential ingredient of the offence u/s 338 of the Penal Code the negligence has to be established by the prosecution and it must be culpable or gross.



In the aforesaid facts and circumstances, Continuance of the criminal prosecution against the petitioner appears to be an abuse of the process of the court. Such being the position- Cr. Misc. no. 7051/2005 is allowed and the impugned order dated 7.2.2002 is hereby

quashed.

Now coming to the other Cr. Misc., that is, Cr. Misc. no. 1666/07 this court finds that some inaccuracy in statement, which may be incorrect, inadvertent or immaterial, may not justify a prosecution as expedient in the interest of justice. Since the prosecution itself of the petitioner has been quashed and, therefore, it would not be in the interest of justice to proceed further in the present matter.

This Cr. Misc. is, accordingly, dismissed.

(M.Saran, J.)

Patna High Court
The 9-5-2008
NAFR/BKS