



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO.190 OF 2012

APPLICANT : Dr. Pramod Yashwantrao Gurjar,
Aged about 62 years, Occ. Medical
Practice, Yashwant Hospital, Camp,
Amravati.

..VERSUS..

NON-APPLICANTS : 1 State of Maharashtra
Through Incharge Police Station,
Gadge Nagar, Amravati.
2 Shri. Tushar Vijay Kulkarni,
Aged about 38 years, R/o. Khaparde
Garden, Amravati.

Mr Anil Mardikar, Senior Advocate with Mr Apurv De, Advocate for Applicant.
Mr N. R. Rode, APP for Non-Applicant No.1/State.
Ms S. H. Bhatia, Advocate (Appointed) for Non-Applicant No.2.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES, JJ.

RESERVED ON : **6th SEPTEMBER, 2023.**

PRONOUNCED ON : **8th SEPTEMBER, 2023.**

JUDGMENT : (PER : VALMIKI SA MENEZES, J.)

. This is a criminal application invoking our
inherent jurisdiction under Section 482 of the Code of
Criminal Procedure (hereinafter referred to as “the Code”)

seeking to quash FIR in Crime No.142 of 2004 dated 15.04.2004 and Charge-Sheet/Final Report filed thereupon bearing No.41 of 2005 dated 08.03.2005 for offence punishable under Section 304-A of the Indian Penal Code (hereinafter referred to as “the IPC”).

This is a case where the complainant, brother of the husband of the deceased, alleges medical negligence on the part of the applicant, a Doctor/Surgeon, who conducted cesarean surgery for delivery of a child born to the patient, who unfortunately succumbed hours after the surgery, due to hemorrhage.

2. From the investigation papers filed along with the Final Report, the following facts appear on record:

- a) Smt. Kanchan Atul Kulkarni was admitted on 05.03.2004 for delivery of a baby under the care of the applicant, who is an Obstetric and Gynecology Surgeon at Yashwant Hospital, Amravati; a cesarean surgery (C-Section) was

performed by the applicant on 06.03.2004 between 6:00 p.m. and 7:00 p.m. after which she was shifted to a room at that hospital at 7:30 p.m. From the hospital papers, it transpires that till 11:30 p.m., the patient was comfortable and the notings in the hospital record state that very little bleeding was seen through the catheter placed in the uterus.

b) At about 11:45 p.m., the patient was found bleeding profusely, with blood oozing all over the bed; the applicant was called to examine the patient and he ordered a blood transfusion to be commenced. In the meanwhile, the applicant also called the Anesthetist, since the patient may have required a further surgery. The applicant also called one Dr. Pushpa Junghare for a second opinion at around 1:30 a.m., who opined that the patient had Disseminated Intravascular Coagulation (DIC) and her blood coagulation

had stopped. Various medicines were administered to the patient for coagulation of blood, which was, in the opinion of the doctors due to Disseminated Intravascular Coagulation, a medical condition seen in the form of profuse bleeding. However, since the patient continued to bleed from her vagina, the applicant explained her critical condition to her relatives and with their consent, she was shifted by an ambulance to Dr. Yadgire Intensive Care Unit, Amravati with the applicant accompanying the patient for further treatment.

(c) At Dr. Yadgire Intensive Care Unit, two blood transfusions were given to the patient. Despite which she continued to bleed; It was then decided by Dr. Atul Yadgire, who was an Obstetric Surgeon, to perform an emergency hysterectomy operation on the patient to remove her uterus. The operation was performed at

around 3:15 a.m., wherein the applicant and Dr. Pushpa Junghare assisted.

(d) Unfortunately, the profuse bleeding continued in the patient even after the hysterectomy was performed, which according to Dr. Atul Yadgire, the applicant and Dr. Pushpa Junghare was due to DIC, and the patient's condition deteriorated, with her blood pressure dropping and she was declared dead at 5:05 a.m. in the morning of 07.03.2004.

(e) A postmortem was conducted in which the report suggests that the death of the patient was caused "by shock due to hemorrhage because of an incisional cut on the urinary bladder led to profuse bleeding because of this it led to Postpartum Hemorrhage (PPH) with Disseminated Intravascular Coagulation (DIC).

(f) It appears that one Tushar Vijay Kulkarni, who is arrayed as non-applicant No.2 herein, the

brother of the husband of deceased Kanchan, had given a report to the Police alleging that the applicant and two other doctors namely Dr. Atul Yadgire and Dr. Ullhas Sangai had acted negligently and caused the death of the said Kanchan.

An opinion was sought by the investigating agencies from a Committee consisting of six doctors from the Civil Hospital. The report of the Committee was obtained on 12.04.2004 which, though not signed by the doctors nor referred to any minutes of the discussion amongst them, states that as the Postmortem report suggests the bladder was stitched, the death may have occurred due to hemorrhage caused by DIC. This opinion is inconclusive as to whether the course followed by all the accused persons, who are medical professionals, was in any manner negligent such as to attract criminal liability

under Section 304-A of the IPC; In other words, there was no opinion of any Medical Board or Doctor to establish gross negligence or that any of the medical practitioners involved in the treatment of the patient acted rashly or did not follow the set protocols in the management of the patient. Based on this report, the FIR was registered on 15.04.2004.

After recording the statements of various witnesses, which included doctors, nurses and medical attendants who dealt with the case, the Final Report was filed.

3. After notice was issued to the non-applicant No.2, who is the complainant, on at least three occasions, the last of which was on 21.06.2023, though served, the non-applicant No.2 has not put in his appearance. Consequently, we felt it necessary to appoint a Counsel for the non-applicant No.2 in his absence, which we did by order dated 13.07.2023. The matter came to be heard with

the assistance of Smt S. H. Bhatia, for the non-applicant No.2, who has chosen to remain absent despite service on several occasions. With the consent of the learned Counsels for the parties and with the assistance of the Counsel appointed for non-applicant No.2, we have proceeded to hear the submissions and finally dispose of the present criminal application.

4. Learned Senior Counsel Shri Anil Mardikar for the applicant has taken us through the complaint, statements of witnesses, postmortem report and the medical records of the concerned patient at both hospitals where she was treated. The learned Senior Counsel has also taken us through the opinion of the Medical Board constituted at the behest of the investigating authority and their answers to the queries posed by the investigating authority.

It is the primary submissions on behalf the applicant that to make out a case under Section 304-A of the IPC, the complaint cannot merely allege that the

accused were negligent, but must alleged facts which constitute a case of gross negligence or an act which was rash on the part of the doctors so as to cause the death of the patient under their care. It was further argued that it is not the case in the complaint/FIR that the accused were not qualified medical practitioners or that they lacked the basic skills to treat the patient.

5. It was further argued by the learned Senior Counsel for the applicant that all standard procedures and protocols were followed at every stage by the concerned doctors, who have followed the line of treatment for undertaken emergency surgery on the patient after second opinion was taken. It was further argued that the concerned doctors have continuously monitored the patient who was then shifted for critical care to an Intensive Care Hospital, where in keeping with the standard practices to be applied in Obstetrics and Gynecology, where a patient continues to bleed due to complications of DIC, an emergency hysterectomy was performed to arrest

the bleeding; This, according to the applicant is the standard practice and procedure followed in cases of Postpartem Hemorrhage (PPH) caused by DIC, as set out in standard medical journals. Reliance was placed on the Medical journal/paper by *Michael J. Paidis and Nazli Hossain* on “Postpartem Hemorrhage” and “Disseminated Intravascular Coagulation” wherein the standard medical protocols for management of PPH and DIC are discussed; It is the applicant’s contention that where profuse bleeding continues despite carrying out First Line Management by using coagulants, surgical management is required to be done by procedure of abdominal hysterectomy (removal of cervix). It was also further contended that no civil suit has been filed by the husband or relatives of the deceased Kanchan or by the complainant against the applicant, as the applicant has not received any such summons or notice from any Civil Court or Consumer Court, wherein a claim for compensation based on tort has been made against the applicant.

6. The applicant has then placed reliance on several judgments of the Hon'ble Supreme Court to argue that to make out a case under Section 304-A of the IPC, when medical negligence is alleged, the investigation and complaint must set out the acts committed by the medical practitioners which was so rash so as to be termed not just as a negligent act but should be of a gross nature, resulting in the death of the patient. The judgments relied upon by the applicant are as followed :

- a) *Jacob Mathew Vs. State of Punjab and Anr., reported in (2005) 6 SCC 1,*
- b) *Martin F. D'Souza Vs. Mohd. Ishfaq, reported in 2009 All SCR 802,*
- c) *Jayshree Ujwal Ingole Vs. State of Maharashtra and Anr., reported in (2017) 14 SCC 571,*
- d) *Kusum Sharma and Ors. Vs. Batra Hospital and Medical Research Centre and Ors., reported in (2010) 3 SCC 480.*

7. Opposing the application, Mr Rode, learned Additional Public Prosecutor appearing for the State contends that the postmortem report refers to the cause of death as due to “Shock due to Hemorrhage because of an incisional cut on the urinary bladder led to profuse bleeding because of this it led to PPH with Disseminated Intravascular Coagulation”. According to the prosecution, though this may not be an opinion by a medical practitioner in the field of Gynecology or Surgery, this opinion itself would be enough to support the case against the applicant to be one of “gross negligence” required to be made out under Section 304-A of the IPC. It was further submitted that even the Panel of Doctors constituted at the behest of investigating authority, have opined in their report dated 12.04.2004 that according to the postmortem, there were stitches on the bladder and that death may have been caused due to DIC resulting from the cut on the bladder. It is the contention of the learned APP that the only way to determine whether there was gross negligence

or a rash and negligent act under Section 304-A of the IPC was by recording evidence in a trial through experts and this would not be the appropriate stage to determine whether the acts of the concerned medical practitioners fell within the meaning of Section 304-A of the IPC.

8. Smt. S. H. Bhatia, learned Counsel (Appointed) for the non-applicant No.2/complainant supports the arguments for the prosecution and has placed before us extracts from the internet on “Bladder Injury during C-Section Delivery” by the National Centre for Bio-Technology Information (NCBI), United States, wherein references are made to bladder injuries being amongst the most common injury at the time of a cesarean surgery. The article states that though injuries to the bladder during such surgery may not be life threatening when discovered at the time of C-Section, delay in repairing the injury can be life threatening. The article further makes reference to complications due to such injury which includes blood in the urine, infection and peritonitis. The learned counsel for

non-applicant No.2 has also relied on a judgment of Orissa High Court in *Dr. Biswa Mohan Mishra Vs. State of Orissa, dated 14.08.2023 passed in CRLMC No.1002 of 2017*, where it refused to interfere in its inherent jurisdiction of Section 482 of the Code on the facts of that case, concluding that the matter requires evidence of trial to prove the allegation.

9. We have perused the complaint/FIR lodged, the entire medical records filed along with the charge-sheet, and the statements of the witnesses recorded during the investigation.

Before we proceed to consider the rival contentions and the specific facts which would waive for our decision as to whether a *prima facie* case has been made out to proceed with the investigation and trial for an offence under Section 304-A of the IPC, we deem it appropriate to make reference to certain case law which deals with the subject of gross negligence by medical practitioners.

10. One of the Classic English Cases, which has dealt with the question as to what constitutes guilt of medical negligence and the standard of “reasonableness” required to withstand the test was decided in *Bolam v. Friern Hospital Management Committee, (1957) 1 W.L.R. 582*. The facts of that case were that a doctor, treating a patient suffering from mental illness had failed to administer muscle relaxant drugs during the course of Electro-Convulsive Therapy. He was held not guilty of medical negligence by the Queen’s Bench, even though he had failed to follow the usual medical protocols of the time. There it was held, that whilst deciding the standard to be adopted by a medical practitioner, the standard imposes a duty on a practitioner to use ordinary skills which would be employed in that area of his expertise. We quote from *Bolam*’s case thus :

“... I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.”

“....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. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel, Mr Fox-Andrews put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards then he is not negligent. Mr Fox-Andrews was also as quite right, in my judgment, in sense that a mere personal belief that a particular technique is based is no defence unless that belief is based on reasonable grounds.”

“....At the same time that does not mean that a medical man can obstinately and pig headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.”

11. The Hon'ble Supreme Court of India, in *Dr. Suresh Gupta .Vs. Govt. of NCT of Delhi and Anr.*, *reported in (2004) 6 SCC 422*, dealt with an order of the High Court refusing to exercise jurisdiction under Section 482 of the Code in favour of the accused doctor in a case alleging medical negligence under Section 304-A of the IPC. In that case, the postmortem categorically mentioned that the death was due to a complication arising out of the operation performed by the doctors and a finding by the concerned Magistrate, who refused to discharge the

accused, on the ground that there was material on record to demonstrate that the deceased had died since while conducting the operation incision was given at a wrong part, due to which blood seeped into the respiratory passage causing death. After examining the medical papers and referring to a decision of the House of Lords in **R. Vs. Adomako [(1994) 3 ALL ER 79]**, the Hon'ble Supreme Court has held as under :

“20. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or recklessness". It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in R. v. Adomako (supra) relied upon on behalf of the doctor elucidates the said legal position and contains following observations :-

“Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State.”

21. Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as “criminal”. It can be termed “criminal” only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to

hold him criminally liable.

22. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence.

23. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.

24. No doubt in the present case, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.

25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing i.e. a higher degree of morally

blameworthy conduct.

26. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against the doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

28. After examining all the medical papers accompanying the complaint, we find that no case of recklessness or gross negligence has been made out against the doctor to compel him to face the trial for offence under Section 304A of the IPC. As a result of the discussion aforesaid on the factual and legal aspect, we allow this appeal and by setting aside the impugned orders of the Magistrate and of the High Court, quash the criminal proceedings pending against the present doctor who is accused and appellant before us.”

12. Dr. Suresh Gupta (supra) was cited before another Bench of the Hon'ble Supreme Court whilst deciding the case of Jacob Mathew (supra), which doubted the correctness of the view taken in the *Dr. Suresh Gupta's* case and made a reference of the same after disagreeing with a view taken therein, to a larger Bench. The questions referred to a larger Bench are the following :

“(1) Negligence or recklessness being “gross” is not a requirement of Section 304-A of IPC and if the view taken in Dr. Suresh Gupta's case is to be followed then the word “gross” shall have to be read into Section 304-A IPC for

fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degrees of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304-A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.”

13. The larger Bench of the Hon’ble Supreme Court deciding the reference in Jacob Mathew (supra) has confirmed the view taken in Dr. Suresh Gupta (supra) and after making a reference to Bolam’s case, and holding that the principle laid down therein to be applicable to India, has held as under :

“Conclusions summed up

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 case, WLR at p.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 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.

49. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta case, (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the Report).

Guidelines - Re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within

the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him).

Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case at hand

53. Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be - we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304-A IPC on the parameters of Bolam's test."

14. Jacob Mathew (supra) was followed, whilst applying Bolam test in a later judgment of the Hon'ble Supreme Court in Arun Kumar Manglik Vs. Chirayu Health and Medicare Pvt. Ltd. and Anr., reported in (2019) 7 SCC 401, where the following has been held :

43. Our law must take into account advances in medical science and ensure that a patient-centric approach is adopted. The standard of care as enunciated in the Bolam case must evolve in consonance with its subsequent interpretation by English and Indian Courts. Significantly, the standard adopted by the three-Judge Bench of this Court in Jacob Mathew includes the requirement that the course adopted by the medical professional be consistent with "general and approved practice" and we are bound by this decision.

44. In adopting a standard of care, Indian courts must be conscious of the fact that a large number of hospitals and medical units in our country, especially in rural areas, do not have access to latest technology and medical equipment. A two-Judge Bench of this Court in Martin F D'Souza v. Mohd. Ishfaq held thus: (SCC p. 17, para 37)

“37. The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.”

45. In the practice of medicine, there could be varying approaches to treatment. There can be a genuine difference of opinion. However, while adopting a course of treatment, the medical professional must ensure that it is not unreasonable. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals function. This is to avoid a situation where doctors resort to “defensive medicine” to avoid claims of negligence, often to the detriment of the patient. Hence, in a specific case where unreasonableness in professional conduct has been proven with regard to the circumstances of that case, a professional cannot escape liability for medical evidence merely by relying on a body of professional opinion.”

15. Keeping in mind the principles laid down in Bolam's case and by the Hon'ble Supreme Court in Dr. Suresh Gupta (supra), Jacob Mathew (supra) and Arun Kumar Manglik (supra), we now proceed to evaluate the allegations made in the complaint and the material

collected during investigation, and whether a case has been made out to proceed with the trial/prosecution under Section 304-A of the IPC.

There is no doubt that the complaint *per-se* does not allege any lack of qualification on the part of the accused or that there was any lack of skill shown by them, both, during the first surgery where a C-Section was performed and during the second surgery when the hysterectomy was conducted. There also does not appear any specific allegation in the complaint that any of the doctors did not follow a standard medical protocol or guideline during the surgeries or during the post operative treatment after the first surgery. The entire case of the prosecution seems to have been built up around and incision found on the bladder as opined in the postmortem report. There is no medical opinion rendered, even assuming that there was such a cut on the bladder, that it was caused by an act which was so rash on the part of the surgeons during either the first surgery or the second

surgery, or that the medical condition of DIC was directly related to that incision.

16. If one quickly runs through the medical records of the patient, it is not in dispute that until around 11:45 p.m. the patient was stable. It was thereafter that the patient was found bleeding profusely. She was then taken to the operation theater, where the second opinion was sought from Dr. Pushpa, who also opined that the patient was a case of DIC; Thereafter, the family members were explained her condition and the patient was shifted to an Intensive Care Hospital, where transfusions were given, and since the bleeding did not stop, the patient was taken for a second surgery where a hysterectomy was performed. Despite all these efforts, the patient succumbed at around 5:30 a.m. in the morning.

The statements recorded by the investigating authority, apart from the family members of the patient are of Dr. Pushpa Junghare, who is an M.D. in Gynecology

practicing for nine years and who gave her second opinion to the accused No.1 opining that the patient was suffering from DIC and her blood coagulation had stopped. She further states that Dr. Thakrey who was the Lab Technician, performed primary test of blood at around 1:30 a.m. which showed a result that the patient's blood was not coagulating, after which it was decided to shift the patient to Dr. Yadgire Hospital, where intensive care was given. She also stated that she assisted Dr. Yadgire and Dr. Gurjar (accused) to perform the emergency hysterectomy. She has further opined that the patient had bleeding due to the DIC.

17. Besides Dr. Junghare, statements were recorded of Dr. Nitin Datte, Pediatrician, who opined that the baby delivered from the patient during the cesarean was normal. Statement of Dr. Nitin Bijwe, the Anesthetist during the cesarean surgery was also recorded, who stated that the surgery was uneventful and the patient was shifted from the operation theater to the room at 7:30 p.m. He has

stated that he was called at midnight by Dr. Gurjar, stating the patient was bleeding and returned to the hospital where the patient was taken to the operation theater and since the bleeding did not stop was shifted to Yadgire Hospital, where, an Anesthetist, he assisted the accused and Dr. Yadgire to perform the hysterectomy. He also stated that blood transfusion was given during that time and after the hysterectomy the bleeding had stopped. However, since the patient had a condition of DIC, the blood was found not coagulating. He also stated that he did not notice any complications during the cesarean surgery.

18. Tushar Kulkarni, complainant states that the patient required urgent blood and all blood reports were received within two and half hours of samples being taken. He also states that one Dr. Dara transfused one bottle of blood to the patient at 8:30 p.m. He states that according to him, there was negligence by the doctors hence, the patient died.

19. The opinion of the Panel of Doctors, who have answered the queries of the police investigation through its report dated 12.04.2004 has referred to the finding of the postmortem of a stitch on the bladder and has stated that the patient may have expired due to bleeding caused from DIC. The opinion is not clear, and certainly does not conform with Bolam test or the requirements of demonstrating “gross negligence”.

20. We are also mindful of the fact that the complainant, though served on more than one occasion has neither put in appearance to contest the matter nor has, as it appears from the fact that the accused have not received any claim either by way of a civil suit or a consumer complaint, for a claim on the basis of a negligent act in tort.

21. Referring to the extracts from journals produced on record, referred earlier by us, it appears from the pathology test reports, referred to in the statements, that the blood of the patient was not coagulating and at least

three doctors including the accused had opined that the patient was suffering from the condition of DIC. The medical journals produced before us seem to suggest that Postpartum hemorrhage is to be managed first medical, by administering blood transfusion as a first line of management and thereafter the condition can be surgically managed by compression stitches or uterine devascularisation. If the bleeding does not stop, the further management is to be done by conducting abdominal hysterectomy.

Broadly it appears, that the surgical team in both hospitals which included the accused had followed exactly this protocol for management of PPH caused by the patient medical condition of DIC. Thus, applying Bolam test and the dictum laid down by the Hon'ble Supreme Court in Jacob Mathew (supra) as set out in para 48 thereof, we find it difficult to hold that there was any medical negligence on the part of the accused doctors, much less "gross negligence", which is the test laid down in the said cases.

Thus, we are of the considered view that looking at the contents of the complaint, statements of all the witnesses and the medical opinion produced, no case can be made out by the prosecution which would place the acts of the accused within the requirements of being “gross” negligence for the purpose of Section 304-A of the IPC.

22. In Dr. Biswa Mohan Mishra (supra), a clear opinion had been given by the District Medical Board (DMB) that the concerned doctor had not performed an Ultra Sonography (USG) of the abdomen and pelvis of the patient, which if done would have provided the correct diagnosis and a proper line of treatment could have been followed. The CDR records of the concerned doctor’s form also showed that he was at some far of location and were not even present to administer any treatment to the concerned patient. That was a case, where the medical negligence was established both, on a clear medical opinion rendered by the Board and by the fact that the doctor was not even present for more than two hours, to treat the

patient. It was in that set of facts that the judgment was rendered. In our considered opinion, the judgment does not lay down any ratio but was decided on the specific facts of that case.

As held in the various judgments referred to by us above, we need to draw a fine balance between upholding and preserving the faith that citizens have on the medical profession and the reverence with which they treat doctors, as against isolating those cases where there is *prima facie* evidence of “gross” negligence of the kind required to be demonstrated for bringing home charges under Section 304-A of the IPC. We are afraid that we have not been convinced to hold that this is one such case that falls within the requirements of “gross” negligence.

23. For the reasons stated above, and after considering the material collected during the investigation, we are of the opinion that there is no case what prosecuting in a trial for charges against the applicant under Section

304-A of the IPC. We find, that this is a fit case for invoking our inherent jurisdiction under Section 482 of the Code to quash the FIR in Crime No.142 of 2004 dated 15.04.2004 and related Charge-Sheet/Final Report bearing No. 41 of 2005 dated 08.03.2005.

24. We hereby allow the criminal application and quash and set aside the FIR in Crime No.142 of 2004 dated 15.04.2004 and related Charge-Sheet/Final Report bearing No. 41 of 2005 dated 08.03.2005.

25. The fees of appointed Counsel be given, as per Rules.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)