

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH: NAGPUR**

**CRIMINAL APPLICATION (APL) NO. 524 OF 2013**  
**WITH**  
**CRIMINAL APPLICATION (APL) NO. 509 OF 2013**

**CRIMINAL APPLICATION (APL) NO. 524 OF 2013**

Potu S/o. Suryabhan Atram,  
aged about 37 years, Occu : Labourer,  
r/o. Bellori, Post : Chalbardi,  
Tq. Kelapur, Distt. Yavatmal.

... **APPLICANT**

**...VERSUS...**

1] The State of Maharashtra,  
Through Police Station Officer, P.S.  
Pandharkawada, Distt. Yavatmal.

2] Aniruddh S/o. Seshrao Adhao,  
Aged about 52 years, Occu. Service/  
Police Inspector, R/o. C/o. Police  
Station Pandharkawada,  
Distt. Yavatmal.

... **NON-APPLICANTS**

**WITH**

**CRIMINAL APPLICATION (APL) NO. 509 OF 2013**

Dr. Rajratan s/o. Mahadeorao Moon,  
aged about 53 years, Occu : Service,  
r/o. C/o. Shri A. K. Ballamwar,  
Rajilaxmi Ward, Pandharkawada, Tq.  
Kelapur, Distt. Yavatmal.

... **APPLICANT**

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aged about: 52 years, Occ : Service  
Police Inspector, R/o. C/o. Police  
Pandharkawada, Distt. Yavatmal

**... NON-APPLICANTS**

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Shri R. J. Mirza, Advocate for the Applicants in both applications.

Shri M. K. Pathan, A.P.P. for the non-applicant no.1/State in both applications.

None for the non-applicant no.2 in both applications.  
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**CORAM: Z. A. HAQ AND  
AMIT B. BORKAR, JJ.**

**DATED: 28.10.2020**

**COMMON JUDGMENT (PER : AMIT B. BORKAR, J.) :**

1. Both these applications challenge First Information Report bearing No.197 of 2013 dated 06.08.2013 registered by the non-applicant no.2 – Police Station for offences punishable under Sections 304, 314, 316 and 201 read with Section 34 of the Indian Penal Code and Sections 4 and 5 of the Medical Termination of Pregnancy Act, 1971 (for short “the Act of 1971”).

2. The facts giving rise to filing of the present applications, in short, are as under:

The applicant in Criminal Application (APL) No.509 of 2013 is a qualified doctor and the applicant in Criminal Application (APL) No.524 of 2013 is a driver of the applicant in Criminal Application (APL) No.509 of 2013. F.I.R. came to be registered against both the applicants on 06.08.2013 bearing Crime No.197 of 2013. It is alleged in the First Information Report that Kajal was in relationship with Pankaj Madavi. Due to their physical relationship, Kajal became pregnant, which was realised by her after four months. For carrying out abortion, Pankaj Madavi contacted Potu Atram, driver of Dr. Moon, who is the applicant, in Criminal Application (APL) No.509 of 2013. On 04.08.2013, Kajal was admitted in the hospital of Dr. Moon and she was operated on 05.08.2013. But, after operation, her condition got complicated. Dr. Moon advised them to take further treatment at Yavatmal. Potu Atram, therefore, arranged for car. While transferring Kajal to hospital at Yavatmal, she died on the way. The impugned F.I.R., was, therefore, filed against Dr. Moon and his driver Potu Atram alleging that though Dr. Moon was aware of the possibility of death due to abortion, he conducted abortion on Kajal and, therefore, offences punishable under Sections 304, 314, 316 read with Section

34 of the Indian Penal Code and Sections 4 and 5 of the Act of 1971 were registered against them. Both Dr. Moon and Potu Atram have filed separate applications challenging F.I.R. bearing No.197 of 2013 dated 06.08.2013.

3. The non-applicant no.1 – State filed replies in both applications and pointed out that Kajal died because Dr. Moon performed her abortion . It is further submitted that opinion of the Medical Board had been sought by the Investigating Officer by letter dated 17.09.2013. Query Report had also been sought from the Head of the Department, Medical Justice and Forensic Medical Science and Hospital, Yavatmal, by letter dated 17.09.2013 but, both the reports are awaited. It is further submitted that Dr. Moon had no authority in law to open the aforesaid clinic until his suspension is revoked by the Medical Council. It is stated that during investigation, it is revealed that Dr. Moon had no operation theater facility for performing medical termination of pregnancy and had illegally performed abortion. Therefore, it is prayed that the applications deserve to be rejected.

4. We have heard learned Advocate for the applicants and learned Additional Public Prosecutor for the non-applicant no.1 and

carefully scrutinized First Information Report, which is impugned in both these applications.

5. Shri R.J. Mirza, learned Advocate for the applicants, in both applications submitted that the issue involved in the present applications is no longer *res integra*, in view of the judgment of the Apex Court in the case of *Jacob Mathew Vs. State of Punjab and another reported in (2005) 6 SCC 1*. He invited our attention to paragraph no.48, where the Apex Court has summed up its conclusions. He also invited our attention to paragraph No.52 of the said judgment and submitted that the Investigating Officer, before proceeding against the doctor, ought to have obtained an independent and competent medical opinion applying Bolam Test to the facts collected in the investigation. It is, therefore, submitted that the contents of the F.I.R., is abuse of process of law.

6. Shri Pathan, learned Additional Public Prosecutor for the non-applicant no.1, strenuously opposed the case of the applicants. He submitted that this is a case of gross negligence. He submitted that the investigation revealed that Dr. Moon had no operation facility and this is a classic of *res ipsa loquitur*. He submitted that even otherwise also since the hospital of Dr. Moon was not registered, as contemplated by the provisions of the Act of

1971, offence punishable under Section 5 of the Act of 1971 is made out and, therefore, he prayed for dismissal of the applications.

7. Having carefully scrutinized the contents of the F.I.R., it appears that only allegation against the applicant - Dr. Moon, is as under:

“एकंदरीत पंकज मडावी याचा जवाब व मृत्युचे कारण पाहता डॉ. मुन त्यांनी कु. काजल हिचा गर्भपात करतांना तिचा जिव जाण्याची शक्यता असल्याचे माहित असूनही गर्भपात केला त्यामुळे तिचा मृत्यु झाला म्हणून कलम ३०४, ३१४, ३१६ भा.दं.वी. r/w ४, ५ वैद्यकिय गर्भपाताचा कायदा प्रमाणे डॉ. मुन पंकज मडावी, पोतु आत्राम व पुनम नर्स यांचे विरुद्ध सरकारतर्फे फिर्याद आहे.”

8. Having gone through the allegations against the applicant - Dr. Moon, we are of the opinion that in view of the judgment of the Apex Court in the case of *Jacob Mathew* (supra), continuance of the proceedings would amount to abuse of process of law. The Apex Court in the case of *Jacob Mathew* (supra) has held that the Court should be circumspect before instituting criminal proceedings against a medical professional. It is further held that the negligence comprises of : (i) a legal duty to exercise due care on the part of party complained of; (ii) breach of the said duty and (iii) consequential damage.

9. It has been held that in cases where negligence is alleged against professionals like the doctor, the Court should be careful before instituting criminal proceedings. It is not possible for any doctor to assure or guarantee that the result of treatment would invariably be positive. The only assurance a professional can give is that he is professionally competent, has requisite skill and would undertake task entrusted to him with reasonable care. It would be pertinent to quote the following observations made in *Jacob Mathew* (supra) specially paragraph nos. 26, 28,29 and 30, which read as under:

*“26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.*

*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 a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being 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 the society”.*

30. *The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. 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”.*

10. After discussing the independent law on the subject, the Apex court concluded as follows:

*“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 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, 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”.*

11. The Apex Court in paragraph No.52 of the said judgment held as under:

“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 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”.

12. We have considered the submission of Shri Pathan, learned Additional Public Prosecutor that in the facts of the present case, offences punishable under Sections 4 and 5 of the Act of 1971

are made out. After careful consideration of the contents of the First Information Report, we find that there is not a 'word' in the First Information Report, which even remotely indicates violation of Section 4 of the Act of 1971, as alleged by Shri Pathan. Only because sections of the statute are mentioned in the First Information Report, in absence of the allegations indicating fulfillment of ingredients of offences alleged, the prosecution was not justified in incorporating Sections 4 and 5 of the Act of 1971 in the First Information Report.

13. Applying the law laid down in *Jacob Mathew* (supra) case, we are of the view that this is not a case where the applicant, who is medical professional, should face trial especially when there is no allegation of gross negligence against Medical Practitioner nor there is any opinion obtained from medical expert, as contemplated in paragraph no. 52 of the judgment in the case of *Jacob Mathew* (Supra). The only allegation against Dr.Moon is that he had knowledge that the abortion can cause death of his patient. In the facts and circumstances of present case, it cannot be said that the applicant in Criminal Application (APL) No.509 of 2013 is guilty of criminal negligence.

14. Insofar as the applicant in Criminal Application No.524 of 2013 is concerned, the allegation against him is that he was contacted by Shri Pankaj Madavi, who was in relationship with Kajal (deceased). It is alleged that Potu Atram (Applicant) told him to bring Kajal on 04.08.2013 and Potu Atram arranged for Indica Car for the purpose of transferring Kajal (deceased) to hospital at Yavatmal. Having considered the allegations against the applicant in Criminal Application No.524 of 2013, we are of the view that no case for continuance of proceedings against the present applicant (Potu Atram) is made out .

15. For the reasons stated above, the First Information Report lodged against both the applicants deserves to be quashed and set aside.

16. We, therefore, pass the following order:

ORDER

(i) Criminal Application (APL) Nos.509 and 524 of 2013 are allowed; and

(ii) The First Information Report No.197 of 2013 dated 06.08.2013 registered by the non-applicant no.1-Police Station for offences punishable under Sections 304, 314, 316 read with Section

34 of the Indian Penal Code and Sections 4 and 5 of the Medical Termination of Pregnancy Act, 1971 against Shri Dr. Rajaratan s/o Mahadeorao Moon and Potu s/o Suryabhan Atram is quashed and set aside.

Both the applications are allowed in the aforesaid terms.

**JUDGE**

**JUDGE**

*Ambulkar*