

IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CRLMC No.4710 of 2014

Dr. Arjun Charan Dash

....
Mr. M. Agarwal, Advocate

Petitioner

-Versus-

State of Odisha and Another

....
Mr. P.K. Muduli, AGA

Opposite Parties

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT : 19.09.2022

1. Invoking the jurisdiction under Section 482 Cr.P.C. the petitioner moved the present petition for quashing of the FIR, order of cognizance dated 7th January, 2014 and the criminal proceeding in connection with G.R. Case No.2202 of 2013 pending before the court of learned S.D.J.M., Puri arising out of Kumbharpada PS Case No.370(6) dated 5th November, 2013 for an offence punishable under Section 304(A) IPC on the ground that the same is not tenable in law.

2. Briefly stated, the petitioner is a Gynecologist and at the relevant point of time, he was running a clinic by name Shri Krishna Health Care and Reproductive Research Centre situated at Puri. By then, the complainant had been admitted in the clinic on account of being pregnant. In fact, some issues arose when the complainant had completed 39 weeks of pregnancy and for that, she had to be under the treatment of the petitioner. During that time and in course of such treatment, the complainant had leakage of fluid which was responded as a normal symptom. However, the complainant was dissatisfied with the line of treatment and the

manner in which the case was handled by the petitioner. Finally, the complainant suffered death of her foetus for which caesarean delivery was initially not advised but at the end, it was resorted to. According to the complainant, she was administered with unnecessary medicines and injections which proved to be fatal for the foetus. With the above allegations, the complainant lodged the FIR consequent upon which Kumbharpada P.S. Case No.370(6) was registered which ultimately resulted in the submission of chargesheet against the petitioner under the alleged offence.

3. As pleaded by the petitioner, the allegations to be baseless and there has been no medical negligence which is claimed by the complainant and in absence of any material, much less a prima facie case, the criminal proceeding which is otherwise an abuse of process of law should not be allowed to continue, rather, terminated in the interest of justice. It is further pleaded that there was no *mens rea* for the alleged offence and despite that the learned court below took cognizance of the offence under Section 304(A) IPC and summoned the petitioner which is palpably illegal and thus, not tenable in law.

4. Mr. Agarwal, learned counsel for the petitioner contended that even if the FIR and chargesheet are taken at face value and accepted in its entirety do not prima facie constitute an offence of rashness or negligence and that apart, the learned court below completely lost sight of the fact that *mens rea* was conspicuously absent and also was unmindful of the principles concerning medical negligence which have been laid down in the classical judgment of the Apex Court in **Jacob Mathew Vrs. State of Punjab and others** reported in AIR 2005 SC 3180. While advancing such an argument, Mr. Agarwal cited one more decision of the Supreme Court in **Martin F. D'Souza Vrs. Mohd. Ishaq** reported in AIR 2009 SC 2049 which is of course related to a consumer dispute but deals with

medical negligence. It is contended by Mr. Agarwal that applying the standard set by the Apex Court, in absence of negligence and the defence having been vindicated by an opinion of experts, no case is made out vis-à-vis the petitioner. Referring to the decision of **Jacob Mathew** (supra), Mr. Agarwal further contends that negligence by a medical professional demands a different treatment altogether and rashness or negligence on the part of the petitioner being a doctor requires additional consideration so as to form an opinion that the negligence to be gross or in other words, the negligence or recklessness was of higher degree. According to Mr. Agarwal, as per the said decision, the expression 'rash or negligent act' as occurring in Section 304(A) IPC has to be read as qualified by the word 'grossly'. Lastly, it is contended that an Expert Committee was constituted to examine the case of petitioner on the request of the IO and by the orders of the CDMO, Puri outcome of which completely exonerated the petitioner from any kind of medical negligence and while claiming so, the report of the said Committee under Annexure-3 has been cited by Mr. Agarwal. Hence, the contention is that when there has been no *means rea* on the part of the petitioner and no case of medical negligence was prima facie proved and established even after examination of the complainant's claim by an Expert Committee, chargesheet could not have been filed and therefore, the learned court below fell into serious error by taking cognizance of the offence under Section 304(A) IPC against him which therefore is liable to be interfered with and quashed in exercise of this Court's inherent jurisdiction.

5. On the other hand, learned AGA Mr. Muduli justified the impugned order of cognizance dated 7th January, 2014 under Annexue-2 and contended that the very conduct of the petitioner was such, it clearly amounted to an act of medical negligence and the same was revealed during investigation for which the

chargesheet was submitted. It is further contended that the opinion which was formed at the end of the investigation is based on facts found against the petitioner which proved his negligence while dealing with the case of the complainant, who had been admitted in the clinic as an indoor patient. Hence, according to the learned AGA, prima facie negligence stood established and therefore, the criminal proceeding cannot be quashed. In other words, the contention of Mr. Muduli is that the materials on record since suggest negligence which is attributed to the petitioner and as a case is made out which needs to be enquired into during trial, therefore, the criminal proceeding in G.R. Case No.2202 of 2013 ought not to be interfered with.

6. It is not denied that an Expert Committee was formed by the CDMO, Puri and a copy of the report of the said Committee is at Annexure-3 which contains the request of the IO of Kumbharpada P.S. for necessary clarification on certain points concerning the treatment of the complainant and the reason behind for having delivered a dead foetus. According to the Expert Committee report, while answering the queries of the IO, opined differently which is inconsistent with the claim of the complainant. The actual cause of death as per the Committee's report could possibly be on account of true knot of cord in which a chance of *intra uterine* death is maximum. However, at the same time, the CDMO, Puri expressed a contrary view at the end later to the examination carried out by the Expert Committee which has been addressed to the IO by letter No.17187 dated 31st December, 2013, wherein, he concluded that the petitioner was not at the clinic on the date of occurrence though it was an off day and to justify the cause of death on account of knot of cord, no photograph or any evidence was preserved or even shown to the attendants of the complainant after the surgical operation for the latter's satisfaction and in so far

as the Expert Committee's opinion is concerned, it is based on the data maintained at the clinic by the petitioner himself. In such view of the matter, when there are diverse conclusions reached at by the Expert Committee and the CDMO, Puri, the fact which has not been disputed by either of the parties, it is to be ascertained as to whether, in the facts and circumstances of the case, a case of gross medical negligence is prima facie made out against the petitioner requiring him to face trial before a court of law.

7. Before dealing with the rival contentions and engaging the Court to analyze the same, it is apposite to make a mention as to the principles and guidelines set out by judicial pronouncement vis-à-vis medical negligence. The relevant excerpt of the judgment in **Jacob Mathew** case is reproduced herein below.

“Negligence by professionals 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 and 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 practices. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.*, [2001] P.N.L.R. 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. (Charlesworth & Percy, *ibid*, Para 8.03) Oft quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J.

in Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582, 586 in the following words: "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham Omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill...A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." (Charlesworth & Percy, *ibid*, Para 8.02) The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. After a review of various authorities Bingham L.J. in his speech in *Eckersley v. Binnie* [1988] 18 Con.L.R. 1, 79 summarized the Bolam test in the following words: "From these general statements, 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 knowledge of new advances, discoveries and developments in his field. He should have such 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." (Charlesworth & Percy, *ibid*, Para 8.04) The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35)."

8. While summing up, the Apex Court in the aforesaid decision concluded as following:

(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 304A 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 304A 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.

9. In the decision of **Jacob Mathew**, it has been held that in a situation which involves some kind of a special skill or competence, then the test as to whether there has been negligence or otherwise is not the test of the man on the top of a Clapham Omnibus because he has no special skill, however, a man need not possess the highest expert skill. The only test which is required to be applied if such man exercises the ordinary skill of an ordinary competent man exercising that particular act. In fact, the man on the Clapham Omnibus is a hypothetical ordinary and reasonable person used by the courts in English law where it is necessary to decide whether a party has acted as a reasonable person for instance in a civil action for negligence. The aforesaid phrase was

CRLMC No.4710 of 2014 Page 11 of 18

reportedly brought into legal use for the first time in a judgment by an English Court of Appeal in the case of **McQuire Vrs. Western Morning News** reported in [1903] 2 KB 100. The essence of the debate was that what significance the opinion of an ordinary man shall have in a libel suit. The phrase of man on the Clapham Omnibus was used in the context of public opinion, the purpose being to examine the liability which is sought to be fastened against someone, a professional alleged of negligence, where the opinion of an unskilled person counts insignificant. The Supreme Court in **Jacob Mathew** held that the test for determining medical negligence as laid down in **Bolam Vrs. Friern Hospital Management Committee** reported in [1957] 1 WLR 582 runs the field in its applicability in India. However, at the same breath, the Apex Court in **Jacob Mathew** case did air a word of caution by observing that it may not be misunderstood that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient; all that was to emphasize the need of care and caution in the interest of the society; for, the service which the medical profession renders to the human being is probably the noblest of all and hence, there is a need for protecting doctors from frivolous or unjust prosecutions and many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation and such malicious proceedings have to be guarded against. The principle of *res ipsa loquitur* was also discussed in **Jacob Mathew** which stipulates that near occurrence of some types of accident is sufficient to imply negligence. The aforesaid is a Latin maxim meaning 'the thing speaks for itself' which is a doctrine that infers negligence from the nature of the accident when evidence regarding the conduct of the defendant is lacking. In a case of medical negligence, the conduct of the professional and the explanation offered by him bears relevance apart from considering

the line of treatment which he followed which ultimately resulted in a mishap. The above aspects which have been highlighted upon by the Apex Court in the case of **Jacob Mathew** as also referred to in **Martin F. D'Souza** (supra) shall have to be kept in mind while dealing with a matter of medical negligence.

10. In so far as the FIR is concerned which is at Annexure-1, the complainant alleged inappropriate behaviour by the petitioner, while she was informing about leakage of fluid and had asked for immediate delivery. The allegation is that the complainant was admitted in the clinic of the petitioner but was left unattended and when she was in dire need of medical attention, the petitioner was absent as he had left for Bhubaneswar and when he returned in the night and checked her up at 10.30 pm, she was informed about the death of the foetus and thereafter, the petitioner advised her for a normal delivery but on the next day i.e. 27th October, 2013, caesarean delivery was suggested. According to the complainant, the petitioner did not discharge the duty properly with due care and on account of his negligence, she lost her ten month old foetus and also sustained immense mental and physical agony by alleging that the delivery should have been done when it was needed the most but was delayed deliberately for monetary considerations which in fact left the foetus dead and endangered her life too for deferring surgery and insisting for a normal delivery. The manner of treatment has been questioned by the complainant alleging negligence on the part of the petitioner. A preliminary enquiry was conducted. A copy of the report of the Expert Committee is annexed by the petitioner and it is claimed that no medical negligence was established during such enquiry. The Expert Committee reached at a conclusion that after analyzing the case record, no negligence was found or proved against the petitioner. However, the CDMO, Puri offered the final opinion by a report dated 31st December, 2013 with a contrary view. In so far as the CRLMC No.4710 of 2014

discharge summary dated 1st November, 2013 is concerned, a copy of which is available in the record, the death of the foetus is suggested to be on account of knot of cord. The complainant was supposed to be attended by the petitioner at the clinic but according to her, the latter left for Bhubaneswar for which there was no timely attention, as a result of which, the foetal death occurred. It is not denied that no specimen was preserved in proof of the cause of death of the foetus. There is no material on record to show that some kind of a medical urgency surfaced during the absence of the petitioner when the complainant was all along at the clinic and receiving check up. It was found during enquiry that the clinic did not have a resident doctor at the relevant point of time to look after the patients in absence of the petitioner which has been reported by the CDMO, Puri. Yet the complainant while was at the clinic received treatment being attended by the staff nurse and till the very end, she had no complication and was receptive to the movement of foetus, however, such movement could not be felt after 8.30 pm on 26th October, 2013 which was informed to the petitioner, who attended her at 10.30 pm in the night and after ultrasonography, the foetal death was confirmed. The line of treatment has not been questioned by the Expert Committee nor by the CDMO, Puri, who reported the absence of the petitioner on the off day and was of the opinion that he should have been present to attend the complainant all throughout. It has not been concluded by the Expert Committee that the petitioner's treatment or approach was in anyway erroneous or a departure from the regular practice while dealing with the delivery case. The findings of the Committee is that after the *intra uterine* death of the foetus, the usual course of action is always by means of induction of labour and if that fails, caesarean operation is suggested and in the present case, when the normal delivery could not be ensured, the surgery was carried out to remove the dead foetus. There is

also no confirmation to the allegation that on account of the medicines and injections administered, the complainant developed some complication and it resulted in the foetal death. Whether merely for the absence of the petitioner and non-preservation of any evidence or specimen at the clinic as to the cause of death of the foetus by itself sufficient to sustain the criminal action? As per the decision in **Jacob Mathew**, the opinion of a competent professional conversant with the subject shall have to be obtained while deciding a case of medical negligence against another individual who is also no less proficient in that subject and in such matters, a layman's point of view bears no relevance because a finding thereon shall have to be tested considering the expert opinion instead of the views of an ordinary man who carry no skill required to assess the situation. In the present case, the complainant was dissatisfied with the kind of treatment she was meted out at the clinic in the hands of the petitioner but in absence of any opinion from the Expert Committee and also the CDMO, Puri on the line of treatment to be in any manner seriously wrong, it would not be justified to reach at a conclusion otherwise. The complainant no doubt was not satisfied and claimed that she was not attended by the petitioner, who reached late in the evening but would that be sufficient enough to fasten the criminal liability and the answer would be in the negative. At times, dissatisfaction drives a person to believe that there was medical negligence even though the line of treatment is found to be according to the protocol. If a conclusion is reached at that the treatment was grossly wrong or it was a complete departure from the usual practice, in such a situation, medical negligence may be attributed. However, in the case at hand, no such material could be collected to show that the petitioner was in any way conducted himself improperly in deviation to the regular protocol which is normally followed while attending delivery. The death of the foetus was

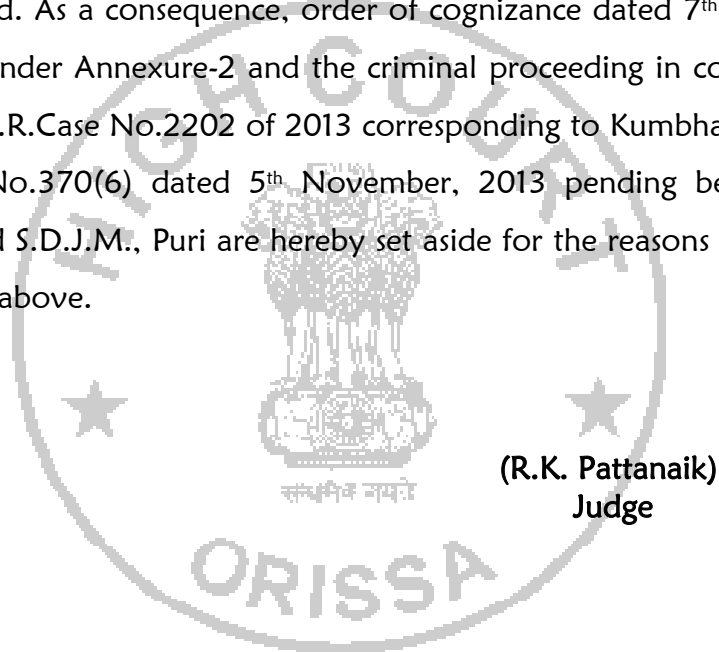
suggested to be on account of knot of cord and during the stay at the clinic, the complainant did not have any issues or complication of grievous kind except leakage of fluid which was not found to be unconventional or unusual either by the Expert Committee or the CDMO, Puri. The medicines and injections were administered to the complainant in usual course which was also not found fault with during the enquiry. So the only allegation which is left and directed against the petitioner is about his absence but the complainant received check up at the clinic and did not have any major complication except sensing absence of movement of the foetus whereafter as per the protocol induction of labour was suggested but lastly caesarean was adopted which in the considered view of the Court cannot be a ground to allege gross negligence. Applying the **Bolam** test and the guidelines summed up by the Apex Court in **Jacob Mathew** (supra) wherein it has been held that negligence may be on account of having not possessed of requisite skill which the person professed to have; or he did not exercise with reasonable competence the skill which he did possess and standard to be applied for judging whether the person charged has been negligent or not would be that of an ordinary competent person exercising skill in that profession. Unless there is gross negligence clearly discernable from the materials, for minor or not so significant lapses by a doctor or a professional in terms of treatment would not be sufficient to prove gross medical negligence. A word of caution is that for each and every lapse which is not related to skill and competence of a professional or of some other kind unless there is evidence to establish negligence of higher degree, it should not be followed by a criminal action which is what has been held by the Supreme Court in **Jacob Mathew** case. A similar cautious approach is suggested in the aforesaid decision that a medical professional may be charged of negligence but it necessarily calls for a treatment with difference. In the instant case,

except absence of the petitioner and non-preservation of any specimen, no other error or wrong was noticed by the Expert Committee or for that matter, the CDMO, Puri with regard to the line of treatment. The final opinion of the CDMO rather based on facts which may not be so relevant when the complainant had no urgent medical complication during her entire stay at the clinic. If for temporary absence of the petitioner, medical negligence is alleged, it would not be wise to say so. Likewise, non-preservation of specimen and not taking the complainant and her attendant into confidence by showing any part of the operated specimen is not sufficient either to allege an act of serious negligence. As it appears, the chargesheet was filed on the strength of final opinion of the CDMO, Puri despite the fact that it did not receive any confirmation from the Expert Committee which rather had an opinion that cannot be entirely brushed aside. To hold that there has been medical negligence from the side of the petitioner for certain lapses which neither directly nor indirectly proved to be the cause of the foetal death, it would be grossly inappropriate and an overstatement. The Court does have sympathy for the complainant for the loss suffered which cannot be compensated in any manner but at the same time, it shall have to consider whether medical negligence is *prima facie* established. In the case, for whatever lapses attributed to the petitioner regarding his absence on a particular day but without any comment being received from the Expert Committee and also the CDMO, Puri vis-à-vis the line of treatment, it would not at all be safe to allege medical negligence. It may even be said that due to not so concrete and convincing evidence about gross negligence, there is also a remote possibility of proving the guilt of the petitioner. An error of judgment does not amount to medical negligence. The petitioner appears to have followed an acceptable medical practice or protocol standard vis-à-vis the case of the complainant. For a medical negligence, a higher

degree of culpability is required and not ordinary or average kind which may be sufficient for a civil liability but cannot be adequate to sustain a criminal action. Hence, the Court reaches at an inescapable conclusion that the petitioner could not have been criminally prosecuted even though he was found guilty during enquiry of some lapses which are not so significant to stretch it far and allege him of medical negligence.

11. Accordingly, it is ordered.

12. In the result, the petition under Section 482 Cr.P.C. stands allowed. As a consequence, order of cognizance dated 7th January, 2014 under Annexure-2 and the criminal proceeding in connection with G.R.Case No.2202 of 2013 corresponding to Kumbharpada PS Case No.370(6) dated 5th November, 2013 pending before the learned S.D.J.M., Puri are hereby set aside for the reasons indicated herein above.



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