Before Mahabir Singh Sindhu, J.

DR. KAMAL JEET SINGH—*Appellant*

versus

PREM PAL—*Respondent*

CRM-M-31874 of 2013

May 30, 2019

Criminal Procedure Code, 1973, Section 482—Indian Penal Code, 1860, Section 482, Section 304-A-Medical negligence- Quashing of criminal complaint and summoning order—Wife of complainant having a stone(calculus)of 16 mm in her left ureter of kidney and consequently, operated by petitioner/doctor —Stone was not coming out, therefore, it was pushed time and again, which led to rupture of ureter having made punctures and contrast inserted to outline Pelvicalyceal system(PCS)—Again a fresh puncture was made, due to which, a gush of pus came out which led to collection of blood in abdomen-held, in view of law laid down by Hon'ble Supreme Court in Jacob Mathew's case (2005) 6 SCC 1, there is pre-condition for seeking opinion from a Doctor in Government service qualified in branch concerned before proceeding in a complaint case which was not satisfied before passing summoning order-petition partly allowed—Summoning order set aside—Direction to constitute Medical Board by competent authority of Government Medical College, Amritsar, regarding negligence of petitioner.

Held, that both the Courts below have ignored the law laid down by the Hon'ble Supreme Court in judgment titled as *Jacob Mathew* versus *State of Punjab and another'*, (2005) 6 SCC 1, based upon the *Bolam's test Bolam* versus *Friern Hospital Management Committee,* (1957) 2 All ER 118 (QBD) being a locus classicus for medical negligence. Also argued that there is no material available on record to substantiate that petitioner was negligent in any manner while discharging his duties in the present case.

(Para 8)

Vikram Chaudhri, Senior Advocate assisted by
Isha Goel, Advocate
for the petitioner/accused.

Veneet Sharma, Advocate
for the respondent/complainant.

MAHABIR SINGH SINDHU, J.

(1) Present petition has been filed under Section 482 of the Code of Criminal Procedure *(for short 'Cr.P.C.')* for quashing of Criminal Complaint bearing RBT No.348 dated 26.07.2007 **(P-10)**, titled as ***Prem Pal*** versus ***Dr. Kamaljit Singh*** along with all consequential proceedings arising therefrom including the order dated 05.06.2012 **(P-16)**, passed by learned Judicial Magistrate 1st Class, Amritsar *(for short 'JMIC')*, whereby petitioner has been summoned to face trial for an offence punishable under Section 304-A of the Indian Penal Code, 1860 *(for short 'IPC')*. Further challenge is to the order dated 06.07.2013 **(P-17),** passed by learned Additional Sessions Judge, Amritsar, vide which, the revision petition against the above said summoning order has been dismissed.

(2) Brief facts of the case are that wife of the respondent/complainant, namely, Mrs. Veena *(hereinafter referred as 'patient')*, aged 45 years, was admitted in Saini Multispeciality Hospital, Model Town, G.T. Road, Amritsar *(hereinafter referred as 'Hospital')* on 05.04.2007 at about 11:10 AM due to some pain in abdomen. After her examination, it transpired that she was having a stone (calculus) of 16 mm in her left ureter of kidney and consequently, operated by the petitioner on 07.04.2007. Further alleged that as per the findings in the Operation Notes, stone was not coming out, therefore, it was pushed time and again, which led to rupture of ureter having made punctures and contrast inserted to outline Pelvicalyceal System (PCS). Also alleged that again a fresh puncture was made, due to which, a *gush* of *pus* came out which led to collection of blood to the extent of one litre in the abdomen. Further alleged that petitioner, who operated the patient, should have adopted another method to remove the stone instead of pushing the same repeatedly while using ureteroscopy, which shows the negligence on his part and the same is clear from the Post Mortem Report (PMR) as well. In other words, the allegations are that instead of using the ureteroscopy by pushing the stone, an open surgical method ought to have been adopted for removal of the stone to avoid wounds and internal damage to the kidney, resulting into accumulation of *pus* and blood.

(3) Complaint reveals that a report dated 29.05.2007 was submitted by Dr. Surinder Paul, Associate Professor, Department of Pathology, Government Medical College, Amritsar to the effect that due to stone in ureter, size of left kidney of patient was enlarged to 15 x 9 x 5 cm., which led to blockage of urine from kidney, leading to

hydronephrotic changes. The above fact is further sought to be corroborated by Histopathological Report to substantiate the carelessness and negligence on the part of petitioner resulting into uncontrollable infection, leading to the death on 14.04.2007.

(4) Immediately, a complaint was moved to the In-charge, Police Post, Ranjeet Avenue, Amritsar on 14.04.2007 itself for conducting the post mortem of the dead body as well as legal action against the petitioner and thereafter, another complaint is also stated to have been made to Senior Superintendent of Police, Amritsar in this regard.

(5) In support of the complaint, following five witnesses were examined at pre-summoning stage before learned JMIC:-

CW-1 Respondent/complainant-Prem Pal;

CW-2 Dr. Surinder Paul, Associate Professor, Department of Pathology, Government Medical College, Amritsar;

CW-3 Resham Singh, Press Reporter, Daily Ajit;

CW-4 Dr. Kirpal Singh, Lecturer, Medical College, Amritsar, who conducted the post-mortem;

CW-5 S.I. Sukhbir Singh, Police Station Makboolpura.

(6) Learned trial Court, after taking into considering the entire material available on record, came to the conclusion that there are sufficient grounds to proceed against the petitioner for an offence punishable under Section 304-A IPC and thus summoned him while passing the impugned order dated 05.06.2012.

(7) Aggrieved against the above order, revision was preferred by the petitioner, but remained unsuccessful as the same was dismissed on 06.07.2013. Hence, the present petition.

(8) It is contended by learned Senior Counsel on behalf of the petitioner that apart from being highly qualified i.e. Master of Surgery, petitioner is a doctor of repute with brilliant record in his field and thus, the allegations of negligence are totally uncalled for. Further contended that both the Courts below have ignored the law laid down by the Hon'ble Supreme Court in judgment titled as ***Jacob Mathew*** versus ***State of Punjab and another***[1]***,*** based upon the Bolam's test ***Bolam***

[1] 2005 (6) SCC 1

versus ***Friern Hospital Management Committee***[2] being a *locus classicus* for medical negligence. Also argued that there is no material available on record to substantiate that petitioner was negligent in any manner while discharging his duties in the present case.

(9) On the other hand, learned Counsel for the respondent/complainant submitted that there is more than sufficient material available on record at this stage for summoning the petitioner for commission of offence punishable under Section 304-A IPC inasmuch as the negligence is apparent that instead of resorting to the required surgical method for removal of the stone, he adopted the course which caused multiple wounds in the ureter of the kidney and lot of *pus* & blood were accumulated, resulting into uncontrollable infection and failure of multiple organs. Further argued that petitioner disappeared for 24 hours and left the patient unattended on the mercy of other staff members and when her condition deteriorated beyond control, then she was shifted to Fortis Hospital, Amritsar on 10.04.2007, where she ultimately died on 14.04.2007 at a very young age.

(10) Heard both sides and perused the paper-book.

(11) There is no dispute that patient was admitted in the Hospital on 05.04.2007 due to some pain in her abdomen, where she was operated by the petitioner on 07.04.2007. When her condition deteriorated, she was referred to Fortis Hospital, Amritsar on 10.04.2007 and ultimately died on 14.04.2007 due to multiple organs disfunction as a result of secondary shock, which was sufficient to cause death in an ordinary course of nature, as is clear from the Post Mortem Report dated 14.04.2007 (**P-3**).

(12) Paper-book reveals that on 06.04.2007, after due examination of the patient, she was declared "fit for surgery" and her relevant progress report (**P-2**) reads as under:-

"**Progress Report**

06.04.2007 - A/c posted for PCNL for pre-operative fitness.
10:20 AM

On Examination:-
T-N
P-82/-min.

[2] (1957) 2 All ER 118 (QBD)

BP-140/86
RS-BL no extra sound
CUS – S1, S2 +ve
No Murmar
Hb-11
TLC-9000
Blood Urea 26
Serum Creatinine:- 1.0

Medical Opinion:
Patient fir for surgery."

(13) Despite the above factual position, concededly, neither any consent was obtained from the patient; nor there is any material on record to suggest that she was personally ever made aware about the fatal consequences, which may result on account of the surgery advised by the petitioner. Although, petitioner has tried to justify the factum of consent while referring to the Authorisation given by the husband of the patient, but if there was such a high risk involved in the surgery and patient was fully conscious as well as capable, then mere putting signature by her husband on a cyclostyle proforma cannot be countenanced as sufficient disclosure of risk factor by the doctor in view of the inalienable right i.e. right to life, enshrined under Article 21 of the Constitution of India (*for short 'Constitution'*).

(14) Ultrasound report dated 31.03.2007 of the patient, which was available with the petitioner and has been attached with paper-book, clearly reveals that her left kidney was enlarged up to 16 mm calculus in proximal ureter and relevant part of the same reads as under:-

> "Right kidney is normal in size, shape and echopattern. Left kidney is enlarged and shows dilated pelvicalyceal system due to a calculus of size 16 mm in proximal ureter. Distal ureter can not be traced. Cortical thickness is decreased (10 mm)."

(15) Respondent/complainant, while appearing as CW-1 before learned JMIC, stated that when stone did not come out, urinals were punctured again and again, resulting into accumulation of about one litre blood along with *pus*. Further deposed that petitioner performed the operation with sheer negligence and could not control the blood along with *pus*, resulting into infection in the body of the patient and her ultimate death on 14.04.2007. A report (Mark 'B') of Doctor Surinder Kumar, Professor, Pathology was brought on record to substantiate that

size of the stone increased and urine did not pass properly. This witness also stated that complaint was made to the police on 14.04.2007 itself for conducting the post mortem report as well as necessary legal action against the petitioner.

(16) Dr. Surinder Paul, Associate Professor, Pathology Department, Medical College, Amritsar, who had examined both the kidneys of the patient, appeared as CW-2 and stated that first kidney was normal, whereas second was enlarged measuring 15 x 9 x 5 cm. and relevant part of his testimony pertaining to second kidney reads as under:-

" **Gross Examination**

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SECOND KIDNEY:	Cystically dilated. Enlarged measuring 15 x 9 x 5 Cms. Pevlicalyceal system dilated. Cortex thin. Cortex and medulla cannot be differentiated. No stone recovered.

MICROSCOPIC EXMAINATION

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SECOND KIDNEY:	Majority of Glomeruli are normal. Some are hyalanized. Tubules are normal looking with necroses at places. Tubulointerstitial tissue is edematous and infiltrated with acute and chronic inflammatory cells.

IMPRESSION

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SECOND KIDNEY:	Hydronephrotic Change."

(17) CW-4 Dr. Kirpal Singh, Lecturer, Government Medical College, Amritsar, who conducted the post mortem examination of deceased, stated that on dissection of the abdomen about 500 cc of fluid, yellowish colour was present on peritoneal cavity. On incising

the retroperitoneal, about 1 litre fluid including clotted blood was present in left perinephric region. Left kidney was dissected out and size of the same was enlarged up to 14 x 9 x 3.5 cms. with 2 rents measuring 1 x .8 cm. situated on posterolateral aspect with gap of 1 cm. On cut section pelvicalyceal system was markedly dilated. Cortical thickness was 1.2 cm., pelvicalyceal system was full of blood and no evidence of any stone was found. Cause of death in this case, as per his opinion, was due to multiple organs disfunction as a result of secondary shock, which was sufficient to cause death in an ordinary course of nature.

(18) S.I. Sukhbir Singh, CW-5, stated that a complaint dated 14.04.2007 (Ex.PA) in the matter was received from the respondent/complainant and on the basis thereof, an enquiry was conducted, resulting into a report (Ex.PB) to the effect that petitioner treated the patient negligently and knowingly well that there was *pus* in her body, but despite that, he did not operate carefully under his observation; rather left her under the supervision of employees of the Hospital, but he himself disappeared for more than 24 hours and patient died. This witness also stated that no Medical Board was constituted despite the recommendation (Ex.PB) by the SHO.

(19) While dealing such cases, the Hon'ble Supreme Court in ***Jacob Mathew's*** case (supra) has laid down that a private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the trial Court in the form of credible opinion given by another competent doctor to support the charge of negligence, but at the same time, observed that this may not be understood that doctors can never be prosecuted for an offence of negligence and para 51 & 52 of the judgment, being relevant, are extracted hereasunder:-

> "**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 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 levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

(20) It transpires that in terms of the directions, given in ***Jacob Mathew's*** case (supra), the police officer recommended for constitution of a Medical Board as per report (Ex.PB), but both sides are oblivious regarding the constitution of any such Board in the matter.

(21) While examining CW-2 Dr. Surinder Paul, learned JMIC asked a specific question regarding the negligence of the petitioner in the present case but he avoided to give any concrete answer and the same reads as under:-

> **Question**: If all the tests before operation are normal and later on, there is pus and infection in the kidney or other organs of body, whether that would amount to negligence of the doctor who had operated upon the patient i.e. Veena w/o Prem Lal?
>
> **Answer**: Nothing could be said about the negligence of concerned doctor.

(22) Perusal of the above answer clearly reveals that CW-2 instead of replying the question adopted escapism despite being a Professor of a Government Medical College for the reasons best known to him and this Court does not appreciate such a course to be followed by a Medical Professor. A fortiori, instead of avoiding the straight answer, CW-2 ought to have given a clear and categoric reply one way or the other so that further quagmire could be avoided.

(23) It is also relevant to record here that in para 48 (4) of the **Jacob Mathew's** case (supra), the Hon'ble Supreme Court has held that "*The test for determining medical negligence as laid down in Bolam's case holds good in its applicability in India"*; but at the same time, it is apposite to mention here that Hon'ble Supreme Court of United Kingdom (UKSC), while departing from Bolam's test in a case of medical negligence, titled as *'**Montgomery*** versus ***Lanarkshire Health Board***[3]**,** observed as under:-

> **"84.** Furthermore, because the extent to which a doctor may be inclined to discuss risks with a patient is not determined by medical learning or experience, the application of the Bolam test to this question is liable to result in the sanctioning of differences in practice which are attributable not to divergent schools of thought in medical science, but merely to divergent attitudes among doctors as to the degree of respect owed to their patients.
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> 85. A person can of course decide that she does not wish to be informed of risks of injury (just as a person may choose to ignorethe information leaflet enclosed with her medicine); and a doctor is not obliged to discuss the risks inherent in treatment with a person who makes it clear that she would prefer not to discuss the matter. Deciding whether a person is so disinclined may involve the doctor making a judgment; but it is not a judgment which is dependent on medical expertise. It is also true that the doctor must necessarily make a judgment as to how best to explain the risks to the patient, and that providing an effective explanation may require skill. But the skill and judgment required are not of the kind with which the Bolam test is concerned; and the need for that kind of skill and judgment does not entail that the question whether to explain the risks at all is normally a

[3] (2015) UKSC 11

matter for the judgment of the doctor. That is not to say that the doctor is required to make disclosures to her patient if, in the reasonable exercise of medical judgment, she considers that it would be detrimental to the health of her patient to do so; but the "therapeutic exception", as it has been called, cannot provide the basis of the general rule.

86. It follows that the analysis of the law by the majority in Sidaway is unsatisfactory, in so far as it treated the doctor's duty to advise her patient of the risks of proposed treatment as falling within the scope of the Bolam test, subject to two qualifications of that general principle, neither of which is fundamentally consistent with that test. It is unsurprising that courts have found difficulty in the subsequent application of Sidaway, and that the courts in England and Wales have in reality departed from it; a position which was effectively endorsed, particularly by Lord Steyn, in Chester v Afshar. There is no reason to perpetuate the application of the Bolam test in this context any longer.

87. The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in Sidaway by Lord Scarman, and by Lord Woolf MR in Pearce, subject to the refinement made by the High Court of Australia in Rogers v Whitaker, which we have discussed at paras 77-73. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it. "

(24) Perusal of the above observations reveal that in ***Montgomery's*** case (supra), Hon'ble UKSC preferred a patient-centric approach. On the other hand, in ***Bolam's*** case (supra), the opinion was doctor-centered and which is as under:-

> " I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. "

(25) Be that as it may, in view of the mandate of Article 141 of the Constitution, this Court is bound to follow the law laid down by the Hon'ble Supreme Court in ***Jacob Mathew's*** case (supra) instead of ***Montgomery*** (UKSC) even though the latest judgment on the point being a matter of judicial propriety.

(26) Concededly, in terms of para 52 of ***Jacob Mathew's*** case (supra), reproduced hereinabove, there is a pre-condition for seeking an opinion from a Doctor in Government Service qualified in the branch concerned before proceeding in a complaint case and that condition has not been satisfied in the present case before passing the impugned summoning order, therefore, this Court is left with no option except to allow the present petition partly and to set aside the impugned orders passed by both the Courts below. It is further directed that a Medical Board be constituted by the competent authority of Government Medical College, Amritsar in terms of para 52 of ***Jacob Mathew's*** case (supra) regarding the negligence of the petitioner, if any, and report be submitted in this regard to learned JMIC in a sealed cover within eight weeks from the receipt of copy of this order and thereafter, a fresh order be passed in accordance with law within next four months.

(27) Copy of this order be sent to the Principal, Government Medical College, Amritsar for constitution of the Medical Board for further necessary action.

(28) Ordered accordingly.

(29) The above observations may not be construed as an expression of opinion on merits of the case.

Angel Sharma