

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.635 of 2015

Arising Out of PS.Case No. 147 Year 2015 Thana Mahua District- VAISHALI(HAJIPUR)

Dr. K.C. Vidyarthi son of Shri Yadu Nandan Rai, resident of village - Gorigama,
P.S. - Mahua, District - Vaishali.

.... Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Patna, Bihar.
2. Anil Kumar, S.H.O., P.S.- Mahua, District - Vaishali.
3. P.G.K. Sinha, S.I., P.S.- Mahua, Distt - Vaishali.
4. Shatrughan Thakur son of Tegru Thakur resident of village- Kanhauli Dhanraj,
P.S. Mahua, District - Vaishali.

.... Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ansul, Advocate
	:	Mr. Fahad Khurshid, Advocate
For the State	:	Mr. Madhukar Krishna Sinha, S.C.-1
	:	Mr. Ashutosh Singh, A.C. to S.C.-1

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
ORAL JUDGMENT
Date: 05-05-2016

By way of the present application preferred under Articles 226 and 227 of the Constitution of India, the petitioner seeks quashing of the First Information Report (for short “the FIR”) lodged in connection with Mahua P.S. Case No.147 of 2015 registered under Section 304/34 of the Indian Penal Code (for short “the Code”).

2. The prosecution case has been instituted on the basis of the fardbeyan of the informant Shatrughan Thakur recorded by the Officer-in-Charge of Mahua Police Station on 28th March, 2015 at 11.15 a.m., wherein he has alleged that on 27th March, 2015 he admitted his son in Arti Nursing Home of the petitioner. While being



treated, the petitioner told the informant that the patient has consumed poison. He asked to deposit Rs.25,000/- for treatment. The informant deposited Rs.5,000/- only. The petitioner asked to deposit the rest amount of Rs.20,000/-. When the informant asked to release the patient, the petitioner stated that the patient will be released on deposit of the remaining amount of Rs.20,000/-. The informant has further alleged that the petitioner negligently killed his son Raushan Kumar for non-payment of Rs.20,000/-. When the informant was not allowed to meet his son, he made an enquiry from the compounder, who disclosed that his son has already died. He also stated that the dead body will be handed over only after payment of remaining amount. The informant paid Rs.8,000/- more but the doctor did not become ready to hand over the dead body and demanded balance amount. He also threatened the petitioner with dire consequences.

3. It has been submitted by the learned counsel appearing for the petitioner that the petitioner is a qualified medical practitioner and is running a Nursing Home in the name and style of 'Arti Nursing Home' at Mahua in the district of Vaishali. He has submitted that the informant along with others had brought the patient, who had consumed poison in a very serious condition in the Nursing Home. The local police was informed in this regard by the petitioner and treatment was immediately taken up. Unfortunately, in course of



treatment the patient died. After the death of the patient the informant Shatrughan Thakur and his associates created ruckus in the Nursing Home. They brutally assaulted the brother of the petitioner, namely, Krishna Kumar Bhargav and also committed theft in the Nursing Home leading to lodging of Mahua P.S. Case No.148 of 2015 under Sections 323, 379, 504, 506 and 324 of the Code. Learned counsel for the petitioner has further submitted that the brother of the petitioner namely Krishna Kumar Bhargav was admitted and subsequently treated in Dayal Nursing Home for the injuries he received as a result of assault. He has submitted that from perusal of the FIR, it would be apparent that no specific allegation regarding negligent or wrong treatment has been made in the present case. Also, there is no allegation that the treatment was denied in absence of payment of money. The crux of the allegation is that the petitioner demanded his professional fees before releasing the dead body. Such an allegation would not attract the ingredients of an offence under Section 304 of the Code. He has submitted that the police ought to have registered the FIR only after obtaining report of an expert doctor or Committee of doctors confirming the allegation of medical negligence and not otherwise.

4. In support of his submissions, learned counsel for the petitioner has placed reliance on the decisions of the Supreme Court



in *Jacob Mathew Vs. State of Punjab and Another*, reported in (2005) 6 SCC 1; *Martin F. D'Souza Vs. Mohd. Ishfaq*, reported in (2009) 3 SCC 1; *A.S.V. Narayan Rao Vs. Ratanlal and others*, reported in (2013) 10 SCC 741 and in *Kusum Sharma and others. Vs. Batra Hospital and Medical Research Centre and others*, reported in (2010) 3 SCC 480.

5. A counter affidavit has been filed on behalf of respondent no.2, wherein it has been contended that the case has been supervised by the Sub Divisional Police Officer, Mahua, who has found the case to be 'a mistake of fact' against the writ petitioner. However, certain directions have been given to the Investigating Officer of the case by the Supervising Officer pursuant to which investigation of the case is going on. Referring to the assertions made in the counter affidavit filed on behalf of respondent no.2, learned counsel appearing for the State has submitted that to hold investigation into a cognizable offence is the statutory right of the police. He has submitted that since the informant has alleged that his son, who was admitted in the Nursing Home, died due to negligence of the petitioner in course of treatment, as the informant failed to pay the amount of money demanded for treatment, a case of culpable homicide not amounting to murder was registered under section 304/34 of the Code against the petitioner and the investigation of the



case is going on. He has submitted that if the accusation against the petitioner would be ultimately found false, an appropriate police report would be submitted in the court on completion of investigation under section 173 (2) of the Code of Criminal Procedure (for short “Cr.P.C”). According to him, the instant application filed on behalf of the petitioner is premature and the petitioner ought to have waited for the outcome of the investigation, as only after proper investigation, it can be said whether or not there was any culpability on the part of the petitioner in the offence alleged.

6. I have heard learned counsel for the parties and have given my anxious consideration to the materials available on record.

7. I find substance in the submissions advanced on behalf of the petitioner. It would appear from the allegation made in the FIR that there is a vague allegation of death of the patient caused due to negligence against the petitioner, who is admittedly a qualified doctor and running a Nursing Home.

8. Now, before proceeding with factual aspect of the case and the rival submissions made on behalf of the parties, let us have a quick look into the legal position on the matter in dispute.

9. Firstly, this Court would like to record that the medical professional are duly protected, if the action is taken in good faith. The criminal law has invariably placed the medical professionals on a

pedestal different from others.

10. Section 80 of the Code states that nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. It protects a person from criminal liability if the act which killed the other person is done “with proper care and caution”, which can be expected of him by a prudent and reasonable man in the circumstances of a particular case.

11. Similarly, Section 81 of the Code states that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

12. Thus, from reading of the provisions prescribed under Sections 80 and 81 of the Code, it would be evident that a doctor is not to be held criminally responsible for a patient’s death unless it is shown that he/she was negligent or incompetent, with such disregard for the life and safety of the patient that it amounted to a crime against the State.

13. Section 88 of the Code provides for exemption for acts not intended to cause death, done by consent in good faith for person’s benefit. The illustration given in section 88 of 1860 of the

Indian Penal Code is of great importance which reads as under:-

“A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z’s death, and intending, in good faith, Z’s benefit, performs that operation on Z, with Z’s consent. A has committed no offence”.

14. From a bare perusal of the illustration given under Section 88 of the Code, it is manifest that a medical professional has been given total protection, if the action is taken in good faith for the person’s benefit after taking his consent whether express or implied.

15. Section 92 of the Code provides for exemption of acts done in good faith for the benefit of a person without his consent though the acts cause harm to the person and that person has not consented to suffer such harm.

16. The illustration (c) of the proviso to Section 92 would be important for considering a case of medical negligence which reads as under:-

“92(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child’s guardian. A performs the operation in spite of the entreaties of the child, intending, in

good faith, the child's benefit. A has committed no offence."

17. Section 93 of the Code saves from criminality certain communications made in good faith. It is introduced to protect the innocent without cloaking the guilty. It requires that the communication should have been made (1) in good faith, and (2) for the benefit of the person to whom it is made.

18. The illustration given in Section 93 of the Code speaks of a surgeon. It reads as under:-

"A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death".

19. A careful scrutiny of Sections 80, 81, 88, 92 and 93 of the Code would make it clear that the Indian Penal Code, 1890 has taken care to ensure that a medical professional, who acts in good faith, should not be punished.

20. Despite the protection given to the medical professionals under the Penal Code, the increasing trend of litigation by unsatisfied patients drew attention of the Supreme Court in more than one case. It has recognized the fact of malicious prosecution of medical professionals and ruled against their criminal prosecution unless



gross negligence is established. It has held that a medical practitioner cannot be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only when conduct fell below that of standards of a reasonably competent practitioner in his field.

21. In this regard I may refer to the land mark judgment of the Supreme Court in ***Jacob Mathew vs. State of Punjab*** (supra). That was a case where the informant's father was admitted as a patient in a private ward of the hospital in the night at about 11 p.m., the patient felt difficulty in breathing. The informant's elder brother, who was present in the room, contacted the duty nurse, who in her turn called some doctor to attend the patient. No doctor turned up for about 20-25 minutes. Then Dr. Jacob Mathew and Dr. Allen Joseph came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in bed. The oxygen cylinder was found to be empty. There was no other gas cylinder available in the room. The informant's brother went to the adjoining room and brought a gas cylinder therefrom. However, there was no arrangement to make the gas cylinder functional and in between 5 to 7 minutes were wasted. By



this time, another Doctor arrived who declared that the patient was dead. On the above said report, an offence under Section 304-A/34 of the Code was registered and investigated. On completion of investigation, charge-sheet was filed against Dr. Jacob Mathew under Section 304A of the Code. Challenging the same, the doctor filed a revision before the sessions court, which was dismissed. As against the same, the doctor filed a petition under Section 482 of the Cr.P.C. before the High Court to quash the FIR and all other subsequent proceedings. The High Court also dismissed the said petition. Thereafter, the doctor approached the Supreme Court by way of special leave petition. In that case, the Supreme Court had made an extensive discussion on the various issues and it drew a line of difference between negligence as a tort and negligence as a crime. While drawing a line of difference, the Supreme Court has succinctly stated in paragraph 14 as under:-

“14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the

consequences. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions (1937 AC 576: (1937)2 All ER 552 (HL) stated: All ER p.556C)

“Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.”

Thus, a clear distinction exists between “simple lack of care” incurring civil liability and “very high degree of negligence” which is required in criminal cases. In Riddell v. Reid, (1942)2 All ER 161: 1943 AC 1 (HL) (AC at p.31) Lord Porter said in his speech -

“A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability”. (Charlesworth & Percy, ibid., para 1.13)”

22. After having referred to the several other judgments of the Supreme Court and the foreign courts, the Supreme Court held in paragraphs 28 to 31 as under:-

“28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the



complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason- whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science - both are too complex to be easily understood. To hold in favour of existence of

negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

31. The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work "Errors, Medicine and the Law" (Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of mens rea has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer

chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how the doctor functions in real life. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.”

23. The Supreme Court went on to remind in paragraph 47 as under:-

“47. Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to society.”

24. After exhaustively considering the various aspects of negligence on the part of a doctor, the Supreme Court summed up its conclusion in paragraph 48 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's case [1957] 1 W.L.R. 582 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](#) of 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](#) of the 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.”

25. The judgment of the Supreme Court in **Jacob Mathew’s** case (supra) was subsequently considered in yet another case in **Martin F D’Souza** (supra). That was a case concerned with claim for compensation under the Consumers Protection Act before the Commission under the said Act. A two-Judge Bench of the Supreme

Court has lucidly and elaborately explained the subject of medical negligence and held in paragraph 106 as under.:

*“106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in **Jacob Mathew's** case (supra), otherwise the policemen will themselves have to face legal action.”*

26. In yet another case while dealing with in the matter in a case of medical negligence in **Kusum Sharma's** case (supra), the Supreme Court observed in paragraph 87 as under.:-

“87.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 or 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 or most likely imminent.”

27. The correctness of the judgment of the Supreme Court in ***Martin F D’Souza*** was again examined by the Supreme Court subsequently in ***Kishan Rao vs. Nikhil Super Speciality Hospital and Another***, reported in (2010) 5 SCC 13. In that case the Supreme Court has held that directions in paragraph 106 in ***Martin F D’Souza’s*** case are not binding precedent in case of negligence before the Consumer Forum but, said direction was affirmed in respect of criminal prosecution.

28. It would be relevant to note here that ***Martin F D’Souza’s*** case and ***Kishan Rao’s*** case are concerned with medical negligence as a tort whereas ***Jacob Mathew’s*** case is concerned with prosecution of a doctor for the alleged medical negligence.

29. In view of the decision of the Supreme Court in ***Jacob Mathew’s*** case it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind



other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.

30. Further, in *Jacob Mathew's* case the Supreme Court has held that for prosecuting a doctor it should be shown that the hazard taken by the doctor should be of such a nature that the injury, which resulted or most likely imminent, after holding so, the Supreme Court has also issued certain guidelines in respect of prosecution of medical professionals in paragraphs 51 to 53. It read as under.:

“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 emphasize 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 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 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's 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.

Case at hand

53. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused- appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non- availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be - we express no opinion thereon) but the accused-

appellant cannot be proceeded against under Section 304-A IPC on the parameters of Bolam's test (Bolam vs. Friern Hospital Management Committee, (1957) 1 WLR 582). ”

31. Recently, a Constitution Bench of the Supreme Court in *Lalita Kumari vs. Government of Uttar Pradesh and Others*, reported in (2014) 2 SCC 1, considered the issue whether a police officer is bound to register an FIR upon receiving any information relating to commission of a cognizable offence under Section 154 Cr.P.C. or a police officer has the power to conduct a ‘preliminary enquiry’ in order to test the veracity of such information before registering the same. The Constitution Bench, after making an in-depth analysis of the legal provisions relating to registration of FIR, more particularly Section 154 Cr.P.C., has affirmed the law laid down in *Jacob Mathew’s* case as would appear from a reading of paragraph 116 of the said judgment. The Constitution Bench has held in paragraph 115 as under.:

“115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary enquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on

the part of the doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.”

32. Further, in paragraph 120.6 the Supreme Court has issued certain directions relating to the power of a police officer to conduct a ‘preliminary enquiry’ in order to test the veracity of the information received under Section 154 Cr.P.C. before registering the same, it reads as under.:

“120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each cases The category of cases in which preliminary inquiry may be made are as under.:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corrupt cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over three months’ delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

33. Thus, it would be evident from the decisions of the



Supreme Court, as discussed hereinabove, that before instituting an FIR against a doctor for medical negligence or omission, the police must obtain an independent and competent medical opinion from a doctor qualified in that branch of medical practice, which can normally be expected to give an unbiased opinion applying Bolam's tests to the fact collected for investigation.

34. Coming back to the facts of the present case, it would be evident from perusal of the FIR that the informant has alleged that he took his son to the 'Arti Nursing Home' of the petitioner for treatment on 27th March, 2015 and under the advice of the doctor, he was admitted in the Nursing Home. While being treated, the petitioner disclosed the informant that his son has consumed poison. He demanded Rs.25,000/- for treatment. The informant deposited Rs.5,000/- and when further demand of Rs.20,000/- was made, the informant asked to release his son, but the petitioner stated that his son would be released only after depositing the rest amount of Rs.20,000/-. The informant has also alleged that the petitioner negligently killed his son for non-payment of Rs.20,000/-.

35. Upon perusal of the allegations made in the FIR and considering the submissions advanced on behalf of the petitioner, I am of the considered opinion that the present case comes within the parameters laid down by the Supreme Court in *Jacob Mathew's* case

and the *Lalita Kumari's* case for the purpose of prosecution of a medical professional.

36. It is reiterated that there is no dispute to the fact that the petitioner is a medical practitioner having a valid qualification and certificate for the same and is running a Nursing Home. The informant and others had brought the patient voluntarily for treatment in the Nursing Home of the petitioner and during the course of treatment the son of the informant died on 27th March, 2015 itself. It would be further evident from the pleading of the parties that the son of the informant had consumed poison and information in this regard was also given to the local police.

37. From perusal of the allegations made in the FIR of Mahua P.S. Case No. 148 of 2015 dated 28th March, 2015 instituted on the basis of the written report submitted by the petitioner before the Officer-in-Charge of Mahua Police Station which has been brought on record as Annexure-3 to the present application, it would appear that after the death of the son of the informant, the informant and his associates became aggressive. They created ruckus, assaulted the brother of the petitioner and committed loot in the Nursing Home. I find that even the counter affidavit filed on behalf of the State would indicate that the Supervising Officer found the prosecution case instituted by the informant against the petitioner to be 'a mistake of

fact', but instead of filing a final report, the investigation is still going on.

38. It is true that the case instituted by the petitioner against the informant is in the nature of counter case. It would not be proper for this Court to give any finding on the merits of the said case. However, at least, it can be inferred from materials on record and the submissions made by the respective counsel for the parties that the grievance of the petitioner is mainly because his son, who was admitted in the Nursing Home of the petitioner after consuming poison, had died in course of treatment due to medical negligence, as the demand of fees made by the petitioner was not fulfilled.

39. I find that the impugned FIR has been instituted by the police in complete disregard to the directions given by the Supreme Court in *Jacob Mathew's* case as also in *Lalita Kumari's* case, as the same was instituted straightway by the police on receipt of information regarding a cognizable offence under Section 304 of the Code without holding any 'preliminary enquiry' and obtaining an independent and competent medical opinion from a doctor in that branch of medical practice. Admittedly, there was no expert report before the police confirming the allegation that the petitioner had acted in a manner amounting to gross negligence while affording treatment of the patient admitted in his Nursing Home warranting

criminal prosecution.

40. I am of the considered opinion that the manner in which the FIR has been instituted warrants this court to invoke its extraordinary inherent jurisdiction under Section 482 of the Cr.P.C. in order to secure the ends of justice.

41. In view of the discussions made hereinabove and considering the above noted decisions of the Supreme Court, the FIR of Mahua P.S. Case No. 147 of 2015 dated 28th March, 2015 and the entire proceedings arising out of the same are, hereby, set aside and quashed.

42. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	13.5.2016
Transmission Date	13.5.2016