

(2019) 08 BOM CK 0122
In the Bombay High Court
Case No : Writ Petition No. 2007 Of 2019

Shrutika Junagade Kankaria	Vs	APPELLANT
State Of Maharashtra And Anr		RESPONDENT

Date of Decision : 20-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 204
Indian Penal Code, 1860 — Section 304A, 320, 338, 418

Citation : (2019) 08 BOM CK 0122

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : A.P. Mundargi, A.P. Kulkarni, Manoj Badgujar, M.R. Tidke, Saloni M. Gule

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith with the consent of the parties and heard finally.
2. This petition takes an exception to the judgment and order dated 23. 01.2019 passed by the learned Additional Sessions Judge, Pune, in Criminal Revision No. 151 of 2018, arising out of order dated 16.02.2018 passed by the learned Judicial Magistrate First Class, Court No.3, Pune in R.C.C. No. 430 of 2018.
3. The brief facts giving rise for filing the present petition, borrowed from paragraph Nos. 2 and 3 of the revision petition, are as under :
4. The complainant i.e., respondent No.2- Anusaya Kshirsagar, who is a housewife, aged 68 years, is residing with her son at Manjari Bk. District - Pune. In April- 2016, her eyesight of right eye was poor and hence, she approached Asian Eye Hospital, Pune for eye examination along with her son. She was examined and informed that there is cataract in right eye, and she has to undergo operation for cataract removal and implant of lens surgery. She agreed to undergo surgery and chose package of Rs.50,000/- (Rupees Fifty Thousand

only). It was decided to perform said operation on 14.04.2016. Thereafter, all investigations and tests were carried out so as to check her fitness to undergo said operation. On 14.04.2016, applicant i.e., the present petitioner performed said operation on her right eye. It is alleged that, after about half an hour after performing said operation by the applicant, her son was called by the applicant in her cabin and he was told that inspite of sufficient efforts, toric lens could not be implanted in the eye of complainant. Several efforts were made to adjust that lens, but it was not adjusted. It was further informed that, there is possibility of injury being suffered by complainant to back side of her eye i.e., retina. It was informed and assured by the applicant that, after taking the prescribed medicines and eye drops, the condition's will be improved. After hearing all this from the applicant, son of the complainant was shocked. He did ask the applicant, whether second opinion of expert eye surgeon is required to be taken? But the applicant told to him that, she herself is well experienced eye surgeon and second opinion is not required. Thereafter, a cheque of Rs.5,000/- was issued to her son by the said hospital. When it was presented for encashment, it was dishonoured. Thereafter, complainant repeatedly made complaint that, even after operation she could not see anything by right eye. She could only see black patches. But the applicant has not taken her complaint seriously and neglected her, and repeatedly told to continue to put prescribed eye drops in right eye and assured that, after passage of some time, her vision of said eye will be improved. Lastly, on 26.04.2016, the applicant was again operated for second time, but inspite of said surgery, complainant could not get vision. When son of the complainant repeatedly asked to the applicant as to why toric lens was not implanted? Why vision of his mother is not improving inspite of two operations? No answers and information was given to him. Thereafter, on 12.05.2016, one eye spectacle was advised to her by the applicant. It was told that by regular use of that spectacle, her vision will be improved. But inspite of regular use of that spectacle, her vision could not be improved. Lastly, on 16.05.2016, complainant's son sought information and papers from the hospital in relation to complainant's treatment given by the applicant. But said information and papers were not supplied to him. Hence, again another application was sent by speed post on 14.07.2016 for obtaining said information and documents, but no information was given. Lastly on 28.05.2016, complainant had taken second opinion from Dr. Nitant Shah at K.K.Eye Institute, Pune. She was diagnosed by Dr. Shah of partial retinal detachment due to surgery performed on 14.04.2016 and 26.04.2016 by the applicant. Thereafter, again applicant has taken second opinion from Eye Hospital, Mohamadwadi, Pune. Eye surgeon of that hospital also expressed same opinion. Complainant was further told that, her vision will never be restored due to partial retinal detachment. Complainant alleged that due to negligence of applicant, she is suffering hardship and blindness. Due to said negligence of the applicant, complainant is having blindness in right eye. Thereafter, on 16.05.2017, a complaint in writing was made with Deputy Director, Health, Pune. Thereafter, Director of Health, Pune constituted committee of experts headed by Dr.Tatyrao Lahane, Dean of Sir. J.J. Hospital, Mumbai. After examination of

complainant, said expert doctors, gave opinion that the applicant was negligent in post operative care of Smt. Anusaya. Therefore, complainant has filed the complaint against the applicant.

5. In this application, the applicant averred that she is MBBS, DNB, FICO, fellow retina and diabetes eye disease expert. She is having her office at Asian Eye Hospital and Laser Institute, behind Jehangir Hospital, Sasoon Road, Pune. She is having vast experience and having name in the medical fraternity. She has received many prestigious awards. Complainant/ respondent No.2 is 75 years old diabetic complainant. She underwent detailed eye check up at Asian Eye Hospital on 11.04.2016 and thereafter get right eye cataract surgery done. After detailed examination, cataract surgery advised in her right eye. Detailed counseling about the surgery and various options of surgery packages and possible outcomes including complications were discussed with her. Accordingly, complainant chosen package of Rs.50,000/- with toric lens implantation. Complainant alleged that the applicant had shown negligence while operating the right eye and caused internal injury to her. Applicant claims that Dr. T.P.Lahane's expert team gave opinion that there was no negligence in cataract and lens implants surgery. The capsular bag from which cataract used to be removed is known to be more fragile and is known to break more than general population during cataract surgery. During the surgery of this complainant, break in the fragile capsule noted in time and managed with meticulous anterior vitrectomy procedure. The scientific protocol was observed and surgery was completed. A small cortex was left behind to avoid excessive manipulation during primary surgery which is often the case in such situations. After the surgery, the complainant relatives were called to meet the applicant personally and detailed information was given by the applicant about the surgery including occurrence of posterior capsular break, its incidence, its management and need for implantation of monofocal lens in such situation. Even after this discussion complainant's son seem to be very annoyed as the surgery did not go as expected. He started to speak very loudly and arrogantly and threw discharge summary on applicant's face. He had called other patients who got operated that day and complained to them and asked them, whether their surgery went as per plan and complained with them that, his mother's not. He was repeatedly explained that monofocal or toris lens gives same vision. Thereafter, as per hospital's policy, even difference in surgery cost of Rs.5,000/- was refunded in good faith to the complainant by cheque. When complainant was examined at first day follow up, the next day the eye was healing well and lens was stable. Hence, she was asked to continue the drops and called for follow up after three days. Again she was examined, but complainant was not happy about the vision. She has informed that the cortex will eventually get absorbed in due time. But her son was very agitated all the time and were not at all willing to wait. Thereafter, cortical clean up was also performed with her consent and procedure of anterior chamber wash to remove residual cortex was performed, but complainant was highly anxious. Hence, small procedure of anterior chamber wash was performed. Thereafter, again on 30th April, detailed check up of retina

was performed when vision was 6/9. In spite of hospital efforts and improvements in the vision, which were documented, the complainant and her son continued to be dissatisfied and agitated all the times. Therefore, applicant advised to get second opinion from Dr. Prakash Kankariya or other senior eye doctors. Complainant was never prevented from seeing another doctor. In spite of all these efforts, the complainant filed a criminal complaint of negligence during surgery against the applicant.

6. It is the case of the petitioner that some more important things in the complaint, which are missing while taking the court order of learned Magistrate, the petitioner is of the opinion that respondent No.2/ complainant has misled the Court while taking the order of issuance of process under section 204 of the Code of Criminal Procedure from the learned trial Court. The complainant never complained to black spots, in fact the vision recorded was good 6/6p when seen last time by the petitioner at Asian Eye Hospital and also 6/9 vision recorded at K K Eye Institute by Dr. Nitant Shah. Further, retina examination (fundus examination) was done time to time by the petitioner, who is well qualified, certified and long term trained 'retina specialist' from Sankara Netralaya, Chennai, which is the best training program for retina in India. Typically, ours being a tertiary care eye institute handling complex cases referred from various eye doctors from Maharashtra, we have a team of retina specialists who deal with retinal problems on day to day basis.

7. It is further case of the petitioner that retina was checked by retina specialist i.e., the petitioner herself and she had also asked the complainant to take 2nd opinion from Dr. Prakash Kankariya and our another vitreo-retina specialist at Asian Eye Hospital, for which, she did not come. The complainant was also asked to take 2nd opinion from outside if she desire for her own satisfaction. Names of senior specialist i.e., Dr. Udayan Dixit, Dr. Nitin Prabhudesai and Dr. Nitant Shah were given to the complainant in writing. Asian Eye Hospital is a NABH certified eye hospital. We give complainants their rights and responsibilities papers as per protocol which clearly mentions that complainant has right to take 2nd opinion. Further, the complainant visited K K Eye Institute where she was diagnosed with partial retinal detachment and told to undergo urgent but simple gas injection procedure to restore the retina, which was neglected by her. The complainant still had very good vision that could have been maintained easily in fact we encourage 2nd opinion. In spite of knowing the urgency, the complainant delayed surgery by more than 15 days, because of which potential vision was lost. In case of partial retinal detachment, surgery is always emergency which should be done within hours, where she delayed it by over 15 days. This shows complainant's negligent behaviour.

8. It is further case of the petitioner that an opinion from Dr. Nitin Prabhudesai was taken after retina detachment surgery. This opinion is not related to cataract surgery done by the petitioner, but of retinal detachment surgery done later on by another surgeon at HV Desai Hospital. The committee members should have

come to hospital to check all the examination findings and surgery records of the complainant before giving their opinion. Because it seems that the complainant has concealed vision assessment report at K K Eye Institute with committee when vision was good. So also Dr. Lahane's expert opinion clearly states that there was no negligence in surgery and further there was no negligence as per his opinion. Dr. Lahane is also unaware of the fact that the petitioner is a trained certified retinal specialist from Sankara Netralaya Chennai, which is Asia's best eye hospital, and it is recommended as India's old experienced and proficient for doing retinal diagnosis and treatment.

9. It is further case of the petitioner that before doing 2nd procedure, the petitioner had examined retina in details and she herself is a trained retina specialist. Retinal check up was done at each visit and retina was found to be attached the retinal detachment started 12 days after the complainant was seen at the Asian Hospital by the petitioner which could not have been diagnosed before that. Looking at complainant's dissatisfied behaviour, she was called for 2nd opinion, but she did not turn back. The complainant was also examined by Dr. Vardhaman Kankariya, who is an internationally reputed well trained ophthalmologist, and the petitioner was not negligent in post operative care, as she repeatedly examined the complainant and retina multiple times from day of surgery (9 times in period of 28 days at Asian Eye Hospital). The petitioner took repeated efforts and care for the complainant, gave time repeatedly to counsel her inspite of arrogance and tolerating foul language by her son repeatedly. The petitioner had also told the complainant and her son to see other doctors if they wish when they arrogantly told her that they have paid money to her, so it is only her that should solve their problem.

10. It is further case of the petitioner that the vision at last follow up at Asian Eye Hospital was 6/6p -6/9 (90%) and similar vision also noted after 12 days at another hospital (K.K.Eye Institute) was 6/9p (90%). Hence, the vision is not manipulated. Retina was attached as last seen at Asian Eye Hospital on 12th May and was partially detached after 12 days at KK Eye Institute i.e., on 28th May. This can occur within few hours (several evidences). As it was a partial detachment, the vision was still good at K K Eye Institute, but as the complainant delayed treatment, the vision dropped further at H V Desai Eye Hospital seen after 10 days thereafter i.e., on 6th June, as it lead to now a total retinal detachment. The progress from partial to complete detachment can occur within hours, therefore the complainant was advised urgent surgery at K K Eye Institute, which she neglected. It seems the complainant and her relatives hidden the K K Eye Institute report from Dr. Lahane.

11. It is the case of the petitioner that she has delivered her care with great compassion, commitment and scientific protocols. It is an attempt by the complainant to seek revenge and spoil doctor's reputation, which is also seen by her repeated attempt to lodge a police complaint, which was denied to her. The complainant's son repeatedly threatened the petitioner with his ID Card

demonstrating police uniform during all his interactions. As per expert opinion of medical board headed by Dr.T P Lahane, there was no negligence during surgery by the petitioner. All steps including implantation of monofocal IOL, vitrectomy and other steps were absolutely as per scientific standards as per expert opinion. The board has made only one comment that the complainant was not referred for retinal opinion post operatively. The board is probably unaware that the petitioner herself is very well qualified retina specialist. Most importantly, the complainant was actually referred for 2nd opinion for her own satisfaction with option given of any of three retinal specialist- Dr. Nitin Prabhudesai, Dr.Udayan Dixit and Dr.Nitant Shah. The complainant did not take 2nd opinion for 20 days after she was referred i.e., on 28th May and then ultimately went to Dr. Nitant Shhah on 2nd June. The complainant has kept the committee and the Court in dark that petitioner had referred the complainant to another retina specialist for 2nd opinion also. If the committee would have been aware about petitioner's qualification as retina specialist and that 2nd opinion referral was sought in this case, the committee would not put those remarks.

12. As per the case of the petitioner, shortcomings of the committee and its opinion are, (i) the committee's opinion cannot be taken seriously as there is no single retina expert in the medical committee formed by Civil Hospital for giving opinion in the patient involving retina detachment. Any retina specialist is aware that the retinal break and retinal detachment can occur over few hours and hence, referring the patient earlier would have made no difference, (ii) the committee has given opinion about cataract surgery only based on patient's version of the events without even examining her eye after cataract surgery. The complainant's eye was examined by committee after the eye had undergone a retinal surgery which changes all the facts about the eye, (iii) the biggest shortcoming is that the committee members never visited petitioner's hospital to understand the real medical facts and examine case papers, which is an absolutely legal necessity before giving opinion, (iv) the current visual outcome (the vision of the complainant) in the right eye is not associated with the 1st surgery done by petitioner because vision was good after the surgery done by petitioner. The remained reduced after the 2nd surgery done by other surgeon at another hospital and (v) retinal detachment (the problem which the complainant had before 2nd surgery) is not related to the 1st surgery. It is an independent problem.

13. It is further case of the petitioner that the complainant has not placed all material facts and in such situation, the order passed by the learned Magistrate issuing process against the petitioner is contrary to the law which is to be revisable by this Court. Being aggrieved by the said order, the petitioner filed Criminal Revision Application No. 151 of 2018 before the learned Sessions Judge at Pune. Respondent No.2 i.e., complainant appeared in the said revision and contested the same by filing her written submissions. After hearing both the sides and perusing material on record, the learned Additional Sessions Judge, Pune has dismissed the Revision Application by judgment and order dated 23.

01.2019. Hence, this petition.

14. Learned Senior Counsel appearing for the petitioner submits that even on perusal of entire allegations made in the complaint, it cannot be said that the petitioner has committed any act which will amount to an offence under sections 338 and 418 of the Indian Penal Code. He further submits that, the learned Magistrate has failed to consider the complaint and contents of documents filed along with complaint while passing the said order. He further submits that the learned Magistrate failed to consider that, the petitioner had taken utmost care while performing surgery and she was not negligent at all as alleged in the complaint. It is submitted that as per expert's opinion of medical board headed by Dr.T.P.Lahane, there was no negligence during surgery by the petitioner. All steps including implantation of monofocal IOL, vitrectomy and other steps were absolutely as per scientific standards as per expert opinion. The board has made only one comment that complainant was not referred for retinal opinion post operatively. The board is probably unaware that, the petitioner herself is very well qualified retina specialist. The complainant did not take second opinion for 20 days after she was referred and then ultimately went to Dr. Nitant Shah. The complainant has kept the committee and the Court in dark that, the petitioner had referred complainant to another retina specialist for second opinion also. He further submits that the petitioner had taken all care and caution and therefore, criminal liability cannot be attributed to her. He further submits that, the Courts below have failed to consider and appreciate the allegations in complaint about so called negligence in the carrying out of surgery is turned down by the expert committee headed by Dr.Tatyrao Lahane. He further submits that, learned Sessions Judge has grossly erred in holding that the expert opinion goes against the petitioner. If there was no negligence in carrying out the surgery, there is no question of applicability of section 338 of the Indian Penal Code at all. The negligent act post-surgery is neither specifically pleaded nor argued before the Courts below and thus, the observations by learned Sessions Judge that due to negligence of petitioner, complainant has suffered grievous hurt and it is not a remote result of the act. There is no incriminating circumstance against the petitioner to connect her with the alleged offences. Learned Senior Counsel in support of aforesaid contentions pressed into service exposition of law by the Supreme Court in the case of Jacob Mathew Versus State of Punjab and Another (2005) 6 SCC 1., and submitted that the Supreme Court in paragraph No. 48 of the said judgment has summed up the conclusions and has ruled that, 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.

15. Learned Senior Counsel invites attention of this Court to the observations made by the Supreme Court in the case of P.B.Desai Versus State of Maharashtra & Another (2013) 15 SCC 481. Learned Senior Counsel also invites attention of this Court to paragraph No. 44 of the said judgment, and submits that the Supreme Court in the aforesaid judgment ruled that as far as the sphere of criminal liability is concerned, as mens rea is not abandoned, the subjective state of mind of the accused lingers a critical consideration.

In paragraph No. 45 of the said judgment, the Supreme Court has further observed that, the only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate willingness to subject others to the risk of harm. Negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another to the risk of harm where the actor is aware of the existence of the risk and, nonetheless, proceeds in the face of the risk. This, however, is the classic definition of recklessness, which is conceptually different from negligence and which is widely accepted as being a basis for criminal liability.

Therefore, learned Senior Counsel relying upon the pleadings and grounds taken in the petition and annexures thereto, and submits that petition deserved to be allowed.

16. On the other hand, learned Counsel appearing for contesting respondent invites attention of this Court to the affidavit in reply filed on behalf of respondent No.2/complainant. She submits that the petitioner has approached this Court against the order of issuance of process. The learned Magistrate has seen prima facie case, examined the complainant and thereafter, process has been issued against the petitioner. She further submits that there are two reports of expert committees, which would indicate that, the petitioner was negligent inspite of immediate and sincere request of the complainant and her son to seek second opinion of the expert doctor conversant with the subject before second surgery, however, the petitioner proceeded further to perform second surgery. She further submits that the complainant was not able to see anything and therefore, was required to approach three doctors to seek their opinion. An

opinion of all three doctors has been taken by the complainant, which ultimately shows the negligent act of the petitioner, which would attract the ingredients of sections 338 and 418 of the Indian Penal Code, which are invoked by the prosecution. She further submits that in the case of Jacob Mathew (supra), the Supreme Court made it clear that, 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. She further submits that in the present case, it was incumbent upon the petitioner to take proper care during the surgery and also post operative care. Before going for second surgery, the petitioner did not take second opinion. The committees report make it clear that the petitioner was negligent while performing operation and also proceeded to perform second surgery without obtaining second opinion from expert doctors in field. She further submits that the facts of the present case vis-a-vis in P.B.Desai's case are different in as much as. In the said case, the Supreme Court was dealing with the case after conviction of Mr.P.B.Desai, who was well known cancer surgeon. However, in the present case, the learned Magistrate has only issued process and there is an ample opportunity to the petitioner to appear before the learned Magistrate and prove her innocence.

17. Heard learned Senior Counsel appearing for the petitioner and learned Counsel appearing for respondent No.2 at length. With their able assistance, I have carefully perused the pleadings and grounds taken in the petition and annexures thereto so also reply filed by respondent No.2, and in particular two reports of expert committees, which are placed on record along with reply.

18. It appears that before issuance of process, the learned Magistrate has perused complaint, verification statement, and documents on record and after hearing the advocate for the complainant, process has been issued. The learned Magistrate held that, as per the contentions of the complainant, she has lost vision because negligent act of the accused so also accused has cheated her. It appears that, the learned Magistrate has, after proper application of mind, recorded the satisfaction that there are sufficient grounds to proceed against the accused but only for an offence punishable under sections 338 and 418 of the Indian Penal Code and accordingly, process has been issued.

19. Being aggrieved by the said order, the petitioner filed Criminal Revision Application No. 151 of 2018 before the learned Additional Sessions Judge, Pune. The learned Additional Sessions Judge while rejecting the said Revision has considered the submissions of the petitioner so also respondent No.2. It would be gainful to reproduce hereinbelow paragraph Nos. 7 to 10 from the judgment of the Sessions Court, Pune:

"7] In this case it is admitted fact that the Complainant Mrs. Anusaya Kshirsagar, aged 75 Yrs. diabetic patient underwent right eye cataract surgery from this applicant in Asian Eye Hospital on 14/04/2016. After detailed examination and

after undergoing all tests, patient has chosen package of Rs. 50,000/- for implantation of toric lens for getting additional benefits of reducing cylindrical number. Admittedly that lens could not be implanted in her right eye after removal of cataract and she was advised to implant monofocal lens. The petitioner in her petition admitted that patient and her son repeatedly complaining about low vision or blindness. Complainant claims that she has taken second opinion in K.K.Eye Institute from doctor Nitant Shah and she was diagnosed with partial retinal detachment. She also taken another opinion from Eye hospital, Mohammadwadi, Hadapsar, Pune on 08/06/2016 where similar diagnosis was made and it was further told that even if her retinal detachment is restored, she could not get proper vision.

8] In this case, Complainant filed complaint with Deputy Director, Health Pune on 16/05/2017. Thereafter, committee of eye specialists was appointed. That committee gave its report dated 03/11/2017. That committee headed by Dr. Tatyrao Lahane opined that no negligence was committed by applicant (Dr.Kankariya) while performing surgery but post surgery patient was repeatedly making complaint but she was negligent in post operative care of complainant Smt. Anusaya. That report is signed by Jt. Director, Medical Education and Research, Head of the Department Ophthalmology, Grant Medical College, and Sir. J.J.Group of Hospital, Mumbai. During the course of argument, advocate for the applicant read only first part of that opinion regarding negligence while doing surgery. That expert opinion clearly goes against applicant.

9] In this case, due to negligence shown by applicant in taking care after operation Smt. Anusaya has lost her vision of right eye. Thus, she sustained grievous hurt within the meaning of section 320 of IPC. Section 338 of IPC deals with causing grievous hurt by doing act negligently endangering human life or personal safety of others. That offence is punishable upto imprisonment of either description for a term of two years. That section covers such kind of grievous hurt caused due to negligence of doctor while performing cataract operation. The opinion of expert committee prima facie shows the direct nexus between the hurt caused and the negligent act of the applicant. Section 338 will apply only where grievous hurt caused is the direct result of the negligent act and not a remote result of the act. In this case, due to negligence of applicant, Complainant has suffered a grievous hurt and it is not a remote result of that act.

10] In this case Complainant alleged that accused made false representation to Complainant and her son that her vision will be improved after operation. In spite of repeated complaints of Complainant, she continued her same line of treatment. She prevented the complainant from taking second opinion about surgery performed by her. She did not take any assistance of expert eye specialist. She did not make proper and prompt efforts upon complaints of patient about poor vision of operated eye. The knowledge of the applicant that she is likely to cause wrongful loss to her patient i.e. Complainant is essential element of section 418 of IPC and that is present in the case. Thus, she has

committed cheating with knowledge that wrongful loss may ensue to her patient whose interest she is bound to protect. That offence is punishable with imprisonment of either description for a term which may extend to three years. The allegations made in the complaint and the expert opinion prima facie constitute an offence under above stated both provisions. Therefore, while passing order Ld. Magistrate properly hold that the Complainant has made out offence punishable under sections 338 and 418 of IPC. In this case the applicant prima facie failed to prove that the Complainant made false allegations against her and those allegations do not make out any offence against her. Therefore, I hold that in this application the applicant failed to prove that Ld. Magistrate has issued the process without sufficient reasons".

20. At this stage, I deem it appropriate to reproduce hereinbelow paragraph Nos. 48 to 51 from the reported judgment in the case of Jacob Mathew (supra), which reads as under :

"Conclusions summed up

48. We sum up our conclusions as under:-

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

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence

arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

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

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

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

(6) The word "gross" has not been used in Section 304-A 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 304-A IPC has to be read as qualified by the word "grossly".

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

49. 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 re-affirm 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).

Guidelines - Re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

51. 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."

21. Clause (5) of paragraph 48 of the said judgment made it clear that, the jurisprudential concept of negligence differs in civil and criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist.

22. In paragraph No. 51 of the said judgment, the Supreme Court has observed that, 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.

23. In the present case, upon careful perusal of the averments made in the complaint, there is no scope for arguments that averments made in the complaint do not attract ingredients of an offence punishable under sections 338 and 418 of Indian Penal Code. The averments disclosed the alleged offences. In the present case, there are two expert reports, which are placed on record by respondent No.2 along with affidavit in reply. The report given by the District Committee on 23.11.2016 is reproduced herein below:

Date: 23/11/2016

"After going through available documents of Smt.Anusaya Guruba Kshirsagar Committee has reached to the following opinion on 23rd November 2016.

1. 1st surgery (Cataract extraction with IOL implantation) of Smt.Anusaya Guruba Kshirsagar done on 13th April 2016. Intra operative dialysis (presuming Zonular dialysis as which dialysis occurred was not mentioned in notes) was observed. Anterior Vitrectomy was performed and foldable Posterior chamber IOL implanted by Dr. Shrutika Kankariya at Asian Eye Hospital, Pune.
2. Post operatively antiglaucoma medication (combigan) was given.
3. 2nd surgery was done on 26th April 2016 by same surgeon Dr. Shrutika Kankariya in which Anterior chamber wash with IOL repositioning was done, indication for AC wash was not mentioned (for retained cortex or Hyphaema not clear)
4. On 12th May 2016 final spectacle prescription was given and at the same time pcotomy was mentioned in notes but date and details of this procedure was not mentioned by Dr. Shrutika Kankariya.

Conclusions

1. Post operatively patient was repeatedly C/o black spots in front of eye with unsatisfactory vision which indicates compromised quality of vision.
2. Non invasive investigations such as Fundus examination, B-Scan, OCT, ERG, VEP were not done post operatively to know the posterior segment status of the operated eye by Dr.Shrutika Kankariya at Asian Eye Hospital, Pune.
3. Vitreo retinal surgeon's opinion was not taken at any time by operating surgeon Dr. Shrutika Kankariya at Asian Eye Hospital, Pune.
4. Patient was not referred to Vitro Retinal Surgeon for expert opinion by Dr. Shrutika Kankariya.
5. Patient herself approached to the Vitreo retinal surgeon on 28th May 2016 at K.K. Eye Institute, Pune and diagnosed as RE Rhegmatogenous Retinal Detachment with Superior Horse Shoe tear and lattice degeneration, patient was advised RE Retinal Detachment Surgery (Cryo = C3 F8 . - . LA) by Vitreo Retinal

Suregon of K.K.Eye Institute, Pune.

6. Patient had taken 2nd opinion at H.V.Desai Eye Hospital, Mohammadwadi, Pune on 8th June 2016 and undergo RE Retinal detachment surgery on 15th June 2016 with explained visual prognosis. Her vision after Retinal Detachment surgery on 22nd June 2016 was - RE CF 2mts & near Vn <N 36 with Glasses her vision was -1.50 90 CF 3mts Near Vision 0.0 <N36.

7. The Final opinion of Vitreo Retinal surgeon Dr. Nitin Prabhudesai was taken on 5th October 2016 at Sassoon General Hospital, Pune and necessary investigations were done as per his advice.

Opinion of Vitreo Retinal surgeon is her RE VEP & ERG (Macula) are abnormal indicating poor optic nerve and macular function.

Sd/-

Dr.R.K. Shelke

President

Civil Surgeon

District Hospital, Pune

Sd/-

Dr.V.N.Sirsikar

Member

District Ophthalmic Surgeon & H.O.D.

District Hospital, Pune

Sd/-

Dr.S.V.Ambekar,

Member

Professor & H.O.D.

Ophthalmology Department

Sassoon General Hospital, Pune

Sd/-

Dr.Khalate

Member

Cl. I Physician & H.O.D.

District Hospital, Pune

Sd/-

Dr.B.N.Kakne

Member Secretary

Additional Civil Surgeon

District Hospital, Pune

24. The report given by Joint Director of Medical Education and Research Head of Dept., Ophthalmology, Grant Medical College & Sir J.J.Group of Hospital, Mumbai on 03.11.2017 is reproduced hereinbelow :-

"Joint Director

Medical Education & Research

Head of Dept. Ophthalmology

Grant Medical College &

Sir J.J. Group of Hospital,

Mumbai

Date: 03.11.2017

Expert Opinion

Smt. Anusaya Guruba Kshirsagar

After going through the documents and expert opinion of appointed committee my opinion is as following.

Smt.Anusaya was operated for cataract surgery by Dr.Shrutika Kankariya on 15th April 2016 at Asian Eye Hospital Pune.

Notes suggests there was dialysis and vitrectomy was done. This may be zonular dialysis. This can happen as complication in cataract surgery it requires vitrectomy which was done by the operating surgeon Dr. Shrutika Kankariya.

Because of zonular dialysis she could not complete her commitment of toric lens as it requires intact capsular bag. Not implanting toric IOL was scientific decision.

As vitrectomy was done, post operative combigan eye drop was also correct scientific decision.

26th April 2016 Dr.Shrutika did the anterior chamber wash with repositioning of lens. But in the note why it was needed is not mentioned. Smt. Anusaya was complaining black spot in front her eyes with unsatisfactory vision was not investigated by Shrutika Kankariya. Smt.Anusaya was given spectacle correction on 12th May 2016. She writes correction has improved vision of up to 6/6 (page 31).

Smt. Anusaya herself approached vitreo Retinal surgeon on 28th may 2016 at F.F. Institute and later Desai Hospital and both places she was diagnosed as Rhegmatogenous Retinal Detachment in her operated RE.

Her vision noted on 5th June is only Finger counting 3 meters. After retinal detachment surgery on 22nd June 2016 her vision was finger counting in meters.

Conclusions

- 1) Zonular dialysis and vitrectomy was known complication happened while doing cataract surgery.
- 2) Not implanting toric lens was scientific decision as bag was not intact.
- 3) Before doing second surgery she should have investigated the patient for posterior segment complications due to zonular dialysis and vitreous loss.
- 4) She should have taken second opinion of vitreo retinal surgeon before subjecting pt for second surgery.
- 5) Dr. Shrutika was negligent in post operative care and second opinion might have definitely helped in early diagnosis which would have save vision of anusayas RE.
- 6) She has also manipulated improvement in vision on 12th May 2016 while giving correction.
- 7) Dr. Shrutika was not negligent while performing surgery.
- 8) Dr. Shrutika was negligent in post operative care of smt Anusaya.

Sd/-

Joint Director

Medical Education & research

Head of Dept. Ophtalmology

Grant Medical College &

Sir J.J. Group of Hospital, Mumbai"

25. On conjoint reading of both the reports given by the medical experts, who are the members of the committees, it is specifically observed that the petitioner was negligent. Whether the said negligence was civil or criminal may be the matter for trial. However, upon careful perusal of the report submitted by committee consisting of five experts in field, after applying their mind to the facts of the case, concluded that, post operatively patient was repeatedly C/o black spots in front of eye with unsatisfactory vision which indicates compromised quality of vision so also non invasive investigations such as Fundus examination, B-Scan, OCT, ERG, VEP were not done post operatively to know the posterior segment status of the operated eye by Dr. Shrutika Kankariya at Asian

Eye Hospital, Pune. It is further concluded that vitreo retinal surgeon's opinion was not taken at any time by operating surgeon Dr. Shrutika Kankariya at Asian Eye Hospital, Pune.

26. Another committee has given expert opinion wherein it is stated that before doing second surgery, the petitioner should have investigated the patient for posterior segment complications due to zonular dialysis and vitreous loss so also she should have taken second opinion of vitreo retinal surgeon before subjecting pt for second surgery. It is further stated that the petitioner was negligent in post operative care and second opinion might have definitely helped in early diagnosis which would have save vision of anusayas RE.

27. Therefore, conjoint reading of the committees reports unequivocally indicate negligence on the part of the petitioner.

28. The Supreme Court in paragraph No.48 (7) of the judgment in the case of Jacob Mathew (supra), made it clear that, 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.

29. In the facts of the present case, the petitioner failed to take second opinion so also to take post surgery/ operation care and therefore, prima facie, the order of issuance of process invoking sections 338 and 418 of the Indian Penal Code cannot be said to be without any substance. It is not desirable to give elaborate reasons at this stage, suffice it to say that prima facie case is made out for issuance of process. The report of both committees, constituted in conformity with relevant procedure, cannot be brushed aside. At the stage of an issuance of process, what needs to be seen is an averment in the complaint so also verification statement and documents submitted by the complainant. As already observed in the present case, perusal of averments in complaint and verification statement would clearly attract an ingredient of alleged offences. An alleged offences are disclosed and therefore, the learned Magistrate has exercised the jurisdiction vested in him and has issued process after proper application of mind. The learned Sessions Court on close scrutiny of material on record confirmed the order passed by the learned Magistrate. The petitioner made serious attempt to put forth her defence by advancing arguments on merits and criticizing report of the two committees consisting of expert's in field without showing any legal or procedural infirmity in constitution of such expert's committees.

30. At this stage, neither the defence of the petitioner on merits nor her challenge to an expert committees findings deserves consideration, when this Court finds that the constitution of expert's committees was keeping in view relevant rules and procedure.

31. In the light of above discussion and in afore-going paragraphs, this Court is of the opinion that there is no substance in the petition. The petition is devoid of any merits. The observations made hereinabove are prima facie in nature and confined to the adjudication of the present petition.

32. Hence, petition stands rejected. Rule stands discharged.

33. At this stage, learned Counsel appearing for the petitioner prays for continuation of ad-interim relief, which was in force till date/till today, for further period of eight weeks. The prayer of continuation of ad-interim relief is vehemently opposed by the learned Counsel appearing for respondent No. 2. However, in the interest of justice, ad-interim relief, which is in force till today, to continue for further six weeks from the date of actual uploading the judgment on the official website of High Court, Bombay.