

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

47 CRIMINAL APPLICATION NO.1882 OF 2022

1. Premchand Mangalchand Patni,
2. Sarla Premchand Patni,
3. Sarang Premchand Patni,
4. Sonali Sarang Patni. ...Applicants

VERSUS

1. State of Maharashtra,
2. Syed Aman Syed Imam. ...Respondents

...

Advocate for Applicants : Mr.Bora Satyajit S.
APP for Respondents-State : Mr.A.S.Shinde
Advocate for Respondent No. 2 : Mr.Ghanekar Nilesh S. and
Mr.Sohail Subhedar

...

CORAM : R. G. AVACHAT, J.

DATE : 27.03.2023.

PER COURT :

1. Heard. The applicants herein are the Medical Practitioners. The challenge in this application is to the order of issuance of process by the Court of learned Judicial Magistrate First Class, Khultabad, District Aurangabad in SCC No. 103 of 2015 and confirmed by the court of Additional Sessions Judge, Aurangabad in Criminal Revision No. 257 of 2019. The applicants were alleged to

have been negligent in treating a new born child. It is alleged that, due to negligence of the applicants, a new born child passed away. As such, the applicants are alleged to have committed an offence punishable under Section 304A of the Indian Penal Code.

2. The order of issuance of process was passed after the concerned Police Station submitted a report under Section 202 of the Code of Criminal Procedure.

3. In the case of **Jacob Mathew Vs. State of Punjab and Ors. Criminal Appeal Nos. 144-145 of 2004 decided on 05.08.2005 (MANU/SC/0457/2005)**, the Hon'ble Apex Court in paragraph No. 53 of its judgment observed as under :

“53. 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 leveled 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."*

4. The record indicates that the learned Magistrate, before issuance of process, has not complied with the Apex Court's directions in paragraph No. 53 of its judgment quoted hereinabove. The order of issuance of process is liable to be set aside. The petition thus, succeeds in terms of prayer Clauses (c) and (d).

5. The respondent/complainant is at liberty to move the learned Magistrate to ensure the compliance of Hon'ble Apex Court's

order in **Jacob Mathew Vs. State of Punjab and Ors.** (supra) to proceed in the matter.

(R. G. AVACHAT)
JUDGE

mahajansb/