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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :01.07.2024

Pronounced on :09.07.2024

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Crl.O.P.Nos.9183, 10288, 13542 and 14992 of 2024
and
Crl.M.P.Nos.6436, 6437, 7046, 8195, 8196, 9174 & 9175 of 2024

Crl.O.P.No.9183 of 2024:

Dr.D.Senthil, aged 44,
Assistant Professor,
SRM Medical College and Research Centre,
Potheri. .. Petitioner/Accused-1

/versus/

1.The State represented by
Inspector of Police,
CBCID, Kanchipuram. .. 1st Respondent/Complainant

2.Ramalingam .. 2nd Respondent/
Defacto complainant

Prayer: Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records in C.C.No.49 of 2024 pending on the file of the Judicial Magistrate No1, Chengalpattu and quash the same as against the petitioner/accused-1 herein.

For Petitioner :Mr.Abdul Hameed, Senior Counsel for

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Mr.S.Senthil

For R1 :Mr.K.M.D.Muhilan,
Government Advocate (Crl.Side)

For R2 :Mr.R.Sankarasubbu

Crl.O.P.No.10288 of 2024:

Dr.Jambana Shiva S.Raj
S/o Bemar Rajeev,
2nd Year Student of M.Ch.,
SRM Medical College and Centre,
Potheri. .. Petitioner/Accused-3

/versus/

1.The State represented by
Inspector of Police,
CBCID, Kanchipuram. .. 1st Respondent/Complainant

2.Ramalingam .. 2nd Respondent/
Defacto complainant

Prayer: Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records in C.C.No.49 of 2024 pending on the file of the Judicial Magistrate No-1, Chengalpattu and quash the same as against the petitioner/accused-3 herein.

For Petitioner :Mr.P.H.Manoj Pandian

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For R1 :Mr.K.M.D.Muhilan,
Government Advocate (Crl.Side)

For R2 :Mr.R.Sankarasubbu

Crl.O.P.No.13542 of 2024:

Dr.Arjun Pon Avudaiyappan,
S/o Avudaiyappan,
2nd Year Student of M.Ch.,
S.R.M.Medical College and Research Centre,
Potheri. .. Petitioner/Accused-2

/versus/

1.The State represented by
Inspector of Police,
CBCID, Kanchipuram.
Cr.No.3/2020 .. 1st Respondent/Complainant

2.Ramalingam .. 2nd Respondent/
Defacto complainant

Prayer: Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records in C.C.No.49 of 2024 pending on the file of the Judicial Magistrate No1, Chengalpattu and quash the same as against the petitioner/accused-2 herein.

For Petitioner :Mr.P.H.Manoj Pandian for
AAV Patners

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For R1 :Mr.K.M.D.Muhilan,
Government Advocate (Crl.Side)

For R2 :Mr.R.Sankarasubbu

Crl.O.P.No.14992 of 2024:

Dr.Sai Venkat Manoj
2nd Year Student of M.Ch.,
S.R.M.Medical College and Research Centre,
Potheri. .. Petitioner/Accused-4

/versus/

1.The State represented by
Inspector of Police,
CBCID, Kanchipuram.
Cr.No.3/2020 .. 1st Respondent/Complainant

2.Ramalingam .. 2nd Respondent/
Defacto complainant

Prayer: Criminal Original Petition has been filed under Section 482 of Cr.P.C., to call for the records in C.C.No.49 of 2024 pending on the file of the Judicial Magistrate No.1, Chengalpattu and quash the same as against the petitioner/accused-4 herein.

For Petitioner :Mr.P.H.Manoj Pandian

For R1 :Mr.K.M.D.Muhilan,
Government Advocate (Crl.Side)

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For R2 :Mr.R.Sankarasubbu

COMMON ORDER

The complaint by one T.Ramalingam of Thattampattu Village, Cheyyur Taluk, received by Maraimalai Nagar Police Station alleging that the Doctors who conducted surgery to his wife Tmt.R.Amul had committed negligence and thereby caused the death of Mrs.Amul. The said complaint was registered on 05.06.2017 in Crime No.451 of 2017 for the offence under Section 174 of Cr.P.C, and taken up for investigation.

2. Not being satisfied with the investigation carried out by the Maraimalai Nagar Police, the complainant, Ramalingam filed Crl.O.P.No.11378 of 2017 and sought for transfer of investigation to CBCID, Kancheepuram. The said petition was allowed on 14.07.2020. As a result, the investigation was transferred to CBCID, Kancheepuram and case was re-registered as Crime No.3 of 2020 dated 01.12.2020.

The Inspector of Police , CBCID, Kancheepuram on completion of the investigation filed final report against four persons for the offence under

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Section 304-A of IPC.

3. To quash the said complaint, which was taken on file as C.C.No.49 of 2024 by the Judicial Magistrate No.1, Chengalpattu the following 4 Criminal Original Petitions are filed.

(i)The first accused, Dr.D.Senthil, Assistant Professor, SRM Medical College and Research Centre has filed Crl.O.P.No.9183 of 2024;

(ii)The second accused Dr.Arjun Pon Avudaiyappan, 2nd year Student of M.Ch, attached to SRM Medical College and Research Centre, has filed Crl.O.P.No.13542 of 2024;

(iii)The third accused, Dr.Jambana Shiva S.Raj, 2nd year Student of M.Ch., SRM Medical College and Centre, Pother has filed Crl.O.P.No.10288 of 2024;

(iv)The fourth accused, Dr.Sai Venkat Manoj, 2nd year Student of M.Ch., SRM Medical College and Research Centre, has filed Crl.O.P.No.14992 of 2024.

4. The learned counsel appearing for the petitioners submitted that the patient Tmt.R.Amul, aged 45 years, came to the hospital on

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31.05.2017 along with her husband with the following complaints:-

(i)pain in the left loin since the day before

(ii) history of vomiting

(iii)complained of lower abdominal pain

(iv)history of burning micturition

(v)known case of diabetes mellitus, on medication for 1 year

(vi)known case of asthma

(vii)known case of fibroid uterus

(viii)menstrual history of dysmennorhea (painful periods)

5. The examination of the patient after ultrasound scan of the abdomen, suggested right vesico-ureteric junction calculus causing right hydroureteronephrosis, bilateral multiple renal calculi and fibroid uterus. Vasicoureteric junction calculus (area where the ureter joins the bladder). Hydroureteronephrosis (dilation and distension of the renal collecting system of one or both kidneys due to obstruction of urine out flow distant to the renal pelvis). On 02.06.2017 CT scan of the kidney, ureter and bladder had been performed, which suggested her right vesico-ureteric junction and distal ureteric calculi causing hydroureteronephrosis, left

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distal ureteric calculi causing mild hydroureteronephrosis and bilateral renal calculi.

6. On considering the medical condition, the patient was advised to undergo an emergency endoscopic DJ stent procedure to remove the kidney stones blocking both the ureters. The cardiologist opinion sought and he opined that the patient can be taken up for emergency Unological procedure with high risk for perioperative cardiac events. This was informed to the patient and her husband. On their consent surgery was performed by Dr.D.Senthil (A1) and Dr.Arjun Pon Avudaiyappan(A2) on 03.06.2017 under spinal anaesthesia. The operation was successful and unevenful. The patient was shifted to the ward and she did not exhibit any complaints. Necessary post-operative care was taken as per the standard medical protocol. However, on 04.06.2017, at about 07.40 p.m., the patient complained of giddiness and she was immediately shifted to the ICU with ambu bag ventilation and cardio pulmonary resuscitation was performed to the patient. However, the patient died on 09.15 p.m.

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7. On the next day, 05/06/2017, the patient's body was sent to the Government Medical College Hospital, Chengalpet for port-mortem. Dr. Parasakthi, Professor of Forensic Medicine conducted autopsy on 06/06/2017 and same was video graphed by one Balaji, Kavitha Studio, Chengalpet. The post mortem doctor had opined that the death was due to sudden myocardial infraction, bilateral ureteric calculi post bilateral ureteric endoscopic lithortripsy and bilateral DJ stenting and type 2 diabetic melitus. The final post mortem report opined that the patient would have died due to the " effect of injuries to right kidney, viscera negative".

8. Following the dictum of the Supreme Court in *Jacob Mathew's* case, the prosecution obtained opinion of the Medical Board consisting of two experts Dr. K.Saravanan and Dr. T.Srikala Prasad. The Medical Board in its report dated 07/08/2019 opined that, "since there are lot of discrepancies between videograph submitted and the post mortem report, the Histopathology report and the photographs submitted, a definite conclusion as to the cause of death cannot be reached. However,

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based on the videograph and the histopathology report we come to the conclusion that death did not occur due to endoscopic procedure (ureteroscopy/DJ stenting) for stone removal ".

9. After transfer of investigation to CBCID, Chengalpet, prosecution sought for second opinion from the team of experts consisting of the Post mortem doctor Parasakthi, Dr.K.Saravanan (one of the team member of the first medical Board) and Dr. R.Selvakumar. This Board of three experts gave their opinion on 23/06/2021 as below:-

> i)Death is due to Myocardial infarction due to (or as a consequence) of Endoscopic procedure for kidney stone removal.
>
> ii)There is no evidence to say that the Urological procedure for kidney stone removal was because of medical negligence.
>
> iii)There is evidence for medical negligence in the postoperative care.

10. According to the Learned Counsel for the petitioners, the opinion of the 2nd Committee consisting of one of the member from the first committee and the post mortem doctor not to be considered as valid,

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since no reason assigned why their earlier opinion is over ruled. After recording in the post mortem report that the deceased would appear to have died of effects of injury to right kidney and the first committee saying the post mortem findings/report does not correlate with the videograph submitted, the 2nd opinion by the Committee consisting of two members (Dr.Parasakthi and Dr.Saravanan) shifting the allegation of medical negligence to the post operative care is baseless and contrary to the opinion given by its members earlier. Further, the opinions of the two Committee does not fall with the ambit of expert opinion.

11. Hence, it is prayed that the criminal prosecution for the alleged medical negligence is abuse of process of law and contrary to the dictum laid by the Hon'ble Supreme Court in the following judgments:-

(1) Jacob Mathew -vs- State of Punjab and another:(2005)6SCC 1

(2)Chanda rani Akhouri and others -vs- M.A.Methusethupathi and another:2022 INSC 447

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12. Response by the Investigating Officer:-

The State has filed counter narrating the facts and evidence collected during the course of investigation. In the opinion of the investigation officer, evidence collected is sufficient to prosecute the petitioners for offence under Section 304-A IPC.

13. The post mortem report dated 06/06/2017 given by Dr.Parasakthi, the opinion of the first expert Committee dated dated 07/08/2019 consisting of Dr. Saravananan and Dr. Srikala Prasad and the second expert Committee report dated 23/06/2021 consisting of Dr.Prarasakthi, Dr. Saravananan and Dr. T.Selvakumar been compared and in the counter it is contended that the videograph covering the postmortem proceedings during the autopsy over the dead body of Tmt.Amul-was video graphed through a private agency, and during investigation by CBCID, when this videograph was sent to TNFSL Mylapore, through the Court vide D.No.533/2023, dated 28.04.2023 (Phy.124/2023, dated:02.05.2023 of TNFSL, Mylapore, Chennai) to ascertain its genuineness, the TNFSL department in its report dated 27.07.2023 addressed to JM(1) Court at Chengalpattu, has opined that the

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video recording is not a continuous one, but an edited video recording. As such the expert committee consisting of Dr.K.Saravanan and Dr.T.Srikala Prasad, which rendered its opinion on 07.08.2019 did not have all the materials, but for the edited videograph. It was the first accused, who performed surgery on Tmt.Amul, W/oRamalingam on 03.06.2017. He continued as the duty doctor and took postoperative care of Tmt.Amul.

14. The defacto complainant response:-

The learned counsel appearing for the defacto complainant submitted that Tmt.Amul, had developed abdonimal pain. So, got admitted in the SRM Medical College Hospital at Potheri on 31.05.2017 at 15.30 hours for treatment. She was advised to undergo surgery for kidney stone removal. After completion of surgery, on 03.06.2017, she was shifted to Special Ward. The petitioners herein are the Doctors, who conducted surgery and responsible for postoperative care. On 04.06.2017, at about 15.00 hours, Tmt.Amul, complaint to her daughter Lavanya acute abdominal pain. Her daughter notice collection of urine with blood

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in the urinary catheter and also found swelling over abdomen. When this was reported to the duty Nurse, there was no immediate response. No duty Doctor was present in the hospital. By the time, Dr.Venkat Manoj, (A-4) came to the hospital at about 19.30 horus, the patient lost her conscious. The patient was shifted to intensive care unit but declared dead at about 21.15 hours. Realising the death of Amul was due to the negligence of the hospital, which failed to provide reasonable care and grossly neglected to note the cause for bleeding, the husband of the patient lodged complaint reporting negligence of Doctors, who conducted surgery and gave treatment to Tmt.Amul. The post-mortum report clearly say, the death appeared to have occurred due to the right kidney injury, which is due to the negligence while conducting the surgery. To save the hospital management and the Doctors, the prosecution has referred the matter twice, first to a Two Member Committee and then, to three Member Committee, which has substantially diluted the opinion of the post mortem who conducted the autopsy.

15. The accused persons cannot take advantage of certain contradictions in these three reports and seeks quash of the criminal

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prosecution since all the three reports of invariable indicate negligence and same is sufficient to proceed with the trial.

16. The learned counsel appearing for the defacto complainant submitted that, out of three reports, the post mortem report should prevail since it is by the Doctor who has seen the body and found injury in the right kidney. The other two reports given by committee of experts is based on records and videograph of post-mortem. In both the reports, it is clearly observed that the video graph is not clear/edited. Thus, it is *prima facie* established that the patient had suffered injury on her right kidney during surgery and she was not attended properly during post operation when she complaint of pain and blood seen in the urine catheter. Hence, prays for dismissal of these petitions.

17. The submissions on either side heard. Records perused.

18. The petitioners are doctors and admittedly they all participated in the treatment of Tmt.Amul while she was in-patient in SRM College Hospital between 31.05.2017 to 04.06.2017. Records

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maintained by the hospital reveals that Accused 1 and 2 were Doctors who conducted surgery on 03.06.2017. The accused 3 and 4 were duty Doctors in-charge of Post operative care.

19. The medical records further discloses that, Tmt.Amul, aged 45 years, came to SRM Hospital and Research Centre on 31/05/2017 complaining pain. She had medical history of known diabetics and asthma under treatment. The Nurse's record shows that till the patient shifted to operation theatre at 11.20 a.m. on 03/06/2017 that she was conscious and her vitals was stable. After completion of the procedure, the patient was first shifted to recovery ward at 12.25 p.m and subsequently shifted to Urology ward at 1.30 p.m. Next day on 04/06/2017 at about 10.00 a.m Dr.Senthil (A-1) had seen the patient. At that time, the patient found conscious and oriented. Vitals were checked and recorded. The Doctor has advised certain drugs to be administered. At 5.30 p.m Dr.Manoj (A-4) has seen the patient and he had advised to continue the same medicine. At about 7.20 p.m, the patient had

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complained giddiness. Her pulse was not recordable. She was un-response and went into sudden cardiac arrest. The patient shifted to ICU but she could not revive and declared dead on 04/06/2017 at 9.15 p.m. The death intimated to the Marimalainagar Police Station. The body was handed over to the police at 5.50 p.m on 05/06/2017. The police sent the body to Government Medical College Hospital, Chengalpet for post-mortem. Dr.Parasakthi, Prof. Forensic Medicine had conducted autopsy and given her report.

20. The records collected during the investigation reveals that Tmt. Amul, before being admitted in SRM Hospital on 31/05/2017, had been treated as inpatient at Shri Satyasai Medical College and Research Institute at Nellikuppam, Kanchipuram District. She had been there as in-patient from 19/05/2017 to 31/05/2017. From the case summary and discharge record issued by the said hospital, it appears that Tmt.Amul got admitted in that hospital on complaining lower abdominal pain for past one year. The Doctor's at Shri Satyasai Medical College and Research Institute had done kidney, urnine bladder Scan and after getting the general surgeon opinion, advised for urology opinion and review.

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Tmt.Amul had been under treatment at Shri Satyasai Medical College Hospital for 12 days. Her ultrasound (USG–pelvic) report taken in this hospital shows multiple renal calculi in right kidney. Largest 1.1 cm. In her left kidney– 7 m.m calculi.

21. At the time of her discharge from Shri Satyasai Medical College Hospital on 31/05/2017, the condition of the patient as found in the discharge summary is "**Condition at discharge:** Patient complaint of pain in right loin to groin. Known case of renal calculi. Treated with I.V fluids and Analgesics. Patient comfortable now."

22. Immediately, on the same day, the patient had gone to SRM College Hospital, Pottheri. The outpatient slip of SRM Hospital reveals that she had been examined by OP Doctor at 15:29 hrs. She has reported pain in left loin from previous day night and vomiting after taking water. After physical examination and considering her past diagnosis of left renal calculi with multiple uterine fibroid, she had been taken as inpatient at 15:52 hrs. Before the procedure, A-4 had obtained the opinion of Cardiologist, who had opined that the patient can be taken up for

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emergency urological procedure with the high risk of perioperative cardiac events. After obtaining the written informed consent from the patient and her husband, the Doctors have proceeded with the surgery.

23. The learned counsel for the defacto complainant as well as Government Advocate (Criminal Side) relying upon the post mortem Doctors' opinion that the deceased would appear to have died of effects of injury to the right kidney,, submitted that, when the multiple calculi found only on the left side of the kidney, the unexplained injury on the right side kidney is the proof of negligence. The injury caused negligently in the course of endoscopic procedure had resulted in the myocardical infarction.

24. In short, it is contented that, for prosecuting the petitioners, (a) the opinion of the PM Doctor that the death is due to the effect of injury to the right kidney, (b) the opinion of the first Expert Committee Members that the first operative day, no cardiologist opinion was obtained in spite of cardiologist warning to look for perioperative cardiac care and (c) the opinion of the second Expert Committee Members that

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the death is due to myocardial infarction due to (or as a consequence) of endoscopic procedure for kidney stone removal and there is evidence for medical negligence in the post-operative care, all are to be taken into consideration and these opinions make out a clear case of negligence which attracts offence punishable under Section 304 A of IPC.

25. Section 304 A of Indian Penal Code reads as under:-

304-A Causing death by negligence:-

> "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both"

26. The expression 'negligence' does not mean the same in criminal law and civil law. The jurisprudential concept of negligence differs in civil and criminal law. The principle of '*res ipsa loquitur'* (thing itself speaks), is widely applied in civil cases, which cannot be pressed into service in criminal law, since the burden of proof is on the

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prosecution and no presumption either legal or factual is permissible under the scheme of Indian Evidence Act.

27. In *Suresh Gupta –vs- Govt. of NCT of Delhi* reported in *((2004)6 SCC 422)*, a two Judges Bench of the Hon'ble Supreme Court held that, the act attributed to the Doctor, even if accepted to be true, could be described as an act of negligence, as there was lack of due care and precaution. But, for this act of negligence, he may be liable for 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. Later, in *Jacob Mathew case,* the Hon'ble Supreme Court had a doubt whether the word "grossly" be read into Section 304-A of IPC for professionals, like Doctors and set a different standard among the offenders. When this issue was referred to the Larger Bench, three Judges Bench vide their judgment dated 05/08/2005, referring to Sections 88, 92 and 93 of IPC, held that, the criminal law has invariably placed medical professionals on a pedestal different from ordinary mortals. Though the word " gross" has not been used in Section 304 A IPC, yet it is settled in criminal law negligence or recklessness, to be so held, must be of such a

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high degree as to be 'gross'. To impose criminal liability under Section 304-A IPC, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be proximate and efficient cause without intervention of another negligence. It must be *causa causans*; it is not enough that it may have been the cause *sine qua non.*

28. Further, the Hon'ble Supreme Court in *Jacob Mathew v. Stte of Punjab and another reported in (2005) 6 SCC 1)* apart from explaining the expression "negligence" – as a Tort and as a Crime, opined in unambiguous term, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.

29. As explained by the Hon'ble Supreme Court in *Jacob Mathew's* case, offences under Sections 304 A, 336, 337 and 338 IPC are subject to the exemptions under Sections 88, 92 and 93 of the Indian Penal Code. As far as medical professionals are concerned, the criminal

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law has invariably placed them on a pedestal different from others. Therefore, before holding a person for medical negligence under Section 304 A IPC , the test whether he is exempted under Section 88 IPC has to be carried scrupulously. The illustration to Section 88 IPC makes very clear that a surgeon without any intent to cause death, knowing that a particular operation is likely to cause death, who suffers under a painful complaint, for the sufferer benefit, performs the operation and in good faith is exempted from the prosecution.

30. In this case, the patient had come to the SRM Hospital on 31/05/2017 after being treated by another hospital for 12 days as inpatient. That hospital also had adviced surgical intervention for her abdominal pain. The patient was still suffering abdominal pain when she got admitted in the SRM Hospital on 31/05/2017 at about 15:52 hrs. On obtaining the opinion of the cardiologist that urological procedure involves high risk for perioperative cardiac events, the patient and her husband (the defacto complainant) were informed and only after obtaining their written consent, the doctors have proceeded. The case sheets maintained in the regular course of activity indicates that there was

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no sign of discomfort shown or expressed by the patient till 7.20 p.m of 4th June, 2017. The patient found conscious and her vitals were recorded and found normal. She had taken liquid diet, the duty doctor has visited her at 5.30p.m and advised to continue the same medication.

31. The second Committee, which consist of 3 Experts, had observed that, on the first post operative day only 2 vital readings (temperature, pulse and respiratory rate) i.e one BP recording were mentioned in the graphic TPR Chart and physician's notes were recorded only twice in the case sheet (one at 11.40 AM and another one at 5.30 pm). For the said reasons, the expert Committee had concluded that there is evidence for medical negligence in the post operative care.

32. In this regard, it is necessary to find out whether the opinion of the second Committee constituted in terms of the dictum laid by the Hon'ble Supreme Court and whether even if the facts on which the opinion of the Committee is based, if proved will make out a case of criminal rashness or negligence on the part of the accused/petitioners.

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33. For the said purpose, the judicial pronouncements relevant for consideration are extracted below:-

Jacob Mathew vs. State of Punjab and another reported in **[(2005)6 SCC 1]** after extensive research on the 'law of negligence' after quoting "Errors, Medicine and the Law" Edited by Alan Merry and Alexander Mc Call Smith, the Hon'ble Supreme Court concluded :-

> *Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society. (emphasis added)*
>
> *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*

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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

34. Following Jacob Mathew's case, the Hon'ble Supreme Court in ***Kusum Sharma and Ors. vs. Batra Hospital and Medical***

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Research Centre and Others reported in ***MANU/SC/0098/2010:(2010)3 SCC 480*** laid down the following principles that are to be considered while determining the charge of medical negligence:

> *I. Negligence is the breach of a duty exercised 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.*
>
> *II Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.*
>
> *III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.*
> *IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.*
>
> *V. In the realm of diagnosis and treatment there is*

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scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they

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can perform their professional duties without fear and apprehension.

X The medical practitioners at times also have to be saved from such a class of complaints who use criminal process as a tool for pressurising the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

35. In ***Chanda Rani Akhouri and Ors. vs. M.A. Methusethupathi and others*** reported in ***[MANU/SC/0515/2022],*** the Hon'ble Supreme Court held:-

"*27. It clearly emerges from the exposition of law that a*

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medical practitioner is not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. In the practice of medicine, there could be varying approaches of treatment. There could be a genuine difference of opinion. However, while adopting a course of treatment, the duty cast upon the medical practitioner is that he must ensure that the medical protocol being followed by him is to the best of his skill and with competence at his command. At the given time, medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. (emphasis added)

28. The term "negligence" has no defined boundaries and if any medical negligence is there, whether it is pre or post-operative medical care or in the follow-up care, at any point of time by the treating doctors or anyone else, it is always open to be considered by the Courts/Commission taking note of the exposition of law laid down by this Court of which a detailed reference has been made and each case has to be examined on its own merits in accordance with law."

36. Finally, **in *M.A. Biviji vs. Sunita and Ors reported in MANU/SC/1162/2023,*** judgment dated 19/10/2023**,** the Hon'ble Supreme Court, after considering the earlier judicial pronouncements, held :

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"*36. As can be culled out from above, the three essential ingredients in determining an act of medical negligence are: (1) a duty of care extended to the complainant, (2) breach of that duty of care, and (3) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty. However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner.*

37. Due to the unique circumstances and complications that arise in different individual cases, coupled with the constant advancement in the medical field and its practices, it is natural that there shall always be different opinions, including contesting views regarding the chosen line of treatment, or the course of action to be undertaken. In such circumstances, just because a doctor opts for a particular line of treatment but does not achieve the desired result, they cannot be held liable for negligence, provided that the said course of action undertaken was recognized as sound and relevant medical practice. This may include a procedure entailing a higher risk element as well, which was opted for after due consideration and deliberation by the doctor. Therefore, a line of treatment undertaken should not be of a discarded or obsolete category in any circumstance.

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38. To hold a medical practitioner liable for negligence, a higher threshold limit must be met. This is to ensure that these doctors are focused on deciding the best course of treatment as per their assessment rather than being concerned about possible persecution or harassment that they may be subjected to in high-risk medical situations. Therefore, to safeguard these medical practitioners and to ensure that they are able to freely discharge their medical duty, a higher proof of burden must be fulfilled by the complainant. The complainant should be able to prove a breach of duty and the subsequent injury being attributable to the aforesaid breach as well, in order to hold a doctor liable for medical negligence. On the other hand, doctors need to establish that they had followed reasonable standards of medical practice."

37. On considering the dictum of the Hon'ble Supreme Court laid in the above cases, it is well clear that to determine an act of medical negligence, to hold a medical professional criminally liable for prosecution, the following ingredients are essential:-

"(i) Medical professional without reasonable degree of skill and knowledge.

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(ii) failure or breach of duty to extend care to the complainant.

(iii) damage or harm to the complainant attributable to the breach of duty.

(iv) Exhibiting conduct below the standards of a reasonable competent practitioner in his field.

38. In the case in hand, all the petitioners are qualified and they are not prosecuted for not possessing necessary qualification. No evidence to show, there was breach of care or devotion of duty. The injury on the right kidney observed by the post mortem doctor does not say about its nature or size. The scan report taken at Shrisatyasai Medical College Research Institute (SSSMCRI) and the discharge summary given them reveals that the patient had multiple renal calculi and uterus fibroid. The size of calculi on either side of her kidney is mentioned in the discharge summary given by SSSMCRI. From the CT scan and ultra sound test, it was found that the patient suffers bilateral renal calculi with dydronephrosis. For removal of calculi , bilateral uretero endoscopic lithotripsy and DJ Stenting done on 03/06/2017. Thus the medical record of the hospital show that the procedure was on either side of the kidney (bilateral).

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39. To the questionnaire given to the post-mortem doctor by the Investigating Officer, the Post mortem doctor Mrs.Parasakthi for the question No:11, her answer is under.

> *Q 11: You have mentioned injuries in the right kidney, how it could have been caused?*
>
> *Ans: Due to surgical intervention."*

40. In the First Expert Committee Report consisting of Dr.Saravanan and Dr.Srikala Prasad, it is specifically observed that the post mortem report and the videograph submitted does not correlate. Particularly, the post mortem doctor had mentioned the injury found on the right kidney was a perforated wound with irregular margins and edges seen at the level of the right kidney. From the photograph submitted and examined by the Two Members Committee, they had observed that the injury was incised wound with clear margins seen in the left hand. It does not correlate with the ureteroscopic injury. The PM doctor had sent kidney for histopathology report and the histopathology report does not indicate any abnormality in the organ. After transfer of investigation to

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CBCID, Kanchipuram, the Inspector of Police, CBCID had written a letter on 11/01/2021 to the Director of Medical Education, Chennai, to nominate an expert to offer opinion on the cause of death of Tmt.Amul, since there are discrepancies in the finding of the post mortem of doctor and the opinion of the Two Members Expert Committee. In response to the request of the Investigating officer, the Director of Medical Education had requested the Dean of the Rajiv Gandhi Government General Hospital, Chennai to constitute a committee consisting of Dr.R.Selvakumar, Dr.P.Parasakthi and Dr.K.Saravanan to clarify the discrepancies and give final report.

41. This Court has its own doubt whether the composition of this Three Members Committee is in consonance with the mandate of the Hon'ble Supreme Court given in *Jacob Mathew's case*, which says the Expert Committee must consist of independent competent medical opinion from a doctor in Government Service, qualified in that branch of medical practice, who can normally expected to given an impartial and unbiased opinion. In this case, the Second Committee consisting of three

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members, except one member Dr.T.Selvakumar, the other two members had already expressed their opinion in this matter and their opinions are apparently contrary to each other. The contradictions and discrepancies not clarified in the report by the Second Committee. Neither, the Investigating Officer had questioned the post mortem doctor, why there is material discrepancies with her post mortem report and the videograph/photographs taken during the autopsy. It is also noted from the record, the Inspector of police, Maraimalainagar Police Station vide his letter dated 05/06/2017, had requested the Professor of Forensic Department at Chengalpet Medical College Hospital to conduct autopsy over the body of Tmt. Amul. In his requisition letter, he had not sought for videographing the post-mortem. However, it appears that one Balaji been engaged unofficially to videograph and photograph the process. As per the statement of Balaji, the video tape and photos were collected from him by the Maraimalai Nagar Police. However, the video does not contain the entire post mortem. The recording was in bits and pieces. As per the statement of A.Lakshminarayanan, Scientific Officer, TNSFL the video was only about 4 minutes and not continuous. Further, it was found edited. His statement corroborates the observations made by the two

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Members Expert Committee. While so, no further investigation with the post-mortem doctor or the photographer conducted by the Investigating Officer regarding the manipulations noted by the experts.

42. The entire case of the prosecution is based on the opinion of the post mortem doctor, who had recorded that the right kidney of the patient found with perforated injuries. Whereas, the videograph as observed by the Two Member Committee says it is incised wound with clear margin. Also the histopathology report indicates, one kidney was sent for examination and no abnormality seen in the kidney. The second Expert Committee consist of three members had pointed out that the Investigating Officer, who gave the requisition for the post mortem did not request for video graphy. The unofficially videograph covers only 4 minutes of the post-mortem examination (selective videograph). Authorised police videographer was not engaged for videography. DJ stent was recovered from the peritoneal cavity which was shown in the photographs and injury on the right kidney can be visualized in the photographs. (emphasis added)

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43. However, placing our opinion based on the 4 minute videograph, few photographs and histopathology report of one kidney without any notable findings in support of right kidney injury as mentioned in the post-mortem report will not be justifiable in this case. (emphasis added)

44. In *Jacob Mathew's case*, at paragraph 34(3), it is succinctly said, "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."

45. On examination of the investigation materials relied by the prosecution, this Court finds that no prima facie evidence available on record to proceed with the assumption that the petitioners herein had failed to exercise their skill while discharging the duty as medical

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professional. The medical negligence referred by the expert committee does not satisfy the requirement to place the alleged negligence under the category of 'gross negligence'. The alleged injury on the right side of the kidney as noted by the post mortem doctor does not find support from the histopathology report. The pathologist had seen the kidney and recorded no abnormality noted in the kidney. Further, the time gap of nearly 30 hours between the time of endoscopic procedure (03/06/2017 @ 12.25pm) and the time of reporting giddiness (04/06/2017 @ 5.30 pm) indicates there is no direct proximity between the endoscopic procedure and death. In the absence of any medical record to show that the procedure was faulty, applying the principle of *'res ipsa loquitur'* to this case is not permissible. This Court wish to borrow the words of the Supreme Court in *Jacob Mathew's* Judgment and add, *"Res ipsa loquitur'* is only a rule of evidence and operates in the domain of civil law, specifically 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".

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46. As a result, ***these Criminal Original Petitions for quash are allowed***. The criminal prosecution of these petitioners for offence under Section 304 A IPC stands quashed. The above finding and observations are relevant and confined for the purpose of deciding whether criminal prosecution under law of crimes is sustainable. Those observations shall not be relied in any other proceedings initiated or to be initiated under the law of torts. Consequently, connected Miscellaneous Petitions are closed.

09.07.2024

Index:yes
Internet:yes/no
Speaking order/non speaking order
Neutral citation:yes/no
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To

1.The Judicial Magistrate No.1, Chengalpet.

2.Inspector of Police, CBCID, Kanchipuram.

3.The Public Prosecutor, High Court, Madras.

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DR.G.JAYACHANDRAN,J.

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delivery Common Order made in
Crl.O.P.Nos.9183, 10288, 13542 and
14992 of 2024 and
Crl.M.P.Nos.6436, 6437, 7046,
8195, 8196, 9174 & 9175 of 2024

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