

(2017) 08 BOM CK 0180
In the Bombay High Court
Case No : 37 of 2017

Dr. Dilip Amonkar, & Anr.

APPELLANT

Vs

State of Goa, Through Police Inspector, & Ors.

RESPONDENT

Date of Decision : 22-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 174](#) - Police to enquire and report on suicide, etc
[Indian Penal Code, 1860](#), [Section 468](#),
[Section 471](#), &

Citation : (2017) 08 BOM CK 0180

Hon'ble Judges : Prithviraj K. Chavan

Bench : SINGLE BENCH

Advocate : S. D. Lotlikar, M. Furtado, S. R. Rivankar, S. S. Kantak, A. Kamat

Judgement

1. Office objections in above Stamp Number Main No. 2213 of 2017 are waived.
2. Both the matters are taken up for final disposal and disposed of by a common judgment.
3. Heard.
4. Admit.
5. The learned Counsel for the respondents waive service of notice.
6. Legality, propriety, and correctness of the Order dated 15.06.2017 passed by the learned Additional Sessions Judge, South Goa, Margao, directing framing of charge against the petitioners under Section 304-A of IPC, is impugned by way of these two Criminal Revision Applications.
7. A few facts, necessary for deciding the applications, are as follows:- The petitioner Dr. Dilip Amonkar ("petitioner no.1" for short) is the Head of Surgery Department at Government Medical College, Bambolim. In another petition, the petitioner - Dr. Shantaram Surme ("petitioner no.2" for short) is also a Doctor by

profession. Petitioner no.2 is the family Physician of deceased Ms. Ravina Rodrigues, aged about 16 years, for last 15 years. On 1.7.2010 Ms. Ravina Rodrigues was admitted at Pai Hospital, Vasco-da-Gama, with a complaint of severe abdominal pain. Dr. S. R. Pai, Director and Chairman of Pai Hospital, who is also a renowned Surgeon, requested petitioner no.1 to perform an emergent surgical operation upon Ms. Ravina, as he was to leave for New Delhi due to some urgent work. On 3.7.2010 petitioner no.1 appreciated that the case was of an emergent nature and, therefore, went to Pai hospital in an early hours of 3.7.2010 and found Ravina suffering from an acute appendicitis. He performed a surgical operation and removed the appendix. Post-operative care was taken by Pai Hospital. Ms. Ravina was discharged from Pai Hospital on 5.7.2010. Since Ravina suffered continues pain, she was readmitted by her mother in Pai Hospital on 9.7.2010 as patient was showing sign of distress. She was apparently treated by Dr. Shantaram Surme (petitioner no.2) and by Dr. Pai. When Dr. Pai called petitioner no.1, he suggested that patient be immediately shifted to GMC.

8. On 10.7.2010, Ravina was shifted to GMC at 7.30 p.m. One Dr. Rajesh Patil was on duty and heading the Unit of Surgery. On 11.7.2010, Ravina was re-operated and admitted to Ward no. 106 of GMC. On 15.7.2010, Ravina developed complications in the hospital. On 29.7.2017, Ravina died at GMC.

9. Since Ravina had undergone a surgical operation at Pai Hospital and subsequently in GMC on 29.7.2010, a medico-legal case vide no.10/5023 was registered and thereafter it was re-registered at Vasco Police Station bearing No.27/2010, under Section 174 of Criminal Procedure Code. Post Mortem report was submitted to the Police on 30.7.2010.

10. Ms. Ravika Rodrigues, married sister of Ravina filed a complaint with Vasco Police on 2.8.2010. After a complaint, Government of Goa conducted an inquiry by constituting a committee of six persons. The Committee Members were the Secretary (Health), Director of Health Services, Dean, Goa Medical College, Dr. Pramod Salgaonkar, Dr. Emidio Gomes and Joint Secretary (Health). After a report of the Inquiry Committee, a case was registered vide Crime bearing no.193/2011 against the petitioners under Sections 304, 468, 471, 201 read with Section 34 IPC. After conducting an investigation, Vasco Police has chargesheeted the petitioners along with Dr. Shridhar Pai for the offences punishable under Sections 304, 468, 471, 201 read with 34 IPC.

11. The learned Additional Sessions Judge heard the arguments before Charge and was pleased to quash and set aside Sections 304, 468, 471 and 201 read with Section 34 of IPC against the petitioners and Dr.Shridhar Pai and directed to frame the charge against petitioners no.1 and 2 under Section 304-A of IPC.

12. I have heard Shri S. D. Lotlikar, learned Senior Counsel for petitioner no.1, Shri S. S. Kantak, learned Senior Counsel for petitioner no.2 and Shri S.R.Rivankar, learned Public Prosecutor for respondent no.1.

13. In short, it is the contention of Shri Lotlikar, learned Senior Counsel, that it

being an emergent case of surgery in an early hours of 3.7.2010, only on humanitarian ground he visited Pai Hospital, operated and conducted appendectomy under final anesthesia. Patient was discharged on 5.7.2010. There is not a single statement indicating petitioners negligence in performing the operation. Shri Lotlikar further submits that there is absolutely no material on record, much less, ingredients of Section 304-A IPC. He visited Pai Hospital though initially he did not wish, but visited as he had asked petitioner no.2 to take the patient - Ravina to GMC. It is also submitted that there is no cause of death on record and, therefore, there is no question of charge against him under Section 304-A IPC. He placed reliance on a few case laws.

14. The learned Senior Counsel further submits that there is sole statement of mother of Ravina. There is no opinion of any Expert/Surgeon and, therefore, it cannot be said that the petitioners are responsible for causing death of deceased Ravina due to their rash and negligent acts. Learned Senior Counsel placed reliance in the case of Jacob Mathew Vs State of Punjab and another, (2005)6 SCC 1.

15. Shri S. S. Kantak, learned Senior Counsel appearing for petitioner no.2 submits that he is a family physician of the complainant for 15 years. He is a General Physician and not a Surgeon. He could not have operated the deceased and, therefore, requested petitioner no.1 to perform the operation. There is no direct nexus between the death of deceased and the alleged act of petitioner no.2. The learned Senior Counsel submits that the trial Court had discharged him for rest of the offences, except Section 304-A IPC. The prosecution has not brought anything on record about the second operation, which was not successful. There is no investigation as to what had happened between 10.7.2010 to 29.7.2010.

16. On the other hand, Shri Rivankar, learned Public Prosecutor, has supported the impugned order, inter alia, drawing my attention to the opinion as the cause of death on the basis of Histopathology and Microbiological reports, which are on record.

17. The scope of revisional jurisdiction is very limited and it cannot be exercised to substitute the view taken by the learned Additional Sessions Judge on question of facts, unless findings are shown to be perverse or untenable. Interference may be justified (a) when the decision is grossly erroneous, (b) no compliance with the provisions of law and (c) material on record is not considered. Revisional power of this Court actually enables to correct a grave error. It is well known that the powers of revisional Court are purely discretionary and should be exercised in a rare cases to prevent miscarriage of justice. At the same time, for the purpose of determining, whether there is sufficient ground to proceed against the accused the Court has wider discretion in exercise of which it can determine the question whether the material on record, if not rebutted, is such on the basis of which a conviction can be said to be reasonably possible. What is required to be seen is the existence of prima facie case on the basis of

material produced by the prosecution. If the Court comes to a conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. Probative values of material on record cannot be gone into nor it can be said to be a mini trial. The purpose of framing charge is to ensure that the Magistrate or Judge should be satisfied that the accusation against the accused is not frivolous. There is some material for proceeding against the accused. It would be hazardous to act on the discrepancies unless they are so fatal or glaring to affect the credibility of the prosecution case without affording reasonable opportunity to the prosecution to substantiate the allegations. Keeping in mind the aforesaid principles, let me examine the records and the impugned order.

18. Final opinion for the cause of death (based on memorandum of autopsy report, Histopathology report bacteriology report and available clinical hospital records) given by three doctors namely Dr. Silvano Dias Sapeco, M.D. D. F. M., Dr. Madhu S. G. Ghodkirekar, M.B.B.S. M.D. (Bom), Dr. Savita Chandra, M.D. F.I.C.G.O. pending Histopathology report, which reads thus:-

"a. The cause of death to the best of our knowledge and belief is due to speticemia and shock, in a person having evidence of peritonitis pancreatitis hepatitis, consolidation of lungs and two abdominal surgeries.

b. As per clinical records, the since deceased person under went first abdominal surgery (on 3.7.2010 exact time not known) for appendicectomy under spinal Anesthesia. Investigation officer to get histopathology report of tissue recovered during surgery from the concerned doctors for the actual diagnosis of appendicitis, also investigation officer to get all investigation such as abdominal ultra sound, blood investigations including liver function tests etc. done prior to this surgery in order to decide, whether conditions such as pancreatitis and hepatitis were existing prior to that surgery or otherwise.

c. As per clinical record, the since deceased person underwent second abdominal surgery at Goa Medical College on 10.7.2010 under general anesthesia for laparotomy with lavage of 2500 cc haemoperitonium clot from right iliac fossa with excision of corpus lectial ovarian cyst, since death was after 19 days after that second surgery, no opinion can be given about the source of the 2500 cc haemoperitonium from right iliac fossa which was seen during that second surgery, hence investigating officer to get final clinical opinion from the concerned doctors of Goa Medical College deciding whether this haemoperitonium was due to slipped mesoappendix ligature or ruptured corpus leutial ovarian cyst as submitted by them in their clinical records.

With reference to PM No.774/2010(Miss Ravina Rodrigues, 16 yrs) in Vasco PS UD No.27/10 u/s 174 Cr. P.C. dated 30.7.2010, we have received histopathology report(slide no.30/10) dated 4.8.2010 on 4.8.2010 at 4.00pm which is as follows:-

1. Section from pancreas shows partly autolytic change in the preserved area

there is congestion and acute on chronic inflammatory infiltrate.

2. Section from brain and meninges shows congestion.

3. Section from lungs shows congestion, edema, hemorrhages, acute inflammatory infiltrate in alveoli and bronchioles and microabscesses membranes are seen in some of alveoli.

4. Liver architecture is maintained, showed congestion and dilation of sinusoids centrilobular necrosis and acute on chronic inflammatory infiltrate portal tracts.

5. Section from kidney shows congestion and autolytic changes.

6. Section from heart showed congestion.

7. Section from spleen show congestion.

8. Section from purulent material in peritoneal cavity showed suppurative inflammatory infiltrate on serosal aspect.

9. Section from intestine showed congestion and acute inflammatory infiltrate on serosal surface.

10. Section from caecum and stamps of appendix show congestions and acute inflammatory infiltrate on serosal surface.

11. Section from cervix shows congestion section from wall of uterus showed congestion and follicular cyst fallopian tubes showed congestion."

19. The statement of Gloria Rodrigues, mother of Ravina, reveals that Ravina had complained of stomach pain and vomiting and, therefore, she was taken to petitioner no.2, being a family physician. He diagnosed that she had appendicitis which is on the verge of bursting and, therefore, she needs to be admitted in the hospital. As per the advise of petitioner no.2 - Ravina was admitted at Pai Hospital on 2.7.2010 and it was petitioner no. 2 who appears to have informed Ms. Gloria that he will conduct operation on 3.7.2010. As per her statement, the operation was conducted by petitioner nos.1 and 2 on 3.7.2010 at 7.00 hrs. and thereafter Ravina was under observation of petitioner no.2. Record also reveals that no test was conducted before conducting surgical operation either by petitioner no.1 or petitioner no.2, which indeed, could be said to be a negligent act as it was a major operation of deceased Ravina and therefore, necessary tests ought to have been conducted in view of the Histopathological report which was subsequently obtained. It is also apparent from her statement that after the first surgery she always complained of pain in the abdomen and was not taking any food and used to drink water and that too, she used to vomit. When petitioner no. 2 was called and informed about the same he told her to carry on with the medicines which were given to her. When the abdomen of the Ravina was found enlarging she was again admitted in the hospital on 8.7.2010 in the evening. On 9.7.2010, petitioner no.2 gave some injection and kept Ravina on drips at Pai Hospital and told Ms. Gloria that it is due to acidity. This particular

statement of mother of the deceased also cannot be ignored in the given set of facts and circumstances. It seems that petitioner no.2 advised Sonography on 10.7.2010 only when there was no improvement in her health.

20. Statement of three nurses of Pai hospital namely Lucy Mascarenhas, Poonam Kerkar and Mrs. Angela Fernandes reveal that after admission of Ravina in the Pai hospital on 2.7.2010 till her operation on 3.7.2010 by petitioner nos.1 and 2, no test including blood test was conducted. This supports the statement of Radiologist and, prima facie, indicates the negligent attitude of the petitioners though petitioner no. 2 could have got conducted the basic tests in such a situation. In the morning of 3.7.2010, petitioner no.2 could have arranged for necessary tests as it reveals from the record that he had contacted Dr. Suresh Kannan for giving anesthesia to patient in the morning of 3.7.2010. The statement of Dr. Suresh Kannan reveals that the patient was operated by petitioner nos.1 and 2 for appendicitis.

21. Dr. Sushila Shenoy working as a Consultant Radiologist at SMRC Hospital Vasco was also attached to Pai Hospital states that as per the request of Dr. Pai on 10.7.2010 at 18.30 hours she conducted ultra sound on Ms. Ravina as it was post operative case of appendicitis and the patient had abdominal distension. It revealed from ultra sound report that there was fluid in the abdomen which could be hemorrhagic and it was confirmed to be blood. Thereafter, as per the advice of petitioner no.1 Ravina was shifted to GMC Bambolim. In this background, the learned trial Judge observed, prima facie, from the statements of Sushila and Prasad Shenoy, that the complications after the second surgery have been ruled out. Shri Lotlikar vehemently urged that the impugned order does not reveal what are the basic tests, which were required to be conducted before performing surgery by petitioner no.1 on 3.7.2010. As already stated herein above, no rowing inquiry can be made at the time of framing charge and, therefore, it is only during the course of trial on merits the real truth would be unearthed. The question as to whether the petitioners have taken due care and ordinary skills before or while performing surgery can only be tested in a full fledged trial. The aspect of degree of negligence as to whether it was gross or otherwise cannot be determined at the stage of framing of charge.

22. The most crucial material on record is the Inquiry Report and, in my considered view, it is quite sufficient to frame charge against both the petitioners apart from the observations made hereinabove. Members of the Committee were Secretary (Health), Director of Health Services, Dean, Goa Medical College, Dr. Pramod Salgaonkar, Dr. Emidio Gomes and Joint Secretary (Health).

23. The relevant portion from the report can be reproduced in order to buttress the contention of the prosecution which reads thus:-

""There is no note of referral, he (Dr. Surme) asked us to wait for him at Pai Nursing Home where he came personally"

"No deterioration of her (Ravina Rodrigues) condition was there prior to the

operation, from the time she was admitted to the time of her operation at Pai Nursing Home. Dr. Surme informed my mother that they were waiting for Dr. Amonkar on the day of surgery on 3rd morning."

She was only on IV fluids and around 1/2 a glass of liquid, at a time around 5 teaspoons in a day, on the day of her discharge. I say that we were not informed that anything was serious about her and that there was no big problem. This was at the time between her discharge and readmission on 9th July" When we informed Dr. Surme about her condition, he reassured that she would recover and to continue her tablets. On 9th we admittedly my sister to Pai Nursing Home at 7.00a.m in the morning, both doctors Surme and Pai were there.

On 11th and 12th Dr. R. Patil has not examined her.

In GMC Dr. Amonkar has not examined her after her operation at GMC. Only once Dr. Amonkar enquired from Ravina how she was and she replied that she was fine that too from a distance. Though he was checking other patients he did not check my sister.

I say that he Dr. Patil said that except the mother no one else could see her"

22. Dr. Amonkar on a query said that at the time of phone call of Dr. Surme he did not ask about the blood test, other investigation and their outcome. While there was no such phone calls as above, even if it was true that Dr. Amonkar received calls from Dr. Surme. Dr.Amonkar, instead of going to Pai Nursing Home at Vasco would have asked about the investigations as a professional with ordinary skill may have asked and unless he was satisfied with gravity of situation after due diligence, he could have asked for the patient to be shifted at GMC as the time taken by Dr. Amonkr to go to Pai Nursing Home would have been the same as not might have been taken to shift Ms. Ravina from Vasco to GMC. Dr. Surme also stated that Dr. Amonkar did not see any papers of patient. This reflects on Dr. Amonkar's Conduct as unbecoming of a Senior Government Doctor. Dr. Amonkar, also admitted that he had not seen the consent papers. No diligence has been shown by Dr. Amonkar before taking decision to operate at Pai Nursing Home and these facts indicates serious lapses on his part and conduct unbecoming of a Senior Government Doctor.

23. Dr. Amonkar himself has admitted that the operation theatre at Pai Nursing Home was not up to the Mark and was in unhygienic condition. Again it is clear that Dr. Amonkar could have after reaching there and on seeing the condition of the patient as well as the condition of the operation theater, asked for shifting the patient to GMC and could have operated her at GMC as it has come on record from the statements of nurse(sister) Angela) as well as Mrs. Ravika's statement that Ms. Ravina was not having such pains or was not in such a deteriorating condition that the appendix was going to burst. Dr. Amonkar has admitted that he knew very well and the fact the Dr. Surme is doing private practice. In the light of all the foregoing analysis, it is clear that the operation by Dr. Amonkar at Pai Nursing Home was not on humanitarian ground but on other considerations.

24. It is on record that the consent form at Pai Nursing Home was not filled properly and that Dr. Amonkar has not seen the consent form himself which he should have seen before conducting the operation. Dr. Amonkar has not seen any investigation report. The claim of Dr. Surme that he had taken blood sample himself and given to laboratory, Vasco early morning is not substantiated. There is no mention of the same on the medical papers neither any such formal test report has been produced by him. Sister Angela has stated that she was with the patient from 6.00 a.m till operation was over and if any blood sample was taken, she would have come to know. Mrs. Ravia Rodrigues has also confirmed that Dr. Surme did not leave the Hospital. Dr. Surme, Dr. Pai and Dr. Amonkar all are jointly responsible for conducting the operation without proper investigation.

30. Call records on 10th July; show a number of calls between Pai Nursing Home and Dr. Amonkar:-

- (i) Dr. Amonkar mobile to Pai Nursing Home at 9.29 a.m 75 sec.
- (ii) Pai Nursing Home to Dr. Amonkar at 9.34 am 52 sec.
- (iii) Pai Nursing Home to Dr. Amonkar at 2.14p.m 107 sec.
- (iv) Pai Nursing Home to Dr. Amonkar at 6.19p.m 90 sec.
- (v) Dr. Amonkar mobile to Pai Nursing Home at 6.35 p.m 127 sec.
- (vi) Pai Nursing Home to Dr. Amonkar at 7.05 p.m. 72 sec.
- (vii) Pai Nursing Home to Dr. Amonkar at 7.39 p.m 12 sec.
- (viii) Pai Nursing Home to Dr. Amonkar at 8.28 p.m 26 sec.
- (ix) Pai Nursing Home to Dr. Amonkar at 10.03p.m. 13 sec.

This shows that Dr. Amonkar was in constant touch with Pai Nursing Home throughout, contrary to his statement. Dr. Amonkar had tried to make a case that he waited till 7:00 p.m for patient to be shifted and went to visit on 10th evening and on reaching there at 8.00p.m. Dr. Pai phoned him that the patient has reached hospital but as he was in Amona he could not for the operation at GMC immediately. However, call records show the location of Dr. Amonkar from 6:19p.m to 8.28 p.m. Near Patto Plaza, Mercus and at 10.03 p.m. Near Midas Touch at Panaji. It is, therefore, clear that Dr. Amonkar is again trying to make a false claim to show his sincerity although he had not taken care to go himself for the 2nd operation in such a serious condition especially when the first operation as performed by him and these circumstances should have been a natural concern for him. Dr. Amonkar on 10th July was also in constant touch with Pai Nursing Home, however, he himself did not act as per the gravity of the situation when the patient was shifted to GMC and allowed Dr. Amir Ali to operate. These serious misconduct of Dr. Amonkar are unbecoming on the part of a Government Servant and a professional Doctor."

24. This report of the Committee cannot be lightly brushed aside to find out

prima facie case and material against both the petitioners, who allowed the surgery on the patient to be conducted in the operation theater of the Pai Hospital which was not upto the mark and in an unhygienic condition, as per statement of petitioner no.1 himself. It also revealed that consent form at Pai Hospital was not filled up properly and not seen by petitioner no.1 before conducting the operation. Petitioner no.1 also failed to see any investigation report. Petitioner no.1 could have advised admission of the patient in the GMC but instead he visited a private hospital though on humanitarian ground but to a place which was unhygienic which can also be said to be negligence or a breach of duty on the part of the petitioners who omitted to do something which a reasonable person could not ordinarily do in such situation. Only because, the patient died on 29.7.2010 would not ipso facto mean that there was no criminal medical negligence on the part of the petitioners. Whether the death was proximate and efficient cause without the intervention of another's negligence or whether it was due to post complications after the second surgical, can only be determined during the trial on merits.

25. In view of the limited scope of revisional jurisdiction, it would not be just and proper to interfere with the well reasoned order of the learned Additional Sessions Judge.

26. Learned Senior Counsel placed reliance upon a judgment of Hon'ble Supreme Court in the case of Jacob Mathew Vs State of Punjab and another, (2005) 6 SCC 1. This is well known case of death due to criminal medical negligence and liability of Doctors. It would be apposite to refer paras:-

"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.

30. The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. 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.

47.

(i)

(ii)

(iii) Before the Court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.

(iv)

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.

(emphasis supplied)

Indiscriminate prosecution of medical professionals for criminal negligence is counterproductive and does no service or good to the society.

48.

(1)

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused

followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(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.

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

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

27. The ratio of the Hon''ble Supreme Court in Jacob Mathew (supra), if juxtaposed with the report of the committee, it answers most of the questions. There is no doubt about the skill of petitioner no.1 as a Senior Surgeon. The question whether it was exercised with reasonable competence in the case at hand will have to be determined on adducing evidence. What has been held by the Hon''ble Supreme Court that the test for determining the medical negligence as laid down in Bolam case, WLR at page 586 holds good in its application in India. As a Senior Surgeon and as a Head of Department of GMC petitioner no.1 ought to have taken due care in the ordinary sense over all situation and other factors of which there are observations made by the Members of the Committee in the report. The ratio of the Supreme Court would not be of much help to petitioners at the stage of framing charge. In case of Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee, (2009) 9 SCC 221, the Hon''ble Supreme Court was also dealing with medical negligence by doctors vis-a-vis Consumer Protection. It has held in paragraphs 93, 95 and 157 which read thus:-

93. Nosocomial infections are infections which are a result of treatment in a hospital or a healthcare service unit, but secondary to the patient's original condition. Infections are considered nosocomial if they first appear within 48 hours or more after hospital admission or within 30 days after discharge. Thus it becomes the liability of the hospital to prevent such infection specially in the cases where the patient has high risk of infection due to the nature of disease suffered.

95. It is now almost accepted worldwide that the hospital is liable to prevent such infections specially in the case where the patient has high risk thereof due to the nature of the disease suffered. It also almost stands established that use of Depomedrol and other high dose of gluco corticosteroid may first lead to immuno suppression which may in turn lead to sepsis.

157. There cannot be, however, by any doubt or dispute that for establishing medical negligence or deficiency in service, the courts would determine the following:

- (i) No guarantee is given by any doctor or surgeon that the patient would be cured.
- (ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.
- (iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.
- (iv) Failure to act in accordance with the standard, reasonable, competent

medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

(v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged.

28. The ratio laid down by the Hon''ble Supreme Court in this case also can be juxtaposed with the report of the Committee to find out whether there is prima facie material to frame charge against the petitioners in showing their gross negligence before and at the time of conducting first surgery. In the case of Suresh Gupta Vs Govt. of N.C.T of Delhi, 2004 AIR(SC) 4091, Hon''ble Supreme Court referred to Section 80 and 88 IPC. There is no question of application of Section 88 in the absence of proper consent (even implied) obtained before conducting the first surgery by the petitioners. There can be, no doubt, that it cannot be an offence if it is an occurrence due to accident or misfortune and without any criminal intention or knowledge in doing lawful act in lawful manner though lawful means with proper care and caution were taken. Again, there will be a question as to whether petitioners did the act of conducting surgery in lawful manner and by lawful means and with proper care and caution in the light of the report of the Committee wherein it has been shown that without obtaining consent and without conducting test, operation was conducted in an unhygienic operation theater which lacks proper care and caution. Paragraphs 19 and 21 of this Judgment read thus:-

"19. 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.

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

clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence."

29. The facts in the case of Suresh Gupta, Malay Kumar Gangully and Jacob Mathew (*supra*) are not identical. The ratio in the aforesaid authorities thus can be distinguished in the given set of facts.

30. From the aforesaid discussion, I do not find any reason to interfere with the impugned order dated 15.6.2017. Criminal Revision Application No. 37 of 2017 and Stamp Number Main No. 2213 of 2017, therefore, shall stand dismissed, accordingly.