



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 809 OF 2005

The State of Maharashtra
Through PSO, City Police Station,
Jalgaon.

... Appellant

Versus

Sau. Nanda Prasannakumar Jain
Age 32 years, r/o Shahu Nagar,
Jalgaon.

... Respondent
[Orig. Accused]

.....
Mrs. D. S. Jape, APP for the Appellant-State.
Mr. Abhaykumar D. Ostwal, Advocate for the Respondent.
.....

CORAM : ABHAY S. WAGHWASE, J.

DATED : 22.07.2025

JUDGMENT :

1. State hereby takes exception to judgment and order dated 18.08.2005 passed by learned Chief Judicial Magistrate, Jalgaon in Summary Criminal Case No. 343 of 2001, by which, present respondent stood acquitted from charge under Section 304-A of IPC.

PROSECUTION STORY IN BRIEF IS AS UNDER

2. In nutshell, present respondent was indicted for charge of Section 304-A of IPC on the premise that, she operated and conducted

surgery over deceased Lilabai for hysterectomy i.e. removal of uterus. While operating, a napkin/mop was negligently left out in the abdomen i.e. at the part where surgery was conducted and suturing was already done. This resulted into severe abdominal pain. On re-operation at the hands of PW3 Dr. Patil, the napkin/mop was recovered. However, shortly thereafter, Lilabai died. Thus, on report lodged by son of deceased, crime was registered for above offence.

SUBMISSIONS

On behalf of the Appellant-State :

3. Learned APP would submit that respondent herein is a medical practitioner. Deceased Lilabai, i.e. wife of PW1 and mother of PW2, was admitted on complainant of bleeding in the hospital of respondent-accused, and on advice and decision of accused, she herself performed operation on 07.07.1993. Learned APP pointed out that, in spite of being treated and operated, deceased Lilabai had no relief and rather had complaint of abdominal pain. That, even after discharge and taken home, as complaint persisted, she was brought back for treatment multiple times. However, there was no recovery.

4. Learned APP further pointed out that, finally, complainant shifted and admitted deceased Lilabai in the hospital of PW3 Dr. Sharad Patil, who after performing necessary tests, suggested re-surgery and after that was done, it is pointed out that, PW3 came across a mop inside the abdominal part where surgery was performed by accused and that was precisely the cause of persistent pain. Learned APP would submit that, PW3 has stepped into the witness box and has extensively and in details narrated about the history and the surgery performed by him and about detecting mop in the abdomen of deceased Lilabai after she was operated by accused. Thus, according to learned APP, accused was grossly negligent in conducting the surgery. Deceased had suffered pain and agony till being operated and treated by PW3 and she reportedly died due to complications arising out of above negligent act at the instance of accused. Thus, according to learned APP, there is act of medical/criminal negligence. That, there was no other reason or other cause of death of Lilabai. That, necessary ingredients for attracting Section 304-A IPC were made readily available by prosecution in the trial court.

5. Learned APP further pointed out that prosecution has rested its case on the consistent testimonies of PW1 and PW2. That, there are medical papers of treatment provided by both, accused as well as PW3. That, PW3 has categorically opined death due to negligent act of accused. Investigation revealed sole responsibility of accused. The mop which was negligently left in the abdomen of deceased and which turned out to be fatal, was retained by PW3 and also produced in the court. That, there is no challenge to such evidence. Thus, according to her, full proof case was made out to fasten guilt and there was sufficient material regarding complicity of accused, however, learned trial court failed to appreciate above evidence in its correct perspective and overlooked the legal requirements as well as settled legal position and erred in according acquittal, and hence she urges for indulgence at the hands of this Court by allowing the appeal.

On behalf of the Respondent :

6. Refuting and countering above submissions, learned counsel Mr. Ostwal would submit that prosecution has miserably failed to bring home the charges. According to him, there is no iota of evidence

establishing even a casual link with alleged negligence at the hands of accused and death of Lilabai. He pointed out that firstly, as required by law, the exact cause of death has not been substantiated by prosecution. Secondly, according to him, there is hopelessly inordinate delay in lodging the FIR as, according to him, alleged surgery by respondent, who was a duly and highly qualified medical expert, was conducted on 07.07.1993 whereas deceased died after a year of said surgery, i.e. on 05.07.1994. He very emphatically submitted that during the gap of a year, prosecution's evidence itself demonstrate that there are several other doctors who examined and treated deceased who had several other comorbidities like typhoid, jaundice. Most importantly, according to him, here, PW3, who allegedly detected mop, has not reported police immediately nor has lodged any complaint and rather, without drawing any panchanama of recovery of such mop, the alleged mop was retained in his own custody for the best reasons known to him and it is further pointed out that, surprisingly same was directly produced in the court for the first time after inordinate delay of 6 years. On such count, learned counsel also questions the integrity of the so called mop, i.e. by expressing immense possibility of same being tampered.

7. Learned counsel also questioned failure of investigating machinery to procure alleged mop, to send it for CA analysis and to secure its report so as to connect the said recovery with that of alleged recovery by PW3, and thereby he questions the very chain of custody. Lastly, learned counsel sought reliance on various judicial pronouncements of the Hon'ble Apex Court, more particularly in cases wherein there were charges for commission of offence under Section 304-A of IPC, i.e. *Martin F. D'Souza v. Mhod. Ishfaq* (2009) 3 SCC 1; *Kusum Sharma and others v. Batra Hospital and Medical Research Centre and others* (2010) 3 SCC 480; *State of Punjab f. Shiv Ram and others* (2005) 7 SCC 1; *Jacob Mathew v. State of Punjab and another* (2005) 6 SCC 1 and *Arun Kumar Manglik v. Chirayu Health and Medicare Private Limited and another* (2019) 7 SCC 401.

SUBSTANCE OF EVIDENCE BEFORE THE TRIAL COURT

8. The role and status of the prosecution witnesses and the substance of their evidence is as under :

PW1 Parbat Adhar Patil is the husband of deceased. In his evidence at Exhibit 33, he deposed as under :

“1. Lilabai was my wife. She was not keeping well. She was suffering from excessive bleeding. We therefore, took her to the clinic. She was brought for treatment to the accused in the year 1993. The accused advised that it was necessary to operate and remove uterus. We therefore, admitted her in the hospital of accused. On 7.7.93 Lilabai was operated by accused.

2. After operation Lilabai did not recover. Her health was deteriorating. After discharge by accused we went back to our home. At home Lilabai's health was continuously deteriorating. Again we brought her to the accused and admitted her in the hospital. The belly of Lilabai was increasing. She was not recovering even after the medicine given by accused. We brought Lilabai to the accused 3 to 4 times but she was not recovering. At last we took her to Malegaon to Dr. Sharad Patil. Prior to that accused had got examined Lilabai by Dr. Bhangale of Jalgaon. Dr. Patil said that there was some defect in the operation done by accused and it required to be opened (re-operated). Dr. Sharad Patil operated. He found napkin in the body of Lilabai. The napkin was found in the body at the place which was operated by the accused and stitched by her. On 5.7.94 Lilabai died due to napkin in body. The napkin was shown by Dr. Patil to us.

PW2 Amol Parbat Patil is son of deceased. His evidence is at Exhibit 35, relevant portion of which is reproduced below :

“Lilabai was my mother. She was suffering from excess bleeding. She was firstly taken to Dr. Oswal. She was given treatment of Dr. Oswal for 8 to 10 days. There was no change in her health. Dr. Oswal said to take her to accused. Accordingly, we took her to accused. Dr. Jain i.e. accused said us that she required to be operated. According to her advice, we admitted Lilabai in the hospital of accused on 7-7-93. Accused operated her. When Lilabai was in hospital, her belly was increased (Pot Fogale). We asked about it to the accused. In our absence, accused took Lilabai for X-ray to Dr. Poonam Kothari. Then Accused called Dr. A. G. Bhangale in her hospital. Dr. Bhangale advised for re-operation as in his opinion there was obstruction in stomach. Dr. Jain i.e., Accused did not re-operate. She gave injections and 30 to 40 Salines and reduced belly. 23.7.93, accused forcibly discharged Lilabai. She said that if Lilabai had any trouble, she be brought to her.

2. The Accused runs the hospital under the name Tara Maternity Surgical Hospital. Discharge Card is filed on record. The Document now shown to me is the same. It is at Exh. 36. The prescription of medicines given by the accused are filed by me on record. The documents now shown to me are the same. They bear signature of accused. They are marked at Exh. 37, 38 and 39.

3. Even after discharge, being Lilabai at home, she was suffering pains in lower abdomen. After 15 days, we again brought Lilabai to accused. She prescribed medicines. Lilabai

was even then not feeling well. She was having pain in lower abdomen. Again after 15 days, we brought her to accused. Accused again prescribed medicines. There was no recovery in the health of Lilabai.

4. Accused advised us to consult Jaswant Patil. She issued a letter. The document now shown to me is the same letter. It bears signature of accused. It is at Exh.40. Accused issued one more letter to Dr. Jaswant Patil. The document now shown to me is the same. It bears signature of accused. It is marked with Exh.41. Instead of taking my mother to Jaswant Patil, we took her to Dr. Sharad Patil Malegaon. We narrated the facts and treatment to Dr. Sharad Patil. He advised to open the operated part. On 18.5.94, he opened the operated part. Now says re-operation was on 18.6.94. He found Napkin in uterus which was negligently left by accused. He removed that Napkin. As Napkin was in body for one year, there was damage to the the health of my mother. He removed the Napkin and kept it in one bottle. As Napkin was in body for one year, therefore, though it was removed, she was suffering from nausea, smell of food etc.. On 5.7.94, she died.

5. Dr. Sharad Patil issued one letter about the treatment given to my mother. The document now shown to me is the same. It bears signature of Dr. Sharad Patil. It is placed at Article 'A'. Dr. Patil also issued a Death Certificate of my mother. The document now shown to me is the same. It is marked with Article 'B'.

6. After death of mother, we made a complaint to Medical Counsel against accused to cancellation of Registration Certificate of accused. we issued the copies to S.P. and Inspector, Zilla Peth police-station, Jalgaon. The document now shown to me is the copy issued to police. It bears my signature. The contents in it are true. It is marked with Exh. 42. (The Ld. Counsel for accused objected to exhibit the document raising a ground that the document being copy cannot be exhibited. The document is executed by one uniform process, bearing signature of witness, the document is primary evidence, hence objection overruled).

7. On 8.11.94, police recorded my statement.

PW3 Dr. Sharad Ramchandra Patil is examined at Exhibit 53. His evidence is as under :

“ I am master of surgery. I have obtained the said degree from Marathwada. University. It is recognised by Medical Council, Maharashtra.

2. I am practicing from last 16 years at Malegaon. My hospital is situated at Ravindranath Tagore Road. The hospital is having name "Sushrut Hospital".

3. Lilabai Parbat Patil aged about 45 years, was brought to me on 20th May 1994. I had taken her previous history of the

illness. She has incessant vomitings, abdominal pain and general debility. When she was brought to me, she was practically cachexic. She was operated for hysterectomy 10 months back. She gave me the name of Dr. Nanda Jain who operated her.

4. I examined her. Keeping in mind that she had obstruction, she was advised different investigations. She was advised gastroscopy, dilated C-loop duodenum and pylorus. The document now shown to me the original report of gastroscopy. I relied on that report. I advised patient to have gastroscopy from Dr. Ashok Barve. Accordingly patient undergone gastroscopy and submitted me the report. The document now shown to me is the same report. (The learned counsel for the accused objected to exhibit the certificate contending that the doctor who issued the certificate not examined. The certificate relied by the witness while arriving conclusion for the treatment. Hence, proper person to prove it. Objection therefore, overruled.) The certificate is marked with Exh. 54

5. During other investigation, I had found that, she was passing little faeces through vagina. Fistulography was done keeping in mind rectovagino fistula. Fistulography established it as entero vaginal fistula with dilated loops of small intestine and aecum. These investigations were done after admission in my hospital.

6. Then we decided to operate her but on 27th May 1994 she had sudden right hemiplegia. Because of this condition, her operation was postponed and she was transferred to physician for her treatment.

7. She was re-admitted in my hospital on 16th June 1994, after recovery from hemiplegia. She was operated on 18th June 1994, for entero vaginal fistula and with intestinal obstruction. I operated her with the another surgeon Mr. O. S.Tapade and anesthetist Ashok More. We noticed that all intestine were matted in the pelvis with formation of mass in pelvis, which was gradually separated till we reached entero vaginal fistula site. During this exploration, we came across a mopp (Towel) in the mass. Resection of intestine affected was done and end to end anastomosis was done. Alongwith intestine, preserved the same. I preserved it in 10% formalin.

8. I put the lid of the bottle tied and sealed it with ceiling plaster. Today, I have brought the bottle containing intestine and mopp. The property before the Court is the same. It is marked with Article 'Z'. On the ceiling plaster, I have written the name of patient. I found mopp in the abdomen of Lilabai. I preserved it in the bottle safely and properly.

9. Mopps are used to mopp fluids and blood during surgery. Mopps are used to protect and retract intestines from pelvic cavity. The mopp in the abdomen of Lilabai must have come from previous surgery as there was only one surgery before I operated.

10. Post operative period was stormy. But she gradually recovered and started taking orals. On 29th June 1994, she had burst abdomen and she was re-sutured. But her general condition gradually deteriorated. She developed icterus (Jaundice), which gradually deepened and she had hepatic precoma. On 5th July 1994, she had sudden cardio respiratory arrest and expired at 8.45 a.m. The document article 'A' now shown to me. It is in my handwriting. I issued it on demand. The contents in it are true. It is marked with Exh. 55.

11. I issued the death certificate. Article 'B' now shown to me is the same. It bears my signature. The contents in it are true. It is marked at Exh. 56.

12. I have filed all the originals pertaining to the previous history, diagnosis, treatment and opinion about the illness of Lilabai. The bunch of documents are now shown to me is the same. All the documents are in my handwriting. The contents are true. The bunch is marked with Exh. 57. There are in all 9 documents in the bunch. Each document is marked with Exh. 57/1 to 57/9.

13. Lilabai a had all the problems because of mopp left in her abdomen during her previous surgery. All the complications were due to the mopp which lead her to the death.

PW4 Dalsherkha Pathan, pancha to spot panchanama, did not support prosecution.

PW5 Dr. Arjun Bhangale, also one of the treating doctors, has deposed at Exhibit 75 as under :

“The patient has been visited to my dispensary for medical treatment. I do not remember the name of patient who came before 6 years back. The deceased Lilabai came to me for medical treatment. She told me that she was suffering pain in her stomach. I investigated about her pain suffering in stomach. On investigation nothing has been found in her abdomen, and therefore, I have given medical treatment. I have mentioned the prescription in letter Exh. 45. I have issued such letter to the patient. She visited to my dispensary at about 3-4 times and then she did not turn up. Police recorded my statement.”

PW6 PSI Dattatraya Bhavsar is the Investigating Officer.

ANALYSIS

9. Before adverting to the facts of the case in hand, it would be fruitful to spell out the essential ingredients for attracting Section 304-A of IPC and the judicial precedents over medical negligence and liability till date.

10. The essential ingredients for attracting the said charge are as follows :

- (1) *Death of a person was caused;*
- (2) *Such death was caused by any rash or negligent act;*
- (3) *That the death of such human being has been caused by the act of the accused.*
- (4) *such act does not amount to culpable homicide”*

11. The landmark case on this issue is ***Jacob Matheu V. State of Punjab and Another, (2005) 6 SCC 1***, which is a instructive judgment on the test to be applied while fixing liability due to negligence of doctors. In the said case, by referring previous decision in ***Suresh Gupta (Dr.) v. Govt. of NCT of Delhi*** (2004) 6 SCC 422, ***John Oni Akerele v. R.*** AIR 1943 PC 72, ***Kurban Hussein Mohammuedali Rangwall v. State of Maharashtra*** (1965) 2 SCR 622, ***Kishan Chand v. State of Haryana*** (1970) 3 SCC 904, ***Juggankhan v. State of M.P.*** (1965) 1 SCR 14 and ***Emperor v. Omkar Rampratap*** (1902) 4 Bom., it is observed and held that, though the phrase “rash and negligent act” is finding place in the provision of Section 304-A, it is to be read as qualified by word “grossly”. The doctrines of *causa causans* and *casus*

omissus are also touched upon and it is finally held that, to attract the above charge, it is incumbent upon prosecution to show or substantiate that death in question so occurred is only and only the direct result of a rash and negligent act of the accused, and it is further incumbent on the part of prosecution to show the so-called negligent act in question and that act must be the proximate and efficient cause, without the intervention of other's contributory negligence.

12. In the above judgment, separate discussion is made on criminal medical negligence.

13. In paragraph 15 of the above judgment, the Hon'ble Apex Court has noted with approval the observations in another ruling of the Hon'ble Apex Court in the case of ***Syad Akbar v. State of Karnataka*** (1980) 1 SCC 30, wherein distinction between negligence in criminal law and civil law has been dealt and it is observed that, "*In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where*

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”.

14. After taking the review of evidence in the case in hand on criminal negligence, as well as the law dealt by the Hon’ble Apex Court in case of ***Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra*** (1965) 2 SCR 622 while dealing with Section 304 of IPC, this Court borrows and quotes observations in ***Emperor v. Omkar Rampratap*** (1902) 4 Bom LR 679, which are as under :

“To impose criminal liability under Section 304A, Indian Penal Code, 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 the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non.”

[Emphasis supplied]

15. Here, crucial evidence is of PW1-husband of deceased, PW2-son of deceased and two medical experts who had occasion to treat deceased, i.e. PW3 Dr. Patil and PW5 Dr. Bhangale. PW3 is the doctor who allegedly detected mop/napkin on re-operation. PW5 has been examined to demonstrate that he too treated deceased after being

discharged from the hospital of accused. Therefore, evidence of above witnesses is of significance.

16. It would be useful and also pertinent to take note of the dates when deceased was taken to the hospital run by accused respondent, operated and discharged from hospital of accused, re-operated by PW3 and date of demise of deceased, after which report was lodged.

17. PW1 and PW2 i.e. father and son, who are examined at Exhibits 33 and 35 respectively, in unison testified about Lilabai not keeping well, having complaint of excessive bleeding. According to husband, she was taken to the hospital of accused in 1993 for treatment. It is his version that accused advised surgery i.e. for removal of uterus and accordingly, Lilabai was operated on 07.07.1993, but she did not recover and made complaints of abdominal pain, however, was still discharged from hospital, taken back home and again brought back three to four times to the hospital of accused, but there was said to be no recovery.

18. PW1 husband testified that his wife was taken to Malegaon to the hospital of PW3 Dr. Patil, but prior to it, his wife was examined by Dr. Bhangale of Jalgaon i.e. PW5. According to him, Dr. Patil re-

operated (on 18.06.1994, i.e. almost 11 months after discharge from the hospital of accused where she was operated for the first time on 07.07.1993) saying that previous operation was defective and at that time, he found napkin at the part where accused had operated and given sutures. It is his further evidence that his wife died on 05.07.1994.

While under cross, PW1 has admitted that prior to consulting accused respondent herein, his wife was treated by Dr. Oswal for 8 to 10 days i.e. on the complaint of fever and increasing belly (i.e. abdominal distention or enlargement of abdomen). Said Doctor Oswal is not examined here. PW1 has denied that his wife was also suffering from typhoid as well as jaundice and for said ailment, Dr. Lotaskar had given treatment. However, husband candidly admitted that his wife was examined by Doctors namely Dr. Chikodi, Dr. Bhangale and Dr. Patil. He admitted that, 20 to 22 days after re-operation at the hands of PW3 Dr. Patil, his wife succumbed. **He admitted that no postmortem has been conducted.** He claims to have learnt about detection of napkin on the very day when PW3 Dr. Patil operated her. However, he admitted that his son lodged report on 04.11.1994 i.e. almost one year and four months after death of Lilabai.

19. The other witness, i.e. PW2 is none other than son of PW1 and deceased. It has too come in his evidence that his mother was suffering from excessive bleeding and she being first treated by Dr. Oswal for 8 to 10 days and it is Dr. Oswal who referred his mother to the accused, who operated her on 07.07.1993. He deposed that in their absence, accused had taken his mother to one Dr. Poonam Kothari and thereafter called Dr. Bhangale (PW5) and this doctor advised re-operation, but accused did not operate and rather gave conservative treatment i.e. saline, medicine etc. It has further come in his evidence that after discharge from accused's hospital, accused advised to consult Dr. Jaswant Patil, however, instead, his mother was taken to Dr. Sharad Patil. There was no recovery and doctor Sharad Patil re-operated his mother on 18.06.1994 and at such time, napkin was detected to be negligently left out and this witness attributes said negligent act to accused and holds her responsible for her death.

While under cross, he has admitted that his mother was discharged from hospital of accused on 23.07.1993, taken to Dr. Chikodi at Jalgaon on 07.05.1994 and prescription issued by Dr. Chikodi is at Exhibit 40.

20. On meticulous re-analysis of evidence of father and son, it is emerging that, prior to being taken to hospital of accused, deceased was treated by Dr. Oswal. Present respondent operated deceased on 07.07.1993 for removal of uterus and from hospital of accused, as per discharge card Exhibit 36, deceased was taken home but repeatedly being brought back on persistent complaint of abdominal pain. It is also emerging from their evidence that apart from Dr. Oswal and present accused, other doctors namely Dr. Chikodi, Dr. Bhangale and Dr. Lotaskar had occasion to examine deceased, but only Dr. Bhangale and Dr. Sharad Patil, who allegedly detected napkin on re-operation, are examined. It is worthy to note and mention here that, after first operation by present respondent on 07.07.1993, Lilabai succumbed on 05.07.1994 i.e. exactly a year after first operation done by accused. Even after alleged re-operation by PW3, deceased had survived upto 05.07.1994 and it is admitted that she was alive for almost three weeks after re-operation.

21. Now crucial evidence is that of PW3, as he is sheet anchor for prosecution, he having allegedly come across napkin/mop negligently left out by accused after surgery performed by her on 07.07.1993. His evidence is already reproduced above. On carefully going through his

evidence discussed above, it is noticed that deceased was first taken to him on 20.05.1994 since discharge of deceased from the hospital of accused on 23.07.1993. Complaint noted by this medical expert is of incessant vomiting, abdominal pain with general debility and doctor has specifically noted that she was practically Cachexic (i.e. significant loss of muscle mass leading to functional impairment and decrease in physical activity due to fatigue and weakness). According to him, patient was operated 10 months back by accused. He claims that he advised gastroscopy and it was got done through Doctor Ashok Barve and he received its report Exhibit 54. He also performed fistulography, admitted her in his hospital and then decided to operate her on 27.05.1994 i.e. seven days after admission in his hospital. Meanwhile, on 27.05.1994, deceased suffered sudden right hemiplegia and so operation was postponed and patient was referred to physician and re-admitted in his hospital on 16.06.1994 and finally operated on 18.06.1994 for entero vaginal fistula with intestinal obstruction. He claims to be joined by another doctor in the operation, namely, Doctor Tapade and anesthetist More (**both these doctors are not examined, though crucial witnesses, for lending support to corroborating the testimony of PW3**). During exploration, he claims that they came across mop (towel) in the mass and he preserved the same in a bottle and he carried the same on the date of

his evidence in the trial court i.e. on 18.09.2001 (i.e. preserved mop was produced before the court for the first time on 21.09.2001, i.e. after more than seven years). He clarified that mops are used to mop fluids and blood during surgery and are also used to protect and retract intestines from pelvic cavity. He deposed that the mop in the abdomen of Lilabai “**must have come from previous surgery**” as there was only one surgery before he operated. He further testified that, post operative period was stormy but patient gradually recovered and had already started taking orals. On 29.06.1994 i.e. after 12 days, patient had burst abdomen and re-sutures but her general condition deteriorated. She developed jaundice and gradually it deepened and she had hepatic pre-coma. On 05.07.1994 patient died due to sudden cardio respiratory arrest. Witness identified death certificate, bunch of documents comprising previous history, diagnosis, treatment and opinion about illness of Lilabai at Exhibit 57. Lastly he testified that all the problems were because of the mop left in her abdomen during previous surgery and all complications were due to mop which led to her death.

22. Now, let us take a deep dive in the cross of this witness. In cross he has admitted that, when patient was brought, she was very weak and he agreed to the suggestion that cause of intestinal obstruction

may be cancer, tumor of T.B., twisting of intestine, inflammatory bowel disease, typhoid. He admitted that in case of obstruction, it is necessary to have examination of patients by per-vaginal and per-rector examination. He volunteered that he performed per-rector examination. He further added that in case of Lilabai per-vaginal investigation was not necessary. He admitted that in case of intestinal obstruction, X-ray tests are advised to be done in standing position. However, he denied that sonography is necessary and also denied that no X-ray examination of Lilabai was done, but admitted that in his case paper it is not mentioned that X-ray examination of Lilabai was done. He clarified that he failed to mention about X-ray examination due to oversight and that he had got X-ray examination done through other radiologist but his case paper is silent as to who was the radiologist, and he further stated that, on the basis of his memory, he had referred patient to Dr. Rafik Shaikh for X-ray examination. He denied possibility of perforation of stomach during gastroscopy and he ruled out possibility about paritonities because of ill handling. Though he is unable to state whether thrombosis may convert into cerebral thrombosis and may cause paralysis, **he admitted that Lilabai suffered paralysis.** He admitted that after performing fistulography, Lilabai suffered paralysis i.e. after four days, and it was right hemiplegia which was detected on 27.05.1994 and being treated by

physician from 27.05.1994 to 16.06.1994. **He answered that he did not procure certificate of physician that she was fit to be operated.** He answered that he did not performed CT scan or MRI as was not suggested by physician nor he, on his own, felt like doing it. He admitted that in the certificate issued by him, cause of death of Lilabai was pre hepatic coma and he further admitted that it may be caused due to jaundice. He also admitted of noticing during treatment that Lilabai had jaundice and it is also possible upon post operative septicemia. He answered that he did not take independent consent letter from relatives before operating Lilabai. He answered that he does not remember whether police recorded his statement or not and he answered that document Exhibit 57/1 to 57/9 were not seized by police from him during the course of investigation. He denied interpolations and insertions in above documents. In para 20 he answered that on 29.06.1994 stitches gave up and patient's abdomen burst on that day. He did not collect substance oozing from the burst. Except admitting not informing police immediately after noticing towel in the abdominal cavity, rest are all denials. He answered that, he produced material in bottle for the first time in the Court on 18.09.2000 and only once preservatives in the bottle were changed.

23. PW5 Dr. Bhangale was examined by prosecution also for treating deceased Lilabai and he, in his evidence at Exhibit 75, merely stated about visit of Lilabai to his dispensary six years back. He was apparently running a dispensary and therefore, there is no question of he undertaking any medical procedure and he claims to have attended her with complaint of pain in stomach and accordingly claims to have carried out investigations, but in chief itself he stated that nothing was found in such investigation. He prescribed medicine Exhibit 45. According to him, patient visited him three to four times and thereafter she did not turn up.

Above witness was also cross examined by defence wherein he has admitted that, he had referred deceased to Dr. Arvind Kale for X-ray and sonography and Dr. Kale issued opinion for extended pleha and he also testified about Dr. Kale issued opinion about no visible solid shadow or cystic lesion in the abdomen. In cross he has answered about treating Lilabai for typhoid. He admitted that, in case of obstruction in intestine, it is necessary to get X-ray examination as well as sonography done and he candidly admitted that obstruction in intestine cannot be revealed by gastroscopy (which PW3 allegedly

undertook). He further admitted that, in diagnosis of himself as well as Dr. Kale, it was not revealed that patient was having any obstruction in her intestine. The papers placed by him show that he examined Lilabai on 22.02.1994 and 01.03.1995

24. Thus, here, on careful re-appreciation of evidence of father, son of deceased as well as PW3 Dr. Sharad Patil, it seems that apart from respondent accused, Doctors namely Dr. Chikodi, Dr. Oswal, PW3 Dr. Pawar and PW5 Dr. Bhangale had occasion to treat deceased.

25. This court has raised specific query to the learned APP as to whether in this case autopsy was undertaken, and she fairly admitted that no postmortem was ever conducted. It also emerges that, no independent expert body or other medical or forensic experts have been examined to corroborate PW3 who is attributing negligence and death to the surgery undertaken by respondent accused. When there is no postmortem regarding opinion as to cause of death and in view of the manner of answers given by PW3 while facing cross, this Court is more than convinced, and as is rightly submitted by learned counsel for respondent, that there is no iota of evidence to connect death of Lilabai with alleged mop recovered after second operation by PW3. On the contrary, cross of PW3 and evidence of PW5 clearly show that

deceased, apart from complaint of abdominal pain, had other ailments like paralysis, typhoid and jaundice and was treated for the same. Even PW3 has himself opined death due to sudden cardio respiratory arrest. This very doctor, in paragraph 10 of his chief itself, has described the post operative period to be stormy, which literally means various surgical and anesthetic complications. In same paragraph, he answered that patient had developed jaundice which gradually deepened and patient had hepatic precoma and she expired on 5th July 1994 and prior to it, on 29.06.1994, there was burst abdomen necessitating re-suturing.

26. Resultantly, taking such evidence of PW3 into consideration, there are several other possibilities for the cause of death of Lilabai. There is no direct link suggesting death only and only due to operation conducted by accused on 07.07.1993 which was admittedly performed for bleeding. Apparently, complaint of bleeding seems to have been resolved as none of the doctors who treated her subsequently, including PW3 and PW5, whisper about bleeding through the uterus so as to find fault in the surgery performed by accused.

27. The crucial question arises here is, what is the credit-worthiness of mop allegedly recovered by PW3 after he himself had undertaken procedure on account of abdominal burst on 29.06.1994. Surgery performed by accused is exactly a year back. Surprisingly and shockingly, in spite of PW3 claiming to have retrieved mop during surgery performed by him, he has not reported to police. None of other doctors, namely, Tapade and More, nor any staff, who accompanied him while performing re-surgery are also examined, to lend credence to his version of recovering mop. Though PW1 and PW2 were duly informed about recovery of mop, unfortunately even they did not report police immediately alleging negligence. Report, as stated, is after immense delay. As stated above, PW3 has retained custody of alleged mop with himself and seems to have directly produced it for the first time in the court when he was summoned as a witness. Being custodian of mop which was in fact a *muddemal*, and further admittedly having agreed about changing the preservative, defence was right in raising objection about the chain of custody and very integrity of said recovery. As stated above, Investigating Officer has not bothered to collect the same from PW3 and had not thereby further sent it for CA. Therefore, there are several serious

shortcomings in the investigation. However, as stated, prosecution having miserably failed to show direct connection between mop and death, by no stretch of imagination, case of Section 304-A IPC can be said to be made out.

28. In the light of above material and numerous judicial pronouncements which elucidates the requirement of imposing criminal liability under Section 304-A IPC regarding necessity to substantiate that death in question was the direct result of rash and negligent act of accused, and that the act must be so proximate and an efficient cause, without intervention of other's negligence, it must be "*causa causans*", and not enough that it may be "*causa sine qua non*". For above reasons, case of prosecution, is not worthy of credence.

29. Perused the impugned judgment. In the considered opinion of this Court, learned trial Judge has dealt with the legal requirements for attracting Section 304-A IPC and has minutely appreciated the evidence of PW1, PW2 and PW3. The findings reached at are supported by sound reasons and even on complete re-appreciation and re-analysis of evidence, this Court is also in complete agreement with the view taken by learned trial Judge which is the only possible

view that could emerge on complete re-appreciation. No case being made out on merits, the following order is passed :

ORDER

The appeal is dismissed.

[ABHAY S. WAGHWASE, J.]

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