

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL MISCELLANEOUS No.27618 of 2017**

Arising Out of PS. Case No.-76 Year-2002 Thana- BRAHMPURA District- Muzaffarpur

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Dr. Hemchandra Lal Karn, S/o Hari Narayan Lal Karn, Resident of Village- Chatra, P.S.- Arer Benipatti, District- Madhubani at present Karn Neura Care and Research Centre, Nilkanth Chowk, P.S.- Brahmpura, District- Muzaffarpur.

... .. Petitioner

Versus

1. The State of Bihar
2. Dhruv Bhandari, S/o Bhola Bhandari, Resident of Village- Madhopur, Sultanganj, P.S.- Runni Saidpur, District- Sitamarhi.

... .. Opposite Parties

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**Appearance :**

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|--------------------|---|-----------------------------|
| For the Petitioner | : | Mr. Bipin Bihari, Advocate  |
| For the State      | : | Mr. Abhay Kumar No.- 1, APP |
| For the O. P. No.2 | : | Mr. Arvind Kumar, Advocate  |

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**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**  
**ORAL JUDGMENT**

**Date : 01-10-2019**

Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for the opposite party no.2.

2. This application under Section 482 of the Code of Criminal Procedure (for short 'CrPC') has been filed by the petitioner for quashing the order dated 03.04.2017 passed by the learned 12<sup>th</sup> Additional Sessions Judge, Muzaffarpur in Sessions Trial No.479 of 2016 arising out of Brahmpura P.S. Case No.76 of 2002 corresponding to Sessions Trial No.479 of 2016



whereby he has dismissed the petition filed under Article 227 of the CrPC by the petitioner for discharge from the criminal prosecution.

3. It is submitted by the learned counsel for the petitioner that the petitioner is a qualified and experienced doctor having degree of M.B.B.S., M.S., M.C.H. (Neuro Surgeon). He had earlier been a teacher in Patliputra Medical College and Hospital at Dhanbad. He runs his nursing home, namely, M/s Karn Neuro Care and Research Centre at Nilkanth Chowk in the township of Muzaffarpur. He has been falsely implicated in the case at the instance of the opposite party no.2. The materials collected in course of investigation were not sufficient enough to put him on trial for the offence punishable under Section 304A read with 34 of the Indian Penal Code (for short 'IPC').

4. He has further contended that the investigating officer of the case did not take any opinion from any doctor in the matter before submitting charge-sheet in the case. The charge-sheet was submitted by the investigating officer in a mechanical manner as also in complete violation to the mandate of the Supreme Court in the matters of **Jacob Mathew vs. State of Punjab & Another [(2005 6 SCC 1)]** and **Martin F. D'Souza**



**vs. Mohd. Ishfaq [(2009) 3 SCC 1].**

5. He has further contended that the learned Chief Judicial Magistrate took cognizance of the offence punishable under Section 304A read with 34 of the IPC mechanically without application of judicial mind. He also failed to appreciate that in a case of alleged death due to rash and negligent act on the part of a qualified doctor in absence of medical opinion of an expert in the field no prosecution could have been launched.

6. He contended that the learned Additional Chief Judicial Magistrate-11th, Muzaffarpur further erred in law by allowing the application dated 10.05.2016 of the informant (opposite party no.2) filed under Section 216 of the CrPC vide order dated 20.06.2016 whereby charge under Section 304 A was altered to section 304 IPC and the case was committed to the court of sessions for trial. He has urged that the order impugned whereby the application filed by the petitioner under Section 227 of the CrPC for discharge has been rejected is patently bad in law and is fit to be set aside.

7. *Per contra*, learned counsel appearing for the State submitted that the allegations made in the First Information Report (for short 'FIR') would clearly make out a case of culpable homicide not amounting to murder. In that view



of the matter, no error can be found with the order dated 20.06.2016 whereby the learned Additional Chief Judicial Magistrate-11th, Muzaffarpur committed the case to the court of sessions for trial, as the offence punishable under Section 304A of the Indian Penal Code is triable by the Court of Sessions. He has further contended that the application filed under Section 227 of the CrPC by the petitioner seeking discharge has rightly been rejected by the learned 12<sup>th</sup> Additional Sessions Judge, Muzaffarpur.

8. He contended that the opposite party no.2 and some other witnesses have fully corroborated the allegations made in the FIR in their statements made under Section 161(3) of the CrPC in course of investigation.

9. While adopting the submissions made by the learned counsel for the State, learned counsel for the opposite party no.2 submitted that it is a gross case of negligence on the part of the petitioner and his compounder due to which the daughter of the opposite party no.2 died. He contended that the ratio laid down in the matter of **Jacob Mathew (supra)** and **Martin F. D'Souza (supra)** would not be applicable to the facts of the present case.

10. He argued that in the instant case, there is



allegation that the petitioner deliberately detached the pipe from the body of the daughter of the informant through which saline was being infused in course of treatment. The said act can not be brushed aside by calling it an ordinary case of medical negligence rather the same was a clear case of culpable homicide not amounting to murder and such a culpable action on the part of a qualified doctor is not protected by any judgment of the Hon'ble Supreme Court.

11. Having heard learned counsel for the parties, when I look to the FIR, as contained in Annexure-1 to the present application, I find that the same is based on the written report submitted on 27.06.2002 by the opposite party no.2 to the Officer-in-charge, Brahampura Police Station, Muzaffarpur wherein he has alleged that on the direction of the petitioner he took his daughter Kajal Kumari, aged about eleven years, to Karn Neuro Care and Research Centre for treatment. As per the advice of the petitioner, he got his daughter admitted in the said Research Centre on payment of Rs.1,000/- and her treatment commenced with infusion of saline. On the next day, at about 10:00 a.m., the petitioner arrived at the nursing home and said that the condition of his daughter is improving. He asked him to further deposit Rs.3,000/-. The informant expressed his inability



to deposit the amount at once and requested that he would be able to deposit the amount by the evening. Upon this, the petitioner got enraged. He threatened to stop the treatment. When the opposite party no. 2 requested him with folded hands not to stop the treatment, he allegedly detached the pipe through which saline was being infused to his daughter. Thereafter, the petitioner and his compounder pushed him outside the centre. He has further alleged that due to the aforesaid act on the part of the petitioner, the condition of his daughter worsened and she started squirming and ultimately died at about 4:00 p.m.. He claimed that the petitioner and his compounder deliberately killed his daughter by abruptly stopping her treatment.

12. On perusal of the case diary, I find that the opposite party no.2 has supported the allegations in his subsequent statement.

13. One of the relatives of the informant namely, Rajendra Bhagat in his statement recorded under Section 161(3) of the CrPC has stated that the informant's daughter had sustained injury on her head. She was first taken to Dr. Bhartendu of SKMCH, who referred her to the clinic of the petitioner where she was undergoing treatment. He has corroborated the allegations made by the informant in the FIR.



14. Another witness, Md. Kaiser has stated in his statement that on 26.06.2002, the daughter of the informant had fallen down while going on a motorcycle as a result of which she had sustained injuries whereafter she was admitted in the nursing home of the petitioner and, in course of treatment, she died. He has also alleged that a demand of Rs. 3,000/- was made from the informant of the case and on failure to pay the amount, the pipe through which the saline was being infused was pulled away.

15. However, independent witnesses namely, Garib Nath Ram and Pawan Kumar, in their respective statements recorded under Section 161(3) of the CrPC have stated that the daughter of the informant was being treated in the nursing home of the petitioner, and, in course of treatment, she died. They have stated that the relatives of the informant alleged an act of negligence on the part of doctor and they assaulted the petitioner after he declared the informant's daughter dead.

16. The witnesses Garib Nath Ram and Pawan Kumar are witnesses to the inquest.

17. The postmortem report would reveal that abrasions were found on left forehead just above and lateral to left eye-brow 1.2" x 0.3" and left face just below and lateral to



left eye 1/2" x 1/2". The doctor has further held in the postmortem report that on opening the scalp thick haematoma was found over left half of skull with fracture of temporal bone. On opening of skull subdural haematoma was found. Having recorded the aforesaid findings, the doctor has opined that the deceased died due to shock and haemorrhage and coma as a result of the above injuries.

18. Upon completion of investigation, the investigating officer had submitted charge-sheet under Section 304A of the IPC against the petitioner on 23<sup>rd</sup> December, 2002. On perusal of the materials available on record, the learned jurisdictional Magistrate took cognizance of the offence. Since cognizance was not taken under any other provisions of law except Section 304A of the IPC, the substance of accusation was explained to the petitioner. Thereafter, the trial commenced and, in all, six witnesses were examined till 3<sup>rd</sup> October, 2015.

19. At this stage, an application was filed by the informant of the case under Section 216 of the CrPC for adding the charge under Section 304 of the IPC, as it was a case of culpable homicide not amounting to murder and not a case of death due to rash and negligent act on the part of petitioner.

20. After hearing the parties, the learned ACJM-



II, Muzaffarpur vide order dated 20.06.2016 came to the conclusion that the allegations made against the petitioner actually made out a case of culpable homicide not amounting to murder. Hence, he committed the case to the Court of Sessions for further proceedings under Section 323 of the CrPC.

21. At the stage of framing of charge before the Sessions Court, the petitioner and his compounder filed an application under Section 227 of the CrPC on 27.02.2017 for discharge from the case. They pleaded their innocence and submitted that there is no material or evidence on record to show that the death of deceased was due to any negligence on the part of doctor or any of his staff. They pleaded that the postmortem report does not show that death was due to any intentional or unintentional negligence on the part of doctor or his staff.

22. Learned Additional Public Prosecutor appearing on behalf of the State contested the matter and submitted that the petition filed by the petitioner and another was legally not maintainable. He argued that no medical board was requested to be set up by the petitioner and it was only the medical board, which could have given expert opinion regarding the circumstances under which the daughter of the informant



died.

23. The Sessions Court, however, did not approve the contentions advanced on behalf of the accused persons and rejected the application preferred under Section 227 of the CrPC vide order dated 03.04.2017.

24. Being aggrieved by the aforesaid order dated 03.04.2017 passed by the learned 12<sup>th</sup> Additional Sessions Judge, Muzaffarpur in Sessions Trial No.497 of 2016, the petitioner has preferred the instant application under Section 482 of the CrPC.

25. In course of argument, learned counsel for the petitioner has produced certified copy of the orders passed passed by the learned 12<sup>th</sup> Additional Sessions Judge after the order dated 03.04.2017. Let same be taken on record.

26. From a perusal of the order dated 25.05.2018, it would be evident that charges have already been framed against the petitioner and his compounder vide order dated 25.05.2018.

27. In view of the arguments advanced at the Bar by the respective parties, I am of the view that in the instant case there are four questions, which need to be answered.

28. The first and foremost question is as to



whether the allegations made in the FIR would make the petitioner liable to be prosecuted under Section 304A of the IPC? The second question for determination would be as to whether the learned Additional Chief Judicial Magistrate-II, Muzaffarpur was right in his approach in taking cognizance of the offence and committing the case to the Court of Sessions for trial in exercise of powers conferred under Section 323 of the CrPC? The third question for determination would be as to whether the Sessions Court rightly appreciated the points taken by the petitioner while rejecting the application for discharge filed under Section 227 of the CrPC? And the fourth question for determination would be as to whether it would be proper for this Court to interfere with the impugned order passed by the court below when charges have already been framed?

29. In order to answer the questions formulated by this Court, firstly, one should look to the certain provisions of the IPC, which protects the medical professionals from unnecessary criminal prosecution. They are sections 80, 81, 88, 92 and 93 of the IPC. Considering importance of the aforesaid provisions of the IPC, they are set out hereinbelow:-

**“80. Accident in doing a lawful act.-**

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.

**81. Act likely to cause harm, but done without criminal intent, and to prevent other harm.**-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.

Explanation.-It is question of fact in such a case whether the harm to be prevented or avoided was of such such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

**88. Act not intended to cause death, done by consent in good faith for person's benefit.**-Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who



has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

**92. Act done in good faith for benefit of a person without consent.-** Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

**Provisos-Provided-**

*First.-* That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

*Secondly.-* That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

*Thirdly.-* That this exception shall not extend to the voluntary causing of hurt,



or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

*Fourthly.-* That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

**93.Communication made in good faith.**-No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.”

30. Section 80 of the IPC provides 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.

31. Section 81 of the IPC 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.



32. The explanation to section 81 of the IPC provides that it is a question of fact in such a case whether the harm to be prevented or avoided was of such such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

33. Thus, in view of the provisions of Sections 80 and 81 of the IPC, a doctor can not be held criminally liable 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 patient that it amounted to a crime against the State.

34. Section 88 of the IPC provides for exemption for acts not intended to cause death, done by consent in good faith for person's benefit and who has given a consent, whether express or implied to suffer that harm or take the risk of that harm. The illustration given in Section 88 of the IPC is of great significance. It is set out hereinunder:-

“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.”



35. From a perusal of the illustration given hereinabove under Section 88 of the IPC, it would be 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.

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

37. The illustration (c) of the proviso to Section 92 would be of great significance for considering a case of medical negligence, which is set out hereinbelow:-

“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.”

38. Thus, it would be evident that Section 92 of the IPC gives necessary protection to the medical professionals for acts done in good faith for the child's benefit.

39. Section 93 of the IPC saves certain



communication made in good faith from criminal liability. The said provision can be applied only if the communication has been made in good faith and for the benefit of the person to whom it is made.

40. The illustration given in Section 93 of the IPC also speaks of a surgeon. It is set out hereinunder:-

“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.”

41. In spite of the protections given to the medical professionals under the IPC, the increasing trend of litigation by unsatisfied patients drew attention of the Hon’ble 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. The Hon’ble Supreme Court has held that a medical practitioner can not be 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.



42. In a landmark judgment in **Jacob Mathew v. State of Punjab & Another** (supra), while dealing with the case of negligence by professionals, the Supreme Court succinctly stated in the following words:-

“18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and



does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which



he practises. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.* 2001 PNLR 233(CA) Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.”

43. The Court further observed higher the acuteness in emergency and higher the complication, more are the chances of error of judgments. Para 25 of the said judgment, which is as under:-

“25. A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure



which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.”

44. Further, in para 28 and 29, Hon’ble Supreme Court observed about a doctor faced with an emergency 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.”



45. The Court went on to remind in para 47 as under:-

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

46. The Court exhaustively considered various aspects of negligence on the part of a doctor and summed up its conclusions in para 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 case (1957) 1 WLR 582, 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.”

47. In **Martin F. D’souza Vs. Mohd. Ishfaq [(2009) 3 SCC 1]**, a two-Judge Bench of the Supreme Court has lucidly and elaborately explained the subject of medical



negligence and held in para 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 the 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 doctor/hospital concerned. 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 case [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1], otherwise the policemen will themselves have to face legal action.”

48. Thus, it would be evident from the ratio laid



down by the Hon'ble Supreme Court in **Martin F. D'souza** (supra) that before prosecuting a medical professional, it is mandatorily required to have a report of a competent doctor or committee of doctors specialized in the field relating to which medical negligence is attributed. In absence of any expert opinion of a competent doctor or committee of doctors specialized in the field relating to which the medical negligence is attributed, a medical professional can not be put to any harassment or criminal prosecution.

49. Applying the aforementioned law to the facts of the present case, I find that the minimum requirement necessary for prosecuting the petitioner was not satisfied, as there is no report of a competent medical expert specialized in the field relating to which the medical negligence is attributed against the petitioner and his staff.

50. As noticed, hereinabove, the patient had met with an accident. She had suffered injuries over her head. She was first treated by Dr. Bhartendu Kumar in the Srikrishna Medical College and Hospital, Muzaffarpur from where she was referred to the Research Centre of the petitioner where she was undergoing treatment. The informant, being the father of the patient, had given his consent for treatment. It is also an



admitted fact that the petitioner is a qualified doctor. In course of treatment, the patient died. The allegation against the petitioner is that due to non-payment of Rs. 3,000/- demanded from the informant, he had detached the pipe through which saline was being infused to the patient. The said allegation has been completely denied by the petitioner. Whether the death occurred due to the deliberate action as alleged by the informant or not could have been appreciated only if the matter could have been referred to a competent doctor or committee of doctors specialized in the field relating to which the medical negligence was attributed.

51. These admitted facts make it amply clear that the ratio laid down by the Supreme Court in **Jacob Mathew** (supra) and **Martin F. D'souza** (supra) were not followed before proceeding ahead against the petitioner in a criminal case.

52. Regard being had to the facts and circumstances of the case, this Court is of the opinion that the learned ACJM-II ought not have taken cognizance of the offence punishable under Section 304A of the IPC pursuant to the police report submitted under Section 173(2) of the CrPC and proceeded with the trial. This Court is further of the opinion



that the learned ACJM-II was not justified in committing the case to the Court of Sessions in exercise of powers conferred under Section 323 of the CrPC holding that a case of culpable homicide not amounting to murder punishable under Section 304 of the IPC is made out. This Court is further of the view that after commitment, the sessions court also failed to appreciate the facts and law involved in this case in correct perspective. It failed to appreciate the ratio laid down by the Supreme court in **Jacob Mathew** (supra) and **F. Martin D'Souza** (supra) and erroneously rejected the application preferred by the petitioner under Section 227 of the CrPC and, subsequently, framed charge during pendency of the application before this Court.

53. Having arrived at the aforesaid conclusions, the only question to be determined, at this stage, is as to whether this Court should interfere with the prosecution case when the charges have already been framed.

54. In this regard, this Court would like to refer to the judgment of the Hon'ble Supreme Court in **Anand Kumar Mohatta vs. State (Govt. of NCT of Delhi) Department of Home and Anr. [2019 (1) BLJ 128]** wherein referring to the powers conferred under Section 482 of the CrPC, the Hon'ble Supreme Court held:- *"There is nothing in the words of this*



*Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR”. It further observed:- “It is settled principle of law that the High Court can exercise jurisdiction under Section 482 of Cr.P.C. even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court”.*

55. As this Court has come to the conclusion that the prosecution of the petitioner in the instant case is apparently in conflict with the ratio laid down by the Hon’ble Supreme Court in a landmark judgment in **Jacob Mathew** (supra) and **Martin F. D’Souza** (supra), applying the ratio laid down by the Hon’ble Supreme Court in **Anand Kumar Mohatta** (supra), unhesitatingly this Court comes to the conclusion that in order to prevent the abuse of the process of the court, it would be expedient in the interest of justice to interfere with the



prosecution of the petitioner even though the charges have been framed.

56. Accordingly, the application is allowed.

57. The entire criminal proceedings arising out of the first information report of Brahmpura P.S. Case No.76 of 2002 corresponding to Sessions Trial No.479 of 2016 pending in the court of Additional Sessions Judge-12, Muzaffarpur are hereby quashed.

**(Ashwani Kumar Singh, J.)**

Sanjeet/-

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| <b>AFR/NAFR</b>          | NAFR       |
| <b>CAV DATE</b>          | NA         |
| <b>Uploading Date</b>    | 02.10.2019 |
| <b>Transmission Date</b> | 02.10.2019 |

