

(2018) 04 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : Pet u OF s 561-A No. 213 OF 2011

DR. NEERU GUPTA

APPELLANT

Vs

STATE OF JAMMU & KASHMIR AND ANR

RESPONDENT

Date of Decision : 12-04-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 173(8), 561A
Jammu and Kashmir Consumer Protection Act, 1987 — Section 10
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 338

Citation : (2018) 04 J&K CK 0019

Hon'ble Judges : M.K.HANJURA

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The Petitioner-Dr. Neeru Gupta in the instant petition filed under Section 561-A Cr.P.C implores for the grant of the following reliefs in her favour:-

1. i) Dr. Neeru Gupta in the instant petition filed under Section 561-A Cr.P.C implores for the grant of the following reliefs in her favour:-
Quash the order impugned

passed by the learned Session Judge, Rajouri dated 05th August, 2011, as a consequence of which the order of the CJM, Rajouri has been upheld for

reinvestigation of the case in FIR No. 403/08 under Section 338 of RPC.

2. ii) Direct the closure of the case by accepting the report of I.O. based on opinion of Medical Board of Doctors.

3. iii) Direct the concerned respondents to produce the entire record of the case before this Hon'ble Court.

4. iv) Pass any other order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstance of the present case.

2. The facts, as these emerge from the study of the file under consideration

are, that the complainant, namely, Shri Tahir Shah filed a Complaint before the Court of learned Chief Judicial Magistrate, Rajouri (in brevity, the CJM) on 05th November, 2008, wherein he stated that his wife was pregnant.Â On the 12th of July, 2008, she was admitted in Government District Hospital Rajouri.Â She delivered a female baby on the 13th July, 2008 under the supervision of Dr. Neeru Gupta.Â On being born when the baby was examined by Dr. Koul, Children Specialist, posted as such in the District Hospital, Rajouri, he declared that the child was suffering from Erbs Palsy and these injuries were caused due to the damage cause to the network of nervous system during her birth, as a result of excessive force being applied to the infant's head during delivery.Â The complainant alleged that this injury was caused to the newly born baby due to the rash and negligent act of the petitioner-Dr. Neeru Gupta, while conducting the delivery of his wife. On the perusal of the complaint, the learned CJM, Rajouri forwarded the same to the authorities of its Police Station, Rajouri, for taking necessary action under law.Â On the receipt of the Complaint with the endorsement of the learned CJM, Rajouri, the police authorities of Police Station, Rajouri registered an FIR bearing No. 403/2008 at police of Police Station, Rajouri, with which the investigation commenced.

3. On the culmination of the investigation of the case, the police authorities concluded that the allegations leveled in the Complaint are not made out against the petitioner and, accordingly, a Final Closure Report u/s 169Â Â Cr. P.C was laid before the Court of the learned CJM, Rajouri.Â The complainant appeared before the Court of learned CJM, Rajouri with a request that the case be reinvestigated.Â After recording the statement of the Complainant and on assessing and evaluating the entire material on record, the learned CJM, Rajouri directed the police authorities to reinvestigate the case in accordance with the law so that the ends of justice could be secured. The learned CJM, Rajouri did not accord approval to the Closure Report and declined to accept it.Â Â

4. The petitioner assailed the order of the learned CJM, Rajouri in a Revision filed before the learned Session Judge, Rajouri and the learned Session Judge, Rajouri vide his order dated 05th August, 2011, impugned herein, held that the revisional jurisdiction can be exercised by a Court in a situation,

where the decision impugned is grossly erroneous or patently illegal.Â The learned Magistrate here in this case, exercised the discretion in accordance with the settled norms of law and there is manifestly no error in the order nor has any illegality or impropriety been committed by the learned Magistrate and, therefore, no interference is warranted, as a result of which the learned Sessions Judge, Rajouri dismissed the Revision Petition. The petitioner did not find favour with order of the learned Sessions Judge, Rajouri.Â She assailed the said order before this Court in the instant petition filed under Section 561-A Cr.P.C, inter alia, on the grounds that; A case of criminal negligence can not be filed against a doctor discharging his/her duty by using the highest degree of professional skill for any complicity allegedly resulting in an injury to the child during the delivery. It has also been pleaded that in view of the detailed guidelines laid down to protect the interests of the doctors and saving them from unwarranted and malicious proceedings, a case of criminal negligence is not maintainable when the act is not the result of rash and negligent act on the part of the doctor attending the patient.Â It is further contended that the Court of competent jurisdiction cannot order the reinvestigation of the case without giving proper reasons whatsoever, which prompted it to direct further investigation particularly when the Court of first instance as well as Revisional Court failed to appreciate the police report and the opinion of the medical board, which had ruled out the negligence.Â It is also pleaded that the complainant being the father of the child, who also happens to be the public prosecutor could not appear in the Court and defend the order of the Magistrate for reinvestigation in view of his onerous duty and reasonability as a public prosecutor as prescribed by the Code of Criminal Procedure, and that the order impugned amounts to abuse of the process of Court as also prevents to give effect to the letter and spirit of the Section 173 (8) of the Code of Criminal Procedure besides preventing to secure the ends of justice.

5. The petitioner has proceeded to state that the Investigating Officer, in the case, on the demand of the complainant, through the office of Director

Health, Jammu, sought the constitution of a Board of Directors and this request was acceded to, whereafter a Board of Doctors comprising Dr. M.K.

Koul, Pediatrician, Dr. Shildar Kumar Ortho-Surgeon, Dr. Bashir Malik, Surgeon and Dr. Manisha Bhagat, Gynaecologist was constituted.Â The

Board opined that it could be a complication of a normal delivery documented in medical literature, instance being one in a thousand, even in a good setup.Â The Board further opined that the complication was not a result of deliberate error of judgment on the part of the doctor so it cannot be classified under any type of injury.Â The petitioner has stated that this opinion was formed after going through the case history of child and after examining various reports of incidence and prognosis of the nature of injury that the child is purported to have received, which is known by different medical names such as; brachial plexus birth palsy (Erbs Palsy).Â The authentic medical literature on the subject was also considered, which provided extra material on shoulder dystocia, also known as Erbs-palsy and brachial plexis.

6. The petitioner has also averred that based on the medical report and other evidence, the Chief Prosecuting Officer submitted a Closure Report in the Court of CJM, Rajouri on 28th October, 2009 and neither the learned CJM nor the learned Sessions Judge accepted the said report.Â The impugned order passed by the learned Sessions Judge is bad and against the spirit of the law as laid down by the Apex Court of the country, holding that the burden of onus of proving medical negligence lies on the complainant and a mere averment in the Complaint was neither any evidence nor could the same be treated as conclusive evidence against the persons complained of.

7. The further contention of the petitioner is that the Complaint of the private respondent lacked bonafides and fairness in law.Â Brushing aside the medical evidence in the form of the opinion of the Board of Doctors by the learned Session Judge amounts to a serious omission in not considering the same worthy of any credit. The complainant has also filed a Complaint simultaneously before the learned State Commission (Consumer Protection, J&K), Jammu under Section 10 of the Consumer Protection Act.Â Even the said Complaint is without any merit, which has been slated for preliminary hearing on its maintainability.

8. In the end, the petitioner has urged that the learned Sessions Judge appears to have concentrated more in highlighting the powers of the Magistrate while considering the Closure Report and did not touch the important facts, which ought to have received the attention of the Court viz; the conclusive

medical evidence based on the opinion of the Board of Doctors as a consequence of which the impugned order is liable to be quashed.

9. The respondents have filed the objections, wherein they have controverted the petition of the petitioner chiefly on the grounds; that Section 561-A

Cr. P.C is not a substitute for a second revision u/s 435 Cr.P.C. Resultantly, the inherent powers of the Honâ??ble High Court cannot be exercised

against the order of the revisional Court.Â That there is no manifest illegality or error apparent on the face of the record thereby warranting

interference by this Honâ??ble Court while exercising its inherent powers.Â The power u/s 561-A is to be sparingly exercised only to prevent the

abuse of the process of the Court or secure the ends of justice, but in the instant case neither the process of the Court has been abused nor any

miscarriage of justice has been caused by the Courts below rather an endeavor has been made to secure the ends of justice by conducting a fair

investigation.Â The Erbs Palsy is a devastating injury with serious long term problem caused to the nervous system because of the excessive pulling

of the new born baby at the time of the delivery causing injury to the 5th and 6th cervical roots and the muscular atrophy resulting into paralysis of the

limb because of which the baby cannot flex the arm at the elbow.Â This fact is mentioned in B.D. Chaurasiaâ??s Human Anatomy Vol. 1 at Page

No. 53.Â Even the certificates of Dr. Sushil Razdan and Dr. Gaurav Vaid substantiate that the aforesaid injury has been caused to the baby of the

answering respondent due to the negligent act on the part of petitioner and her associate which could have been avoided had the delivery been

conducted diligently and carefully. The investigation has been conducted by the I.O. in the perfunctory manner just to shield the accused from criminal

prosecution.Â He has not recorded the statement of the answering respondent, his mother in law and Dr. Mehmood Chowdhary, who conducted the

ultrasonography regarding the well being and size of the baby.Â Moreover, the statements of the Dr. M.K. Koul, Children Specialist, Dr. Sushil

Razan and Dr. Gourav Vaid, who have treated the baby have also not been recorded though they are the specialist in the relevant field and have

issued the certificates that the injuries have been caused to the baby of the answering respondent at the time of delivery, which could have been

avoided if due diligence and care had been exhibited by the petitioner.Â What to talk of the statements of the complainantâ??s witnesses even the

statements of the doctors of the so called medical board constituted at the instance of the petitioner have not been recorded by the Investigating

Officer. Under these circumstance,, further investigation was rightly ordered by the Courts below for thorough probe into the matter and that the

order impugned does not cause any prejudice to the petitioner and the same is an interlocutory order, as such the inherent powers cannot be exercised

for quashing the same.

10. Heard and considered.

11. Risking repetition it needs must be said that a Board of Doctors comprising of Dr. M.K. Koul, Pediatrician, Dr. Shildar Kumar OrthoSurgeon, Dr.

Bashir Malik, Surgeon and Dr. Manisha Bhagat, Gynaecologist was constituted in order to trace out the cause, leading to the death of the deceased.

The opinion of the Board of the Doctors is attached to the petition of the petitioner as Annexure-B and is reproduced below verbatim:-

Certified that Sabaha Fatima D/o Sh. Tahir Shah R/o Saim Smith Tehsil Thanamandi, age eight month was examined by Board of following

doctors on 08th April, 2009. She was found to have pareses of right upper arm in a state of recovery phase.

Duration of paresis could be more than six months. Probable causes could be:-

1. Shoulder Dystocia.

2. Post delivery trauma.

1. Dr. Bashir Malik, Surgion Specialist.

2. Dr. Manusha Bhagat, Gynaecologist.

3. Dr. M.K. Koul, (Paediatrician).

4. Dr. Shalinder Sharma (Ortho Surgeon).

The paresis mentioned in the Medical Board Certificates of Sabaha D/o Sh. Tahir Shah could be a complication of normal delivery documented in

medical literature, incidence being one in thousand live birth even in good set ups.

The complication is not a result of deliberate errors of judgment on the part of the doctor. So it cannot be classified under any type of injury.

1. Dr. M.K. Koul
Dr. Shalinder Sharma

(Paediatrician)

Â Â Â (Ortho Surgeon)

3. Dr. Bashir MalikÂ Â 4.Â Â Dr. Manusha Bhagat,Â Â Â Â Â Â Â Â Â Surgion Specialist Â Â Â Â Â Â Â Â Gynaecologist.

Office of the Medical Supreintendent D.H. Rajouri.

No:- DHR/259Â Â Â Â Â Â Â Â Â Â Â Â Dated:-23rd June, 2009

Submitted in original to Station House Officer, Rajouri for information and favour of further necessary action.

Medical Superintendent,

District Hospital, Rajouri.â??

12. What causes this disease is reflected in Annexure-C, attached to the petition, theÂ relevant excerpts of which are detailed below word for word

and letter for letter:-

â??1. Although Erbs Palsy (a Brachial Plexus injury) can occur at any time, most causes happen during birth.Â During the strain of childbirth, the

shoulder of the baby could get caught and stretched behind the Public Symphysis bone (part of the Pelvis bone).Â Once the shoulder is caught, the

Brachial Plexus can be compressed, stretched or torn.

2. Many babies with Erbs Palsy are larger than average at birth.Â

However, newborns of all sizes, including premature babies, can have these injuries.Â A larger baby will have a greater chance of getting caught

behind the Public Symphysis bone and getting injured severely.

3. About 1 or 2 babies in 1.000 suffer from Erbs Palsy.Â The symptoms of Erbs Palsy include a limp or paralyzed arm and/or lack of muscle control

in the arm or hand.â??

13. The Board of the Doctors, as can be seen from a bare perusal of the report cited above, has come to a definite conclusion that the complication

caused to the child is not a result of the deliberate errors of judgment on the part of the doctor and, therefore, it cannot be classified under any type of

injury.Â Â

14. Dealing with an almost identical case, this Court in the case bearing OWP No. 1729/2014, titled, â??Ghulam Ahmad Wani Vs. State of JK and

othersâ?, c/w 561-A No. 02/2015 and â??Dr. Mufti Mehmood Ahmad FarooqiÂ Â Vs.Â Â State of JK and Anr.â?, decided on 15th November,

2017 by a Bench adored by me held as under:-

The law is that the concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in

the criminal law. The element of 'mens rea' has to be shown to exist for concluding that the negligence amounted to an offence. To bring an act

within the definition of criminal negligence, the degree of negligence has to be of a higher order, i.e. it should amount to gross negligence. Negligence,

which can neither be rated as gross nor of a higher degree, may give a person the teeth to seek the settlement of his claim in Civil law, but it cannot

form the baseline for the prosecution of an accused under Section 304-A RPC. The expression 'Rash or Negligent Act', as it occurs in Section

304-A RPC, has to be read to mean 'gross negligence' as is the settled position in the Criminal law. 10. In a case of prosecution of a medical

professional for negligence under criminal law, it has to be shown authoritatively that the acts of omission and commission attributed to a person were

such that no medical professional in his ordinary senses and prudence would have done or failed to do. The act of the accused doctor should be of

such a nature that the injury which resulted was most likely imminent. The law laid down on the subject is beaming and clear. In 'Dr. Suresh Gupta

v. Govt. of N.C. T. of Delhi', reported in 'AIR 2004 Supreme Court 4091', it has been held as under:Â

'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 endo-tracheal 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.Â

25. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and

negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and

deliberate wrong doing i.e. a higher degree of morally blameworthy conduct.Â

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 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.Â

27. See the following concluding observations of the learned authors in their book on medical negligence under the title 'Errors, Medicine and the Law'

[by Alan Merry and Alexander McCall Smith at pg. 247-248]. The observations are apt on the subject and a useful guide to the courts in dealing with

the doctors guilty of negligence leading to death of their patients :-Â

Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral

blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted

with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally

blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made

negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence.Â

Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its

inappropriate use, however, distorts tolerant and constructive relations between people. Some of life's misfortunes are accidents for which nobody is

morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for

compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically

informed analysis." "Â

28. After examining all the medical papers accompanying the complaint, we find that no case of recklessness or gross negligence has been made out

against the doctor to compel him to face the trial for offence under section 304A of the IPC. As a result of the discussion aforesaid on the factual and

legal aspect, we allow this appeal and by setting aside the impugned orders of the Magistrate and of the High Court, quash the criminal proceedings

pending against the present doctor who is accused and appellant before us. " "Â

15. In the case of " "Jacob Mathew v. State of Punjab & Anr. " " , reported in " " AIR 2005 Supreme Court 3180 " " , the legal principles and the law

laid down in Dr. Suresh Gupta " " s case have been re-affirmed. The relevant excerpts of the judgment germane in the context of the decision of

the " " issues raised here in this petition are detailed as under: - " "Â

" "49. We sum up our conclusions as under: - " "Â

(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'. " "Â

(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.Â

(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.Â

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.Â

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

word 'grossly'.Â

(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.Â

(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.Â

50. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's

case (2004) 6 SCC 422 and reaffirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the

law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that

case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage

from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case

(noted vide para 27 of the report).Â

Guidelines re: prosecuting medical professionals

51. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase.

Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The

investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act

of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal

process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest,

which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his

reputation cannot be compensated by any standards.Â

52. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential

ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession

renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a

complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation.

Such malicious proceedings have to be guarded against.Â

53. 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.Â

54. 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 304A IPC on the

parameters of Bolam's test.Â

The appeals are allowed. The prosecution of the accused appellant under Section 304A/34 IPC is quashed.

56. All the interlocutory applications be treated as disposed of.Â??

16. Applying the ratio of law laid down above to the facts of the instant case, the act attributed to the accused here in this case, even if stretched to

unreasonable lengths, can, at the most, be stated to be an act performed with lack of due care and precaution. The allegation levelled against the

petitioner is that, while conducting the delivery of the wife of the complainant, the petitioner handled the infant rashly and negligently as a consequence

of which damage was caused to the network of the infant's nervous system by applying excessive force to the infant's head. A simple lack of

care or an error of judgment or an accident is not proof of negligence on the part of a medical professional. In a case, where a medical professional is

accused of gross negligence, the Investigating Officer and the private complainants cannot be supposed to have the knowledge of the medical science

which will give them the stick to determine whether the act attributed to the accused (medical professional), does or does not amount to rash or

negligent act under the provisions of Section 338 RPC. It will hover before their eyes like the mirage of an oasis. By taking resort to the practice, of

registering cases against a medical professional for an offence under Section 338 of RPC on the mere asking of the Investigating Officer and the

private complainants, the medical professionals will shirk from their work. The threat of criminal prosecution will always loom large on their heads and,

as a consequence of this, the patients will be left in the lurch.Â

17. The law laid down in Civil Appeal No. 368/2013 arising out of the SLP (C) No. 26043/2010 highlights this aspect. It provides that 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 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 him 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 chances of success may be 10 percent (or so), rather than taking a 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

disservice to the Society.

18. Taking the above aspect into consideration, the Apex Court of the country in Jacob Mathew's case felt the need to incorporate certain

guidelines in the Statutory Rules and Executive Instructions by the Government of India and/ or the State Governments in consultation with the

medical Council of India. It directed further that till such time this is not done, certain guidelines which should govern the future prosecution of the

doctors for offences of which criminal rashness or criminal negligence is an ingredient, require to be regulated. In the guidelines incorporated by the

Apex Court, the Court ordained that the private complaint may not be entertained unless the complainant has produced, prima facie, evidence before

the Court in the form a credible opinion given by another competent Doctor to support the charge of rashness or negligence on the part of the accused

Doctor. The Supreme Court commanded that the investigating Officer should before proceeding against the Doctor accused of a rash or negligent act,

obtain an independent and competent medical opinion preferably from a Doctor in Government service in that branch of medical practice who can

normally be expected to give an impartial and unbiased opinion applying the

Bolam's test to the facts collected in the investigation. The Supreme Court further held that a Doctor, accused of rashness or negligence, may not

be arrested in a routine manner (simply because a charge has been leveled 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.Â

19. Reverting back to the facts of the petition before me, a Medical Board comprising four senior doctors who examined the case of the infant in compliance with the mandate of the guidelines laid down by the Supreme Court and the Board after giving a background of the case opined that the complication is not the result of a deliberate error of judgment on the part of the doctor.Â No negligence on the part of the Doctor, who was involved in the management of the case, was found by them.Â

20. In their objections, filed to the instant petition, the respondent-State has contended that Dr. Sushil Razdan and Dr. Gourav Vaid have in their Certificates substantiated the fact that the injury has been caused to the infant due to the negligent act on the part of the petitioner and her associate, which could have been avoided had the delivery been conducted diligently and carefully. The certificates issued by Dr. Sushil Razdan and Dr. Gourav Vaid have been placed on record and these require to be analyzed from the perspective of what has been contended in the objections.Â The certificate issued by Dr. Sushil Razdan (AnnexureA) states that the infant had at birth, right upper brachial plexus injury (Erbs Palsy) and it takes upto six months or one year for recovery.Â She needs constant physiotherapy.Â Dr. Sushil Razdan has nowhere stated it in his certificate that the infant suffered the injury on account of the rash and negligent act of the petitioner.

21. Dr. Gourav Vaid, who as per the certificate (Annexure-D), attached to the petition runs a private clinic is a physiotherapist and he has stated that the infant, who is suffering from right upper brachial plexus injury (Erbs Palsy), is undergoing treatment under his guidance and supervision and she has been suffering with this condition since the date of the delivery due to medical negligence.Â Such condition could have been avoided, if the procedure would have been done with due diligence and care.Â

22. As per the import of the judgment delivered in Jacob Mathewâ?? case (supra), the certificate given by the physiotherapist cannot be considered in arriving at a finding as to whether the condition with which the baby is confronted was caused due to any negligence. He is simply a physiotherapist and was neither on the rolls of the hospital where the infant was born nor has he analyzed any record to arrive at such a finding and above all, he is

not an expert on the subject.Â Even, if it be assumed that the infant suffered the injury due to medical negligence, it would not per-se mean that the negligence was criminal in nature.Â The negligence on the part of the treating doctor has to fall within the mischief and ambit of criminal negligence, which is the basic ingredient of Section 338 RPC. Therefore, the certificate of the physiotherapist cannot be given any credence and it cannot dislodge the finding arrived at by the Board of Doctors recorded after the examination of the available record.Â Lack of necessary care, attention or skill in treating the patient, has been completely ruled out by the Committee of the Experts, i.e., Board of Doctors and, therefore, it will be a sheer abuse of the process of law in case an additional lease of life is given to the prosecution case.

23. Viewed in the context of what has been said and done above, the petition bearing No. 213/2011 under Section 561-A of the Code of Criminal Procedure filed by the petitioner, Dr. Neeru Gupta, is allowed on the analogy of the law cited above, as a sequel to which, the FIR bearing No. 403 of the year 2008 registered against the petitioner at Police Station, Rajouri and all the proceedings emanating therefrom are quashed.