

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1248 of 2024

Dr. Pritha Dutta

-Versus-

The State of West Bengal & Anr.

With

CRR 1242 of 2018

With

CRAN 1 of 2018 (Old CRAN 2386 of 2018)

Dr. Samir Roy

-Versus-

The State of West Bengal & Anr.

With

CRR 1808 of 2018

Dr. Jyotsna Basu

-Versus-

The State of West Bengal & Anr.

For the Petitioner in (CRR 1248 of 2024):	Mr. Pawan Kumar Gupta, Mr. Devesh Srivastava,
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For the Petitioner in (CRR 1242 of 2018):	Mr. Sekhar Kumar Basu, Mr. Antarikha Basu, Mr. Sayan Mukherjee, Ms. Madhumita Basak
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For the Petitioner in (CRR 1808 of 2018):	Mr. Soubhik Mitter, Mr. Smarjit Basu
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For the De facto Complainant : Mr. Shiv Shankar Banerjee,
Ms. Arijita Ghosh,
Ms. Nandini Chatterjee,
Mr. Sauradeep Dutta,
Mr. Soumon Nanda,
Mr. Himadree Ghosh.

For the State : Mr. Debasish Roy,
Mr. Arijit Ganguly,
Mr. Koushik Kundu.

Hearing Concluded on : **21.03.2025**

Judgment on : **16.05.2025**

Tirthankar Ghosh, J:-

The three revisional applications have been preferred challenging the proceedings arising out of Alipore Police Station Case No. 46 of 2014 dated 06.03.2014 under Section 304A/34 of the Indian Penal Code.

The genesis of the present case was on the basis of a letter of complaint forwarded by Somraj Sen husband of the deceased Dr. Arunima Ghosh @ Sen addressed to the Officer-in-Charge, Alipore Police Station. The allegations made in the letter of complaint were to the effect that Dr. Arunima Ghosh @ Sen aged about 31 years was suffering from acute abdominal pain for the last 1½ years. The complainant along with his deceased wife approached Dr. Samir Roy practicing at Nightangle Hospital, Shakespeare Sarani Kolkata and she was under his treatment from the said period and was advised by the doctor to go for a D&C and Laparoscopic Dye Test under a gynaecologist at Kothari Medical Centre on 05.03.2014. At about 8:30 A.M. on 05.03.2014 the complainant's wife got admitted at the

Hospital for the said test. The doctor entered the O.T. at about 09:35 A.M. and subsequently initiated the test, immediately after 20 minutes, the doctor came out and informed the complainant that the operation was successfully conducted but the patient went through a shock and subsequently suffered cardiac failure. Thereafter, the cardiology team came to attend his wife and she was taken to ICCU. During this entire period, the Doctors were unable to revive the complainant's wife/deceased. As a result the deceased breathed her last. The complainant alleges that his wife did not have any health issues. She was healthy and as such it seems to him that there might have been some negligence made during the aforesaid test as well as inefficiency. The complainant therefore requested the Officer-in-Charge to take steps against Dr. Samir Roy and his medical team of Doctors along with the staffs of Kothari Medical Centre.

The background of the case as is reflected from the record which includes the case diary produced on behalf of the state as well as the three revisional applications which incorporates the order sheets of the Learned Chief Judicial Magistrate reflect that initially in connection with Alipore Police Station Case No. 46 of 2014 dated 06.03.2014, a report in final form dated 13.10.2015 was submitted before the jurisdictional Court wherein the Investigating Officer was pleased to discharge the accused persons, holding mistake of fact as the reason of conclusion relating to the death of Arunima Sen @ Ghosh at Kothari Medical Centre. A notice was issued to the de-facto complainant namely Somraj Sen, who filed an application for further investigation before the Learned Magistrate and the Learned Magistrate was

pleased to direct further investigation by a different Investigating Officer. The investigation having been conducted by a different Investigation Officer, a report under Section 173 CrPC was filed on 02.05.2018 wherein the Investigating Officer on an analysis of the fact collected in course of further investigation was pleased to prima facie hold that a case has been made out against Dr. Samir Roy and Dr. Jyotsna Basu under Section 304A/34 of the Indian Penal Code; against Nirmala Jaiswal under Section 304A/34 of Indian Penal Code read with 120B/419/420/465/468/471 of the Indian Penal Code; against Dr. Snehapriya Chowdhury, Dr. Chand Ratan Damani, Dr. Satyendra Sahay under Sections 120B/419/420/465/468/471 of Indian Penal Code; against Dr. Rajesh Chattopadhyay under Section 175 of the Indian Penal Code.

Consequently, the Investigating Officer prayed for issuance of process against the accused persons. The Investigating Officer filed a supplementary charge-sheet on or about 11.09.2019 wherein on conclusion of investigation and after collection of materials, the Investigating Officer opined that case has been made out against Dr. Pritha Dutta, Dr. Mrinal Kanti Das, Dr. Utpal Chatterjee & Dr. Gan Nayak Pathak under Section 304A/34 of the Indian Penal Code and prayed for issuance of process against them.

The three revisional applications which are subject matter of adjudication relate to three doctors namely Dr. Pritha Dutta (CRR 1248 of 2024), Dr. Samir Roy (CRR 1242 of 2018) and Dr. Jyotsna Basu (CRR 1808 of 2018).

Mr. Pawan Gupta learned advocate appearing for the petitioner Pritha Dutta submitted that the nature of job assigned to the petitioner was rendering assistance to the consultant as and when required during her working hours. Her duties in the hospital comprised of ward duties, admission, discharging the patients as well as their pre-operative and post-operative management in consultation with various consultants. Her role was restricted to assisting doctors during surgery and she had no authority to take any decision either at the time of surgery (both pre-operative and post-operative) and she has been implicated in the case without any culpability or any specific role assigned to her and only on the basis of a generalized observation in the report, that whole of the team was responsible for the negligence. Learned Advocate further submitted that the present petitioner was cited as charge-sheet witness No.8 in the charge-sheet which was filed on 02.05.2018, surprisingly she was made an accused in the supplementary charge-sheet submitted by the Investigating Agency on or about 11.09.2019 and it was transparent from the supplementary charge-sheet also which was submitted on 11.09.2019 that her name is appearing as witness No. 8 in the list of witnesses and also as the accused against whom process was prayed for under "Serial No. 16A" in the brief facts of the case, wherein the Investigation Officer prayed for issuance of process against her in connection with the instant case.

Learned Advocate submitted that there was no application of mind to find out any complicity or culpability of the present petitioner and mechanically she has been added in the charge-sheet without attributing,

assigning or ascertaining any role of negligence for which she can be held or called for to face a trial in a Court of law. Learned Advocate therefore, prayed that the proceeding against the petitioner, Pritha Dutta should be quashed as continuation of the same may degenerate itself into a weapon of unnecessary harassment.

Dr. Samir Roy, the petitioner in the revisional application (CRR 1242 of 2018) has also challenged the continuation of the proceedings on various grounds. Learned Senior Advocate Mr. Shekhar Kumar Basu argued on behalf of the petitioner contending that the petitioner was Ex-Professor and Head of Gynaecology and Obstetrics Department of SSKM Medical College and Hospital for the last five and a half decades and had been rendering service to the public and society with reputation. In order to fortify his argument on behalf of the petitioner a background relating to the fact of the case was submitted before this Court wherein it was contended that the deceased Dr. Arunima Sen was the daughter of a classmate of the petitioner namely Dr. Ardhendu Narayan Ghosh with whom the petitioner had been closely associated for the last 50 years. As such there was no question of financial gain while treating the deceased, save and except love and affection. In relation to the treatment of the deceased it was submitted that the deceased approached the petitioner with complain of pain in chronic pelvic region, which usually started 10 to 11 days prior to the commencement of her menstrual cycle. She was diagnosed with Secondary Dysmenorrhea and was advised few tests along with medication. From the clinical symptoms, the petitioner apprehended that apart from the

Dysmenorrhea, Mittelschmerz was not ruled out. As proper medication did not yield any result, several tests including USG were done where from it was detected that the deceased had multiple myoma (tumor in the wall of uterus and polycystic ovarian syndrome). On or about March 2014 the petitioner advised the deceased for Dilation and curettage with Laparoscopic Dye Test, an invasive diagnostic procedure to view the pelvic organs. It usually involves having one tiny incision made at the lower border of the umbilicus. Dr. Arunima Sen (deceased) and her husband (the complainant) visited the petitioner with the decision to go ahead with the said invasive diagnosis just prior to the date of incident i.e. 05.03.2014. As per standard medical protocol the deceased had to undergo all relevant investigation, including the semen analysis of her husband.

In order to substantiate his case learned Senior Advocate appearing for the petitioner elaborated on the medical literature and the protocol followed by the petitioner who is an experienced medical professional in the field and also argued for refuting the contents of the report of the Medical Board which arrived at findings of negligence on the part of the petitioner. Learned Senior Advocate also referred to in detail the incident of 05th March, 2014 in the operation theatre wherein the petitioner was the lead surgeon.

According to the petitioner on 05.03.2014 Dr. Arunima Sen (deceased) attended Kothari Medical Centre for Gynaecological O.T. in empty stomach. After usual formalities of hospital day-care procedure under anaesthesia, she was taken to day-care bed after thorough history and investigation/examination, which was recorded by the on-duty Resident

Medical Officer (RMO). The procedure started after pre-anaesthetic check-up by the anaesthetist. After anaesthesia with endotracheal intubation and proper positioning of the patient, pneumoperitoneum procedure with carbon dioxide was smoothly and slowly done using various needles via infraumbilical port on the patient. The laparoscope was introduced through trocar and pelvic structures which were visualized in monitor and screen.

The laparoscopic finding was:-

1. Presence of two fibroid at fundus of the bulky uterus (conforming with previous U.S.G. reports);
2. Both tubes were congested and ovaries appeared normal;
3. P.O.D. (Pouch of Douglas) was free with 5-10 ml of fluid;
4. Evidence of pelvic endometriosis was absent.

Subsequently, dye test, wherein 20ml of distilled water coloured with approximately 3-4 drops of methylene blue, was done through cannula per vagina. The dye could not be seen inside the tubes except for the fact that the medial 1/3rd of right tube was coloured blue. Extra-peritoneal pelvic area could be visualized by bluish discoloration. The procedure was completed with curettage of one strip of endometrium. Abdominal and vaginal instruments were then withdrawn after thorough inspection of abdominal cavity. The petitioner went to wash his hands upon receiving confirmation about patient's well-being from the Anaesthetist.

After the procedure was over the petitioner while washing his hands outside the OT room was informed by the RMO that the patient's condition

has suddenly deteriorated. The petitioner immediately rushed inside the OT room and found that external cardiac massaging with various injections through intra-venous channel was given to the patient. The Cardio-pulmonary resuscitation (CPR) team immediately rushed inside OT on being called, and continued the CPR, Senior Cardiologist, Dr. Mrinal Kanti Das, was also called by the petitioner, who arrived immediately. The petitioner personally informed the patient's husband (complainant) regarding the grave situation of the patient. She was immediately transferred to the Intensive Care Unit (ICU) for ventilator support with cardiac pacing. The decision to shift the patient to ICU was purely on the premise that monitoring facilities in ICU are better than OT. However, the hospital records of the C.P.R. management are self-explanatory. Despite all steps taken on a war footing the entire medical team failed to revive her heart beat and as such Dr. Arunima Sen (deceased) was ultimately declared dead at around 1:25 pm on 5th March 2014.

Learned Senior Advocate contended that the post-mortem was conducted on 06.03.2014 wherein it was opined by the Medical Officer “death appears to be due to the surgical procedure including small intestine perforation. Further opinion if any can be given after receipt of C.E. and other laboratory and histopathological reports.”

Learned senior advocate in order to emphasise his argument submitted that negligence in the context of medical professional calls for a treatment with difference for assessing rash or negligence on the part of a professional, particularly in respect of a doctor, additional

considerations apply. A case of occupational negligence is different from one of professional negligence. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence mainly 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 resorted 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 ordinary experienced doctors 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. 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 on 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 the particular time.

A professional may be held liable for negligence on one of the two findings: -

- (i)** Either he was not possessed of the requisite skill which he professed to have possessed,
- (ii)** 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 has been negligent or not would be that if 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 practises. A highly skilled professional may possess better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against for negligence.

It was further emphasised that the concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be necessarily negligence in criminal law. For negligence to amount to an offence, the presence of Mens-rea is essential. 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 of a medical professional 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. Additionally, it was submitted that 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 and negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, who is qualified in the branch of medical practice, who can normally be expected to give an impartial and unbiased opinion, applying the Bolam test to the facts collected in course of the investigation.

Learned advocate, thereafter referred to the previous cases and to that effect drew the attention of the Court to the observations made by the Hon'ble Delhi High Court in Writ Petition (Civil) No. 1294 of 2017. It was emphasised that the Hon'ble Delhi High Court has been pleased to set aside the order dated 04.10.2016 passed by the Medical Council of India and directed the petitioners appeal against the decision of the Medical Council of West Bengal be considered uninfluenced by the impugned order.

Learned senior advocate on behalf of the petitioner Dr. Samir Roy illustrated the process and the steps taken by the doctor and emphasised that there was no negligence on his part so as to bring him within the ambit of Section 304A of the Indian Penal Code. However, since the Investigating Officer has submitted the charge-sheet unwarrantedly the petitioner is compelled to approach this Court. In order to emphasise his argument learned senior counsel relied upon series of judgements, which are dealt with herein below.

Reference was made to Martin F. D'Souza -versus- Mohd. Ishfaq reported in (2009) 3 SCC 1 and reliance was placed on Paragraphs 25, 28, 43, 44, 47, 67, 106 & 111 which reads as follows:

“25. Cases, both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals, complaining of medical negligence against doctors/hospitals/nursing homes and hence the latter naturally would like to know about their liability. The general principles on this subject have been lucidly and elaborately explained in the three-Judge Bench decision of this Court in Jacob Mathew v. State of Punjab [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] . However, difficulties arise in the application of those general principles to specific cases. For instance, in para 41 of the aforesaid decision it was observed: (Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , SCC p. 28)

“41. ... The practitioner must bring to his task 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 ... is what the law requires.”

28. The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

43. To fasten liability in criminal proceedings e.g. under Section 304-A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove

that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.

44. *The difference between simple negligence and gross negligence has broadly been explained in paras 12 to 16 of Jacob Mathew case [(2005) 6 SCC 1: 2005 SCC (Cri) 1369], though difficulties may arise in the application of the principle in particular cases. For instance, if a mop is left behind in the stomach of a patient while doing an operation, would it be simple negligence or gross negligence? If a scissors or sharp-edged medical instrument is left in the patient's body while doing the operation, would that make a difference from merely leaving a mop?*

47. *In para 52 of Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] the Supreme Court realising that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection : (SCC p. 35)*

(i) A private complaint should 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.

(ii) 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 opinion applying the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118] test.

(iii) A doctor accused of negligence should 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in Sarwat Ali Khan v. Prof. R. Gogi [OP No. 181 of 1997 decided on 18-7-2007 (NC)] the facts were that out of 52 cataract operations performed between 26-9-1995 and 28-9-1995 in an eye hospital, 14 persons lost their vision in the operated eye. An enquiry revealed that in the operation theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilisation of instruments, cotton, pads, linen, etc. and the damage occurred because of its absence in working condition. The doctors were held liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in Indrani Bhattacharjee [OP No. 233 of 1996 decided on 9-8-2007 (NC)] , the patient was diagnosed as having “mild lateral wall ischaemia”. The doctor prescribed medicine for gastroenteritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a cardiologist in writing.

(f) Full record of the diagnosis, treatment, etc. should be maintained.

67. *The basic principle relating to the law of medical negligence is the Bolam Rule which has been quoted above. The test in fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill. Considering the facts of the case we cannot hold that the appellant was guilty of medical negligence.*

106. *We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , otherwise the policemen will themselves have to face legal action.*

111. *The courts and the Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists. It is true that the medical profession has to an extent become commercialised and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples.”*

Attention of the Court was drawn to Jacob Mathew -versus- State of Punjab and Another, reported in (2005) 6 SCC 1 and reference was made to paragraphs 48, 50 & 53, wherein it has been held as follows:

“48. *We sum up our conclusions as under:*

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: “duty”, “breach” and “resulting damage”.

(2) Negligence in the context of the 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 [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[Ed.: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] 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 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.

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 the 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 a 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 to his reputation cannot be compensated by any standards.

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 the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] test.”*

Learned Senior Advocate appearing for the petitioner relied upon V. Kishan Rao -versus- Nikhil Super Speciality Hospital and Another, reported in (2010) 5 SCC 513 and emphasised on paragraph 18, which reads as follows:

“18. *In the opinion of this Court, before forming an opinion that expert evidence is necessary, the Fora under the Act must come to a conclusion that the case is complicated enough to require the opinion of an expert or that the facts of the case are such that it cannot be resolved by the members of the Fora without the assistance of expert opinion. This Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will*

be unnecessarily burdened and in many cases such remedy would be illusory.”

In *Dr. Suresh Gupta -versus- Govt. of NCT of Delhi and Another*, reported in (2004) 6 SCC 422 attention of the Court was drawn to paragraphs 8, 20 to 26, 28 which holds as follows:

“8. *It is settled position in law that the inherent power of the High Court under Section 482 of the Criminal Procedure Code for quashing criminal proceedings can be invoked only in cases where on the face of the complaint or the papers accompanying the same no offence is made out for proceeding with the trial. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out, the High Court will be justified in quashing the proceedings. (See Municipal Corpn. of Delhi v. Ram Kishan Rohtagi [(1983) 1 SCC 1 : 1983 SCC (Cri) 115 : AIR 1983 SC 67] and Drugs Inspector v. Dr. B.K. Krishnaiah.*

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 [(1994) 3 All ER 79 (HL)] relied upon on behalf of the doctor elucidates the said legal position and contains the 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 the 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 the 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 wrongdoing 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 trial for offence under Section 304-A 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 the accused and appellant before us.*

Petitioners referred to A.S.V. Narayanan Rao -versus- Ratnamala and Another, reported in (2013) 10 SCC 741 and emphasised on paragraphs 10 to 15 which reads as follows:

“10. *This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for prosecuting doctors on charges of criminal negligence. This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed: (Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , SCC p. 35, para 52)*

“52. ... 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 the Bolam [Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582 : (1957) 2 All ER 118 (QB)] 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

11. *From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the “doctors seem to have made an attempt to do their best as per records”.*

12. *However, the High Court thought it fit to continue the prosecution of the appellant for two reasons:*

(1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hrs in conducting bypass after the angioplasty failed; and

(2) that the appellant did not consult a cardio anaesthesian before conducting an angioplasty.

According to the High Court, both the abovementioned “lapses” on the part of the appellant “clearly show the negligence” of the appellant.

13. *The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr Surajit Dan given before the A.P. State Consumer Disputes Redressal Commission in CD No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the*

abovementioned Dr Dan's evidence was recorded wherein Dr Dan in his cross-examination stated as follows:

“... Whenever cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case....”

He further stated:

“... The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery....”

However, the same doctor also stated:

“... The time gap between the angioplasty failure and the surgery is not the factor for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk.”

14. *Unfortunately, the last of the above-extracted statements of Dr Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.*

15. *The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] that the negligence, if any, on the part of the appellant cannot be said to be “gross”. We, therefore, set aside the judgment [Criminal Petition No. 6506 of 2007, order dated 28-10-2010 (AP) sub nom Surjit Dan v. State of A.P., Criminal Petition No. 6368 of 2007] under appeal and also the proceedings of the trial court dated 11-12-2006.”*

Reliance was also placed upon Dr. Soumya Ghosh @ Soumya Ghosh – versus- State of West Bengal (2013) 2 C Cr LR (Cal) 306 and reference was made to paragraphs 34 to 43 and 56, which reads as follows:

“34. 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 on 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 incident) at which it is suggested it should have been used.

35. *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.

36. *A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So, also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. 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. Which course is more appropriate to follow would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in charge of the patient if the patient is not in position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.*

37. *The jurisprudence 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 of prosecution.

38. *The word 'gross' has not been used in Section 304A, IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act as occurring in Section 304A, IPC has to be read as qualified by the word 'grossly'.*

39. *Res ipsa loquitur is only 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*

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

41. *Res ipsa loquitur is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of accident is*

unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have proved or made out by resorting to the said rule.

42. *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.*

43. *A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer an end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the lifesaving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society.*

56. *In the case at hand the accused is a medical practitioner. He received his fees of Rs. 5000/- for undertaking operation in respect of the deceased. So, ex facie motive is absent. Therefore, the remaining part of action taken by the doctor is to be judged to find out if there is any prima facie dereliction of duty or breakage of professional ethics or maltreatment or deliberate and gross negligence in the form viz. for example (keeping inside the abdomen a small knife after operation is over and stitching is done) or something like this. It is not expected from a medical practitioner that he will charge fees from his patient in one hand and at the same time takes such desperate and deliberate steps as to cause gross mistake to take away the life of a patient. It is against the rule of human behavior especially of a professional medical practitioner.”*

The Judgment of Jayshree Ujwal Ingole -versus- State of Maharashtra reported in (2017) 14 SCC 571 was referred by the petitioner and attention of the Court was drawn to the following paragraphs:

“7. *We have heard the learned counsel for the parties. The learned counsel for the appellant has placed reliance on the judgment of this Court in Jacob Mathew v. State of Punjab [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1: 2005 SCC (Cri) 1369] , wherein this Court held that the court should be circumspect before instituting criminal proceedings against a medical professional. This Court has held that negligence comprises of: (i) a legal duty to exercise due care on the part of the party complained of; (ii) breach of the said duty; and (iii) consequential damage. It was held that in cases where negligence is alleged against professionals like doctors the court should be careful before instituting criminal proceedings. It is not possible for any doctor to assure or guarantee that the result of treatment would invariably be positive. The only assurance which*

a professional can give is that he is professionally competent, has requisite skill and has undertaken the task entrusted to him with reasonable care.

8. *It would be pertinent to quote the following relevant observations made in Jacob Mathew case [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1: 2005 SCC (Cri) 1369] : (SCC pp. 22-23, paras 26 & 28-30)*

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

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason—whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an

essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.”

The observations made in paragraphs 3 and 4 of Rakesh Ranjan Gupta -versus- State of U.P. and Another, reported in (1999) 1 SCC 188 was also relied upon by the petitioners, the same reads as follows:

“3. The above allegations do not disclose, prima facie, a case of rash or negligent act on the part of the appellant so as to attract the penal provision under Section 304-A IPC. If there was delay on the part of the doctor to attend on the patient, that may at the worst be a case of civil negligence and not one of culpable negligence falling under the above section. That apart, the cause of death has now been disclosed from the report of the chemical examiner, as one of

consuming poison. The viscera examined in the chemical laboratory showed that result. It is nobody's case that the appellant has administered poison to the patient. It is now apparently clear that death was not on account of anything which the appellant did to the patient. It was primarily due to the poison being consumed by the deceased. Therefore, by no stretch of imagination can it be said that death of the deceased was caused by any act done by the appellant.

4. *The admitted facts being thus, this is not a case to proceed against the appellant in a criminal court for offence under Section 304-A IPC. The charge-sheet is liable to be quashed or else the appellant is likely to be subjected to unnecessary harassment for facing criminal prosecution. We quash it without prejudice to the right of the legal representatives of the deceased to resort to any other action permissible under law.”*

In Dr. Subhas Chandra Saha -versus- State of West Bengal & Another, (2016)1C Cr LR (Cal) 732 petitioners referred to paragraphs 8, 9 and 10 which are as follows:

“8. *In the present case admittedly accordingly to the FIR the death of the victim had occurred in the Nursing Home when the petitioner was not even present there. So, there cannot be any question of any culpable negligence of his part in the light the decision in "Rakesh Ranjan Gupta" (supra). Again it is undisputed that death of the victim was not as a result of any negligent act of the petitioner which itself was the proximate and sufficient causes without intervention of any other person's negligence, in view of the decision in "Kurban Hussain" already quoted in "Sushil Ansal" (supra).*

9. *At the most such culpable negligence can be attributed only to the particular Doctor who was actually present in the Nursing Home when the victim died. But clearly no such liability would arise in case of the present petitioner who was not even present, and therefore there was no scope of any proximate and efficient cause from any act attributable to him which could result in the victim's death.*

10. *The decision in "B. Jagdish v. State of A.P. & Anr." cited on the half of the State is prominently distinguishable from the facts of the present case. In that matter the Supreme Court had held that since there were two conflicting sets of opinions in favour of the complainant and the charged Doctor, and which opinion was correct or appropriate could only be determined after a trial, so there was no scope to quash the proceedings. However in the present case, there is absolutely nothing in the nature of specialised opinions regarding the appropriate line of treatment which ought to have been administered. On the contrary, the petitioner in this case had merely seen the patient in his chamber and advised that he be rushed to the Nursing Home, and for all practical purposes had not administered any "negligent treatment". He can therefore not be faulted for causing the victim's death by negligence."*

The petitioner Dr. Jyotsna Basu is a senior consultant and Anaesthesiologist by profession, she passed MBBS from Calcutta University in the year 1974 and was registered with the West Bengal Medical Council in 1975. She worked as house officer at Safdarjung Hospital in the Department of Anaesthesiology and General Medicine. She obtained her Masters (MD) qualification in the subject from All India Institute of Medical Sciences, New Delhi in 1978 and joined West Bengal Health Services in 1978 as a consultant Anaesthesiologist at Krishnagar

District Hospital. In 1978, she joined Nil Ratan Sarkar Medical College, Kolkata as a teacher and subsequently was promoted to the post of Lecturer. She served the Health Services for 15 years and was In-charge of Anaesthesia in the Cardio Thoracic Surgery Department, National Medical College, Kolkata. At present, she is professor of Anaesthesiology and Head of the Department of Anaesthesiology, Institute of Child Health, Kolkata. She is also associated as Consultant anaesthesiologist with Park Medical Research Society and other medical institutions of repute in Kolkata. On 5th March 2014, she was called over telephone by the Medical Officer of Kothari Medical Centre on behalf of Dr. Samir Roy for attending his patient Dr. Arunima Sen (deceased) to perform the pre-operative assessment. At about 9:00 A.M. in the morning, she was introduced to Dr. Sen at Kothari Medical Centre in the pre-operative observation room by the staff nurse on duty, and it was informed that the patient had been diagnosed to be suffering from severe pain during menstruation (dysmenorrhoea) and primary infertility by the treating surgeon. According to the doctor, the patient was admitted as a day care patient and scheduled to undergo a (Dilatation and Curettage) D&C operation along with a Diagnostic Laparoscopic Dye Test on 5th March, 2014. For the aforementioned diagnosis, as per practice, a day care patient is admitted on the day of surgery itself and discharged on the same day, but is provided with all the hospital facilities as an indoor patient. During the pre-anaesthetic check-up, the patient revealed that she had been suffering from childhood asthma for which she required frequent treatment during her childhood. However, as she grew older, the

intensity of the disease minimised and later she did not require any treatment. The patient further informed the petitioner that she was allergic to SULPHA drugs and TINIDAZOLE and she had undergone an appendectomy operation in 2006 under general anaesthesia without any complications. The patient had no adverse reactions to any anaesthetic drugs during her previous operation which was taken into consideration while deciding for general anaesthesia in this case. All these facts were duly noted during Pre-Anaesthetic check-up by the Medical Officer and by the petitioner and documented in the case sheet of the patient. On examination, petitioner found the patient to be a healthy looking lady, well-built and in good general condition. She volunteered that her bodyweight was about 65 Kg and on physical examination, including examination of cardio-respiratory system, it was found that all the parameters were within normal limits. The information about the patient's childhood asthma and other allergy propensities as well as having been given general anaesthesia during her appendectomy operation in 2006 was documented in Anaesthesia chart during Pre-Anaesthetic check-up. Petitioner thereafter proceeded to narrate the chain of events on the relevant date and also criticised the report prepared by the doctors of Bankura Sammillani Medical College & Hospital. It was further emphasised regarding the theoretical part of the treatment which was administered to the patient in order to prove innocence in light of the accusations made in the charge-sheet. Additionally, it was brought to the notice of the Court that investigation commenced in violation of law and the committee which was formed by

the doctors of Bankura Sammillani Medical College & Hospital, were in violation of the dictum of the Hon'ble Supreme Court in Jacob Mathew case, as it is at the request of the Investigating Officer only such committee or Board of Doctors were formed. The notes of argument which has been submitted on behalf of the petitioner includes the rebuttal in respect of the report prepared by the concerned doctors who acted in contravention of the provisions of law. It was also illustrated regarding the improbability in the contentions and/or findings/opinion of the other doctors, which are part of the materials collected by the investigating officer in course of investigation.

On behalf of the petitioner, reliance was placed on the judgement of the Hon'ble Supreme Court in the case of Jacob Matthew and it was submitted that the Medical Council of India has set specific guidelines on the role of expert opinion in Medical negligence cases. Reliance was placed on the said guidelines and thereafter attention of the Court was drawn to the observation that it shall be mandatory to the patient or his relative, that before lodging a complaint against Doctor/Hospital regarding rashness or negligence, he is to obtain credible opinion from a competent doctor qualified in that branch of medical practice on the facts mentioned in the document supplied by the concerned Doctor/Hospital. In this case, the same was not followed, and after the case was registered, medical opinion was sought for by the investigating officer of the case and the enquiry report prepared by Bankura Sammillani Medical College & Hospital is simply a set of conjectures and inconclusive in nature. No specific acts of negligence have been pointed

out in the entire enquiry report from the Bankura Sammillani Medical College & Hospital, rather there is a discussion of possibilities, and there is no mention of overdose of any of the anaesthetic drugs or any specific procedural defect in any of the expert opinion reports.

Petitioner also referred to the complaint which was filed by the husband of the deceased and submitted that there were no allegations of rashness or negligence which could have directly resulted in the death of the patient. On the contrary, the complaint states that the test was conducted for at least 20 minutes and some of the members of the operating team had left the operation theatre during this time. The complaint also proves that the patient was being continuously attended and that the patient party was updated about the status of the patient. The report which is referred by the Investigating Officer while arriving at his conclusion was criticised and analysed in details. Considering the stage of the proceeding, it was felt that the same need not be gone into at this stage, as the same would result in a mini trial.

Learned advocate for the petitioner also relied upon the judgement of the expert in the case of Martin F.D' souza -versus- Md Ishfaq reported in (2009) 3SCC 1 and submitted that whenever a complaint is received against the doctor or a hospital by the criminal Court, then before issuing notice to the doctor or hospital against whom the complaint has been made, the Consumer Court or Criminal Court should first refer the matter to a competent committee of doctors specialised in the field relating to which medical negligence is attributed, only after the doctor or committee reports that there is a case of medical

negligence then only steps are to be taken. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. The Hon'ble Court was pleased to observe that Police Officials are not to arrest or harass the doctors unless the facts clearly come within the guidelines laid down in the case of Jacob Mathew (supra) failing, which Police would themselves have to face legal action.

Learned advocate appearing on behalf of the de-facto complainant submitted that the present case is gross, rash and negligent actions of the petitioners which resulted in the death of Dr. Arunima (Sen) Ghosh, a Medical practitioner herself. The petitioners failed to exercise reasonable care expected of medical professionals which would be evident from the treatment papers relied upon by them. The team of doctors who were present at the operation theatre as is appearing from the surgical notes and the statement issued by Kothari Medical Centre reflect that the deceased, a medical professional, was aged merely 31 years with no medical history or comorbidities and had gone to a tertiary healthcare provider professing to have state-of-art facility and specialized doctors for undergoing a simple diagnostic procedure under general anaesthesia to know cause of her mid-cycle pelvic pain and delay in conceiving. The patient died of cardiac arrest while undergoing the aforesaid procedure at Kothari Medical Centre on 5th March 2014. The expert committee formed by the direction of the Directorate of Health Services, Government of West Bengal, Swastha Bhawan, in their opinion dated 19th June 2017 opined that "Death of the patient Arunima Sen, 31 years, Female, was due to cardiac arrest during

surgical procedure under anaesthesia in the Operation Theatre. Considering all the findings as noted above we the undersigned committee members are of the opinion that all the members of Doctors team and Kothari Medical Centre were deficient in discharge of duties in treatment and management of critical life-saving care of the patient Dr. Arunima Sen". The committee inter-alia pointed out the gross and negligent acts of the surgeon, assisting surgeon, Anaesthetist, incidents of mismatch in the narration of events in the treatment papers, destruction of evidence. Another report from Bankura Sammillani Medical College and Hospital also points out several rash and negligent acts on the part of the doctors who attended the patient. Learned Advocate proceeded to submit that the diagnostic procedure which was Laparoscopic D&C Dye test, under general anaesthesia started at around 9:50 am on 5th March 2014 and the operation according to the surgeon was a procedure of 12-15 minutes. According to the surgeon, the procedure was completed by them and it is an admitted fact that the operation was conducted without a capnograph machine which is essential for a Laparoscopic procedure for monitoring the saturation of Carbon Di-Oxide during the process. Such fact has been admitted by the hospital authority in its letter dated 24th October 2014 which reads as follows:

"Please note that a multichannel monitor was used. However, recording facility and capnograph was not available."

Following the incident, a complaint was filed at Alipore Police Station by the de-facto complainant and pursuant to the same, an FIR being Alipore Police Station Case No. 46 of 2014 was registered on 6th of March 2014.

Pursuant to the same, post mortem of the deceased was conducted and the documents would also reflect that the photocopy of the certified copies of the treatment papers pertaining to the victim and the incident were not supplied thereby preventing and delaying the de-facto complainant from approaching other forums for relief(s) available under civil and special laws. The documents were supplied pursuant to a direction passed by the Learned Chief Judicial Magistrate, Alipore on 30th April 2014.

The Investigating Officer of the case sought for opinion from the West Bengal Medical Council and the Directorate of Health Services, West Bengal and on receipt of a non-speaking opinion from the Medical Council, the Investigating Officer filed a final report on 13th October 2015. Being aggrieved by the final report so filed by the Investigating Officer, the de-facto complainant preferred an application for further investigation and the Learned Chief Judicial Magistrate, Alipore was pleased to allow the application by an order dated 4th January 2016 in terms of Section 173 (8) of the CrPC. On 19th April 2016, the Learned Chief Judicial Magistrate, Alipore allowed the Investigating Officer to obtain a report from a Government Hospital outside Kolkata, when the Investigating Officer applied for a report from Bankura Sammillani Medical College & Hospital which was responded by way of a report dated 8th June 2016. The report was also sent for final opinion from the Directorate of Health Services, Swasthya Bhawan, West Bengal. On 9th July 2017, the Learned Chief Judicial Magistrate held that the final opinion from Swasthya Bhawan Government of West Bengal is necessary for appropriate dispensation of justice and

thereafter decided to monitor the investigation and directed the Investigating Officer to produce the case diary after obtaining the report from Swasthya Bhawan. Pursuant to such order passed by the Learned Chief Judicial Magistrate, the Investigating Officer pursued Swasthya Bhawan for their final opinion. In the meantime, based on the report of Bankura Sammillani Medical College, a charge-sheet No. 225/2018 dated 2nd May, 2018 was filed by the Investigating Officer on or about 5th of May 2018. Subsequently, the Investigating Officer also received the enquiry report of Swasthya Bhawan dated 22nd May, 2018. In such enquiry report dated 22.05.2018 the Expert Committee of doctors of R.G. Kar Medical College and Hospital also took into account the opinion of Bankura Sammillani Medical College & Hospital. On 28th May 2018, the Investigating Officer filed a prayer for further investigation based on the report of Swasthya Bhawan which was allowed by the Learned Chief Judicial Magistrate, Alipore and following such further investigation, a supplementary charge-sheet No. 97/2019 dated 11th September 2019 was finally submitted before the Learned Chief Judicial Magistrate.

The learned advocate on behalf of the de-facto complainant analysed the reports of the Bankura Sammillani Medical College & Hospital as also that of the Swasthya Bhawan and to that extent tried to substantiate the case with medical literature thereby substantiating the contents in the said report and analysed the findings to rebut the contentions advanced on behalf of the petitioners. Learned advocate submitted that the three petitioners were responsible for gross and negligent acts and the

Investigating Officer not only on an assessment of the materials available but also relying upon the report of the Expert Committee has recorded his satisfaction and thereafter submitted the charge-sheet and the supplementary charge-sheet. An exhaustive rebuttal in respect of the contents which were advanced on behalf of the petitioner particularly with regard to the manner in which treatment was carried out has been submitted on behalf of the de-facto complainant, however, considering the stage of the case, it would not be fit and proper to assess regarding the truth, correctness and acceptability of the details of the medical literature associated with the manner and procedure relating to the treatment which was offered as already two committees have arrived at their findings which has been relied upon by the Investigating Officer to submit the charge-sheet. In order to fortify his argument learned Advocate appearing for the de-facto complainant distinguished the judgments referred to on behalf of the petitioners and submitted that in a different set of factual circumstances the pronouncements were made, as such the said judgments have no application in the facts of the present case.

Mr. Debashish Roy Learned Public Prosecutor appearing on behalf of the State submitted that the Investigating Officer initially was handicapped as the report was not being made available from Swasthya Bhawan. However, after carrying out further investigation and obtaining the opinion of the doctors of Bankura Sammillani Medical College and on placing reliance upon 26 witnesses submitted the charge-sheet before the jurisdictional Court initially against four accused persons which included

the charges against the petitioner Dr. Samir Roy (CRR 1242 of 2018) and Dr. Jyotsna Basu (CRR 1808 of 2018). Thereafter, the supplementary Charge-sheet was submitted on or about 11.09.2019 which was after obtaining the report from the Swasthya Bhawan. A comparison of the charge-sheet and the supplementary charge-sheet would suggest that the Investigating Officer relied upon 4(four) witnesses who are of Directorate of Health Services Swasthya Bhawan and were members of the Committee in order to arrive at his findings thereby implicating 4 (four) other accused persons in the charge-sheet which included the petitioner Dr. Pritha Dutta (in CRR 1248 of 2024).

I have considered the submission of the learned advocates appearing for the petitioners in the three revisional applications, the learned advocate appearing on behalf of the de-facto complainant as well as the learned Public Prosecutor appearing on behalf of the State. Although certain issues relating to question of law was raised but the learned counsel appearing on behalf of the petitioners and the de-facto complainant, both of them intended to either rebut the manner and procedure adopted by the committee of doctors or tried to substantiate the same, the truth or correctness of the opinion arrived at by the committee at the pre-charge framing stage whether it can be considered is a mixed question of fact and law which is to be addressed by this Court.

An analysis of the submissions advanced on behalf of the petitioners, de-facto complainant as well as the State would reflect that Alipore Police Station Case No. 46 of 2014 dated 06.03.2014 was initially registered and

on completion of investigation, the Investigating Officer submitted a final report which was on the basis of a report prepared on 23.09.2015 by the West Bengal Medical Council, wherein an opinion was expressed that there was no medical negligence. It was observed by the Investigating Officer that the Directorate of Health Services, Swastha Bhavan, Government of West Bengal opined on 22.10.2015 that without Multichannel Monitor Record (including Capnograph record), they were unable to provide any report. Consequently on or about 13.10.2015 Alipore Police Station Final report No. 62/15 was submitted before the jurisdictional Court thereby discharging all the accused persons. The de-facto complainant prayed for further investigation on 04.09.2016 being dissatisfied with the opinion arrived by the Investigating Officer of the case. Consequently further investigation was directed by the Learned Magistrate and on a further prayer for an impartial and unbiased investigation, it was prayed that the medical opinion be sought for from a Board of Doctors outside Kolkata as one of the accused happened to be the doctor associated with R.G. Kar Medical College & Hospital, Kolkata. The prayer of the de-facto complainant was allowed by the learned Magistrate and an opinion was obtained from Bankura Sammillani Medical College & Hospital. It was pointed out by the team of doctors/committee of doctors of Bankura Sammillani Medical College & Hospital that:-

- (a)** There is a difference of finding between the Surgeon's note & Autopsy Surgeon's findings regarding presence of methylene blue dye.

- (b)** The time of beginning of operation, end of operation, total time taken during operation, complete haemostasis achieved or not, any complication occurred during the procedure was not mentioned.
- (c)** Intermittent repeat scoline may cause Bradycardia.
- (d)** Propofol and Sevoflurane may cause hypotension, but only 5% Dextrose was given pre-operatively & per-operatively which may lead to haemodynamically unstable condition of the patient.
- (e)** Voluven was used but whether before or after the cardiac arrest was not mentioned.

After analysis of other separate factors including sudden cardiac arrest in a laparoscopic surgery it was inferred the same may be due to Carbon-dioxide Embolus. It was further stated in the report that the patient was medically fit at the time of admission. As such she was healthy woman having acute collapse during surgery, leading to death in immediate post-operative period, which suggests an unnatural death.

A further enquiry report was submitted by the Expert Committee formed by the Directorate of Health Services, Government of West Bengal, Swastha Bhawan, wherein on a detail assessment it was concluded:

“Death of the Patient Arunima Sen, 31Yrs, Female was due to cardiac arrest during Surgical procedure under anesthesia in the Operation Theatre.

Considering all the findings as noted above we the undersigned committee members are of the opinion that all the members of Doctors team and Kothari Medical Centre were deficient in

discharge of duties in treatment and management of critical life-saving care of the patient Dr. Arunima Sen.”

In view of the two reports submitted by the Expert Committee of Doctors which are part and parcel of the materials relied upon by the Investigating Officer. The medical literature so submitted by the petitioners at this stage cannot be taken into consideration, since the Committee of Doctors consisted of 13 (Thirteen) Doctors, 9 (Nine) of whom were from Bankura Sammillani Medical College & Hospital and 4 (Four) of the Doctors were from Swastha Bhawan, Kolkata.

The petitioners have reiterated the guidelines laid down by the Hon'ble Supreme Court in Jacob Mathew (supra). It would be pertinent to state that in the case of Lalita Kumari -versus- Government of Uttar Pradesh and Others, reported in (2008) 14 SCC 337, the Hon'ble Supreme Court desired for conducting preliminary enquiry in cases of medical negligence. However, the said observations were taken into consideration in State of Karnataka -versus- Channakeshava H.D. and Another, 2025 SCC OnLine SC 753 and also in in State of Karnataka -versus- T.N. Sudhakar Reddy, 2025 SCC OnLine SC 382 wherein on an assessment of the facts of the case, it has been specifically held that such preliminary enquiry depends on specific fact and circumstances of each case and the same are not mandatory. In the instant case the Police Authority did not in any manner harass the Doctors or arrested them, and the opinion of the experts were sought for. Pursuant to the directions passed by the Learned Magistrate and on the basis of the initial report of Swasthya Bhawan when no opinion was

expressed, Police did not submit the charge-sheet against any of the accused persons. It is only after further investigation when the procedural lapses of the Doctors were pointed out by the experts of Bankura Sammillani Medical College & Hospital, the Investigating Officer proceeded to submit the charge-sheet and finally submitted the supplementary charge-sheet on receipt of the report from Swasthya Bhawan. Thus, it cannot be said that there was any gross illegality in the investigation of the case which would call for interference by this Court.

Another factor which is to be considered by this Court is relating to the stage of the proceeding. Presently the charge-sheet and the supplementary charge-sheet has been submitted.

From the materials in the case diary, it is evident that the investigating officer not only restricted himself to the report of the doctors of Bankura Samillani Medical College (“BSMC”) and Hospital but also recorded the statements of the Doctors associated with the Committee under Section 161 of the CrPC. The relevant part of the statement of some of the witnesses are quoted in verbatim for the purpose of deciding the subject-matter of the present case.

PW-13 Professor Subhendu Dasgupta was the convenor of the committee formed by the Principal, BSMC. He is a gynaecologist and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“We noticed some faults of Dr. Samir Roy during operation such as he could not prepare the patient properly before going for operation, she needed to bowel preparation properly and that’s why a intestinal perforation in post mortem report. The patient came at the Kothari Medical Centre at about 09.00 hours and she was sent for operation at about 09.30 hours, operation was started at about 9.50 hours, which reflects that she was not prepared properly before the operation. The heart rate, B.P., peripheral oxygen saturation, CO2 level were not mentioned in the bedhead ticket. There are differences between surgeon note and autopsy surgeon’s findings regarding presence of methylene blue die. In operating notes, time was not mentioned clearly. The abdomen is to be swelling before the operating with CO2 for this type of operation. Many times CO2 may mix with blood, which may death of a patient. As per PM report, the patient might due to CO2 embolism i.e, mixing of CO2 in blood. Whether CO2 is mixing with blood or not is measured by some apparatus, which is not found in bedhead ticket.”

PW – 14 Professor Joydeb Nag was a member of the committee formed by the Principal, BSMC. He is an anesthetist and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“Intermittent repeat dose of scoline may cause bradycardia, medicine propofol and sevoflurane may cause hypotension, but 5% dextrose was given pre-operatively and per-operatively, which may lead to haemodynamically unstable condition of patient. I also noticed that voluven was used but whether before or after the cardiac arrest was not mentioned. It was also noticed that operative procedure of anesthesia started at 09.50 am on 05.03.2014 and the woman had hypotension and no peripheral

pulsed felt and flat ECG at 10.12 a.m. to 10.15 a.m. on 05.03.2014. We also noticed that some overwriting in the anesthesia note.”

PW – 15 Professor Shyamal Kundu was a member of the committee formed by the Principal, BSMC. He is an expert in medicine and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“There were some faults of Dr. Samir Roy, gynaecologist and Dr. Jyotsna Basu, anesthetist, which will be cleared by Professor Subhendu Dasgupta and Professor Joydeb Nag, as they are gynaecologist and anaesthetist respectively.”

PW – 16 Professor Joydip Deb was a member of the committee formed by the Principal, BSMC. He is a pulmonologist and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“I could not find any fault in respect of pulmological. The main faults were noticed in respect of Dr. Samir Roy, gynaecologist and Dr. Jyotsna Basu, anesthetist. It will be discussed by Dr. Subhendu Dasgupta, gynaecologist and Dr. Joydeb Nag, anesthetist.”

PW – 17 Professor Swapan Pathak was a member of the committee formed by the Principal, BSMC. He is a pathologist and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“I could not find any fault in pathology. The faults which were found in respect of gynae and anesthesia was clarified by Professor Subhendu Dasgupta, gynaecologist and Professor Joydeb Nag, anesthetist.”

PW – 19 Professor Utpal Dey was a member of the committee formed by the Principal, BSMC. He is a medical surgeon and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“We found some fault of his process. He could not prepare the patient properly before going for OT. She needed to bowl preparation properly. Pre-operative bowel preparation reduces chance of bowel injury during the said dye test. The patient admitted in hospital at about 09.00 hours and she was removed to OT at 09.30 hours without bowel preparation. We also noticed a small intestinal perforation in the PM report. It might cause due to no bowel preparation. The heart rate, B.P., peripheral oxygen saturation carbon dioxide level were not mentioned in the bed-head ticket. There are differences between surgeon note and autopsy surgeon’s findings regarding presence of methylene blue die. In operating notes, time was not mentioned clearly. The abdomen is to be swelling before the operating with CO2 for this type of operation. Many times CO2 may mix with blood, which may cause fatal. The findings which were noticed in the P.M. examination report, the patient might die due to CO2 embolism i.e., mixing CO2 with blood. Whether CO2 is mixing with blood or not is measured by some apparatus, which were not found in bedhead ticket.”

PW – 20 Professor Pranab Kumar Biswas was a member of the committee formed by the Principal, BSMC. He is a cardiologist and the relevant part of his statement, which was recorded by the investigating officer is set out hereunder:

“I could not find any fault in cardiologist Dr. Mrinal Kanti Das of Kothari Medical Centre. The faults which were revealed in respect of gynae Dr. Samir Roy and anesthesia Dr. Jyotsna Basu were clarified by Dr. Subhendu Dasgupta and Dr. Joydeb Nag.”

I have assessed the two reports of the Committee of Doctors as well as the statement of the Doctors recorded under Section 161 of the Code of Criminal Procedure, and I do not find that any role can be assigned towards contributory negligence of Pritha Dutta thereby asking her to face a criminal trial. The report of the Committee of Doctors reflect that some of the basic requirements were not adhered to by the Surgeon and the Anaesthetist which any doctor of ordinary prudence should have adopted and exercised at the pre-operative stage and also in course of the operation procedure, consequently, at this stage the allegations and charges of negligence, so far as they are concerned cannot be interfered with.

Thus, the revisional application being CRR 1248 of 2024 preferred by Dr. Pritha Dutta is allowed, as such the proceedings against her is quashed.

However, in the light of the observations made above the revisional applications preferred by Dr. Samir Roy being CRR 1242 of 2018 and Dr. Jyotsna Basu being CRR 1808 of 2018 is hereby dismissed.

Pending connected applications, if any, are consequently disposed of.

Case Diary be returned to the learned Advocate for the State.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)