

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE**  
**FIR/ORDER) NO. 18663 of 2014**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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VINODKUMAR CHANDANLAL GAUTAM  
 Versus  
 STATE OF GUJARAT & 1 other(s)

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Appearance:

MR PRAVIN GONDALIYA(1974) for the Applicant(s) No. 1  
 MR ASHISH M DAGLI(2203) for the Respondent(s) No. 2  
 MR DHAWAN JAYSWAL, APP for the Respondent(s) No. 1

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**CORAM: HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

**Date : 07/12/2023**

**ORAL JUDGMENT**

1. This application is filed under Section 482 of the Code of Criminal Procedure, 1973 ('the Code' for short) for

the following prayers:

*“8(A) That this Hon’ble Court may be pleased to admit this Criminal Misc.Application;*

*(B) This Hon’ble Court may be pleased to allow this Criminal Misc.Application by quashing and setting aside the impugned FIR being CR No.I-46 of 2014 registered with Chandkheda Police Station for the offence punishable under sections 304A and 114 of IPC and further be pleased to quash and set aside the charge sheet filed in respect to the said FIR being Charge Sheet No.153 of 2014 and all other consequential proceedings arising out of the FIR being CR No.I-46 of 2014 read with Chandkheda police station in the interest of justice.*

*(C) Pending admission, hearing and final disposal of this petition, this Hon’ble court may be pleased to grant stay as to further proceedings of Criminal Case No.8488 of 2014 registered and pending before learned Chief Judicial Magistrate First-Class at Gandhinagar in the interest of justice.*

*(D) xxxxx”*

2. The brief facts leading to filing of this application, as stated in the application, are such that the impugned complaint came to be filed by the complainant alleging that his wife Varshaben aged about 57 years of age and suffering

from Asthma; that as she was having some pain on the left leg, she was taken to the applicant's hospital and it was diagnosed that due to spinal cord problem, there is a pain in the leg and she is required to be operated; that she was admitted in the hospital on 3.6.2013; that the complainant informed prior to the date of the operation about the bronchitis and asthma to the present applicant and anesthetist; that on 3.6.2013, at about 1.30 p.m., the wife of the complainant was taken to the operation theatre and at about 2 o' clock, the present applicant came and entered into operation theatre and after half an hour, he informed to the complainant and his son that the heart of the complainant's wife was stopped for 5 to 7 minutes and it was informed that by using pumping by hands, it started functioning; that she is required to be taken to the hospital having facility of ventilator and therefore at about 4 o' clock in the evening, she was taken to Indus hospital at Sabarmati, where the health of the wife of the complainant further deteriorated and therefore she was shifted to BAPS hospital, Shahibaug on 4.6.2013; and during the further treatment, the wife of the complainant expired on 9.6.2013; that they have provided all the papers of treatment of asthma to the present applicant and anesthetist doctor Dr.Abhay Shah and they looked into such papers; that prior to operation for spinal cord Pulmonary Function Test was required but it was not done

and the facility of ventilator is required to be kept ready while operation of such patient but such facility was also not made available; that at the time of operation Dr.Abhay Shah did not remain present and the same was not informed to the complainant by the present applicant; that at the place of anesthetist Dr.Abhay Shah, service of some another anesthetist was taken; that such important things were not informed and due to all these facts, negligence is committed by the applicant and therefore the wife of the complainant has expired. It is this complaint which is prayed to be quashed by way of this application.

3. Heard learned advocate Mr.Gondaliya for the applicant, learned advocate Mr.Dagli for respondent no.1 and learned APP Mr.Jayswal for respondent no.2.

4. Learned advocate Mr.Gondaliya for the applicant has submitted that :

(i) though the impugned complaint is filed under Sections 304A and 114 of Indian Penal Code ('IPC'), looking to the provision of Section 304A of the IPC, the applicant herein has not performed any rash or negligent act which would hold him liable for negligence;

(ii) that the patient was admitted in the hospital of the applicant for surgery of the spine and the anesthetist doctor viz. Dr.Abhay Shah, after considering the medical papers and bed side PFT reports of the patient opined that, the anesthesia can be administered to the patient and the operation can be performed, therefore, there is no negligence of the present applicant;

(iii) that upon the opinion of Dr.Abhay Shah for anesthesia, the anesthesia was given by Dr.Kalpesh Panchal, who is in the team of Dr.Abhay Shah; that after the anesthesia the problem was started and before the applicant does any surgery, the respiratory problem occurred and the patient was immediately shifted to another hospital, where ICU facility was available; therefore, the applicant was not liable for any negligent act;

(iv) that as per PM report, the cause of death is cardio respiratory arrest due to lung edema and not due to any complication of surgery as she suffered heart problem before the surgery and there are no surgery marks in PM report also as no surgery is performed; therefore there is no rash or negligent act which is alleged against the present applicant;

(v) that there is no any surgery performed by the applicant;

that the applicant is not liable for any decision or act of administration of anesthesia by anesthetist doctor;

(vi) that looking to the report of the committee, there is no opinion about any negligence which can be said to be a gross negligence or any negligence which entail criminal liability; on the contrary, as per the report, the anesthetist could have taken more care when the patient is suffering from asthma; that the anesthetist Dr.Abhay Shah has examined the patient and opined that the anesthesia can be administered and patient can be operated for spine surgery and the applicant has no role to play.

(vii) that the anesthesia machine is equipped with ventilators, and in many cases, they are capable of providing life sustaining mechanical ventilation to patients with respiratory failure and they are used for this purpose every day in the operating room; that the allegation of not having facility of ventilator is not true and correct; that when the patient was found with some problem after anesthesia, immediately the complainant was informed and cardiologist Dr.Kamlesh Chaudhary was called for, who visited the hospital and advised for admission in the hospital where ICU facility is available and therefore the patient was shifted to Indus hospital immediately on 3.6.2013 from where they took

discharge against medical advice and admitted in BAPS hospital where on 9.6.2023, the patient expired; that there is no negligence on the part of the present applicant;

(viii) that there is no mens rea or culpable negligence which could attract the penal provisions; as there is no allegation that, due to surgery or operation the patient died; and therefore the applicant cannot be held liable for act of the anesthetist and there cannot be vicarious liability in criminal law.

(ix) that the complainant failed to even prove the tortuous liability before the consumer forum as the complaint no. 18 of 2015 came to be dismissed by the learned CDRC, Gandhinagar.

5. In support of his submissions, learned advocate Mr.Gondaliya has relied on the following judgments passed by the Hon'ble Apex Court as well as this Court:

(1) Suresh Gupta V/s Government of NCT, Delhi reported in (2004)6 SCC 422.

(2) Jacob Mathew V/s State of Punjab and Another reported in (2005)6 SCC 1.

(3) Malay Kumar Ganguly V/s Sukumar Mukherjee reported

in AIR 2010 SC 1162.

(4) A.S.V.Narayanan Rao V/s Ratnamala and Another, reported in (2013)10 SCC 741.

(5) Salil Sudheer Patil V/s State of Gujarat passed in Cr.M.A.No.15926 of 2018.

(6) Vinod Jain V/s Santokba Durlabhji Memorial Hospital and anr. Reported in AIR 2019 SC 1143.

(7) Kurban Hussein Mohamedalli Bangawalla V/s State of Maharashtra reported in AIR 1965 SC 1616.

(8) Suleman Rahiman Mulani V/s State of Maharashtra reported in AIR 1968 SC 829.

6. *Per contra*, learned advocate Mr.Dagli for the respondent no.2-complainant has submitted that

(i) it is not in dispute that the wife of the complainant was suffering from Asthama since last two and half years and treatment papers were also shown before the date of operation to the applicant-doctor;

(ii) that because of lack of proper care/precaution and also because of the negligent way of treating patient more particularly when such serious surgery was performed, no Pulmonary Function Test (PFTS) which is required to be conducted was not done;



(iii) that there is likelihood of acute shock during operation and for any urgency, the ventilator is also virtually must, x-ray needs to be taken and other required parameters to be fulfilled as pre-operative care which has not been done;

(iii). Referring to Section 304A of the IPC, which section is invoked in the impugned complaint, learned advocate Mr.Dagli submitted that the case was referred to the panel of doctor consisting of dean of medical facility of BGMC and civil hospital, head of orthopedic BGMC and chief head of orthopedic division unit head of pulmonary medicine, professor of pulmonary department, head of anesthesia, forensic medicine and also forensic medicine department from civil hospital, Ahmedabad and opinion in detail has been given on 9.3.2014; joint inspection report was called for by the committee which shows that preoperative detail investigation like x-ray test pre operative physician and anesthetic reference and pulmonary function test are basic requirements. On 7.4.2014 also, the committee has recorded at page no.100 that x-ray test and pre operative operation is not done and therefore the applicant was negligent.

(iv) That the wife of the complainant was high risk patient and there was a serious issue about breathing and

pulmonary function test which was done on 23.9.2012 whereas operation was performed on 3.6.2013 as recorded on page number 105 of the report of the panel and it is also specifically referred that looking to the serious condition of the patient about breathing and last report of the pulmonary function i.e. lungs report of pulmonologist on 23.8.2012, which shows moderate restrictive and severe obstructive disease and before the day of operation, no physician nor pulmonologist opinion or fresh x-ray test or PFT was performed and therefore doctor is negligent as specifically stated in the report which is signed by nine doctors of the panel who are expert in the field.

(v) That the applicant was in knowledge of the fact that the patient is steroid dependent and suffering from asthma since last 2.5 years and she is high risk patient and therefore all precautions are required to be taken which are basic requirement and the same is not taken in the present case.

7. In support of his submissions, learned advocate Mr.Dagli has relied on the following citations:

(1) Dr.Goli Venkata Subba Rao V/s State of A.P. & Anr., reported in 2006(0) Supreme (AP) 1037.

(2) Dr.Rakesh Kumar V/s The State of Jharkhand  
2016(0) CrI.J.1561

(3) B.Jagdish & Another V/s State of A.P. & Another  
reported in 2009(1) SCC 681

(4) Pankaj Ravjibhai Patel V/s State of Gujarat being  
Criminal Misc.Application No.16460 of 2017 dated 31.8.2023.

He, therefore, prays to dismiss this application.

8. I have heard learned advocates for the parties and also considered the material placed on record.

9. It transpires that the patient Varshaben was aged about 57 years of age at the time of incident. The present applicant is spinal surgeon who called anesthetist Dr.Abhay Shah, surgery was fixed on 3.6.2013 and the patient was admitted on 2.6.2013, the patient was taken into operation theatre at about 2 o' clock and thereafter after half an hour, the doctor came out of operation theatre and informed the complainant and his son that there is some complication due to anesthesia given to the patient and therefore the patient is required to be shifted to the nearby hospital whereby facility of ICU is available and accordingly patient was immediately shifted to the nearby hospital; thereafter, after a period of almost six days, during the treatment at the BAPs

hospital, Shahibaug, Varshaben unfortunately expired on 9.6.2013 and therefore the complaint is filed under the provisions of Section 304A and 114 of Indian Penal Code against the present applicant as well as the anesthetist doctor on 2.3.2014 for the incident has occurred on 9.6.2013. Therefore, there is a delay of about 8-9 months in filing such complaint which is not explained in the complaint anywhere and such unexplained and inordinate delay is normally fatal to the case of the prosecution.

10. Moreover, it is also interesting aspect to be kept in mind that the complainant has filed consumer complaint before the Consumer Forum whereby the Consumer Forum, Gandhinagar has dismissed the Complaint no.18 of 2015 by order dated 3.3.2021 after considering various judgments and by giving detailed reasons on the aspect of the negligence in medical science. However, it is informed by the learned advocate for the complainant that the order of Consumer Forum is challenged before the Consumer Commission by way of appeal and appeal is still pending for further consideration.

11. Keeping all these aspects in mind, if we consider the factual aspects of the matter, as transpired from the record, they can be summarized as follows:

(i) that the present applicant is orthopaedic surgeon and is supposed to perform the surgery on the patient Varshaben on the date and accordingly he has planned the surgery and when the patient was taken into operation theatre, anesthesia was given at that point of time and as patient Varshaben was having prior history of asthma, she developed complication and therefore the applicant as well as anesthetist has tried to give cardio vascular massage to the patient and thereafter informed the complainant and his son to shift the patient to the nearby hospital for proper treatment as the patient has developed some complication at the time of administering anesthesia.

(ii) that the anesthetist doctor viz. Dr.Abhay Shah, after considering the medical treatment given by the physician to the patient and medical papers and also performing bed side PFT report of the patient opined that the anesthesia can be administered to the patient and operation can be performed. Therefore, on the opinion given by the anesthetist, such surgery is decided to be performed accordingly.

(iii) that on the opinion of Dr.Shah for anesthesia, the anesthesia was given by Dr.Kalpesh Panchal who is in the team of Dr.Abhay Shah; that after giving dose of anesthesia, the problem had started with the patient and that before the

present applicant who is surgeon could perform any surgery, the respiratory problem occurred and patient was immediately shifted to another hospital where the ICU facility was also available, after taking the consent of the relatives of the patient, more particularly, the complainant. As per the post-mortem report, the cause of death is cardio respiratory arrest due to lung edema and not due to any complication of surgery. No surgery marks are also found in the post-mortem report as no surgery is performed by the present applicant and prior to performance of such surgery, such complication is developed with the patient.

(iv) that thereafter the committee of expert doctors was formed as per the direction of the Hon'ble Apex Court in the judgment of Jacob Mathew and thereafter the policy was framed by the government in such cases whereby also, the committee has not found involvement of the present applicant by performing any surgery and has not found any gross negligence which attracts any criminal liability of the present applicant. The committee has found that the anesthetist could have taken more care as well as the present applicant who is consultant surgeon of the patient prior to performing the surgery as patient was suffering from asthma. But, in the present case, it transpires that Dr.Shah who is anesthetist has examined the patient and opined that the anesthesia can

be administered and patient can be operated for spine surgery and therefore for this aspect, the applicant has as such no role to play, moreover, considering the fact that the medical papers of the treatment regarding asthma was of the recent past i.e. about 15 days back which was also perused by the doctors as well as the anesthetist before deciding for performing surgery on that unfortunate day.

(v) that the anesthesia machine is also equipped with ventilators and such machines are used for this purpose every day for patient room and therefore when the patient was found with some problem due to administering of anesthesia, the present applicant has informed the complainant within few minutes and cardiologist Dr.Kamlesh Chauhan was called for who visited the hospital and advised admission in the hospital where ICU facility is there and therefore the patient was shifted to Indus hospital on 13.6.2013 from where the patient took discharge against medical advice and admitted in BAPS hospital where on 9.6.2013, the patient has expired. The guideline which is provided by the applicant along with the written statement for using anesthesia machines by the American Society of Anesthesiologist also indicates that such machines are equipped with ventilators facility.

12. In view of the above factual aspects and considering the judgments which are cited at the bar, prima facie, no mens rea or culpable negligence of the present applicant can be found which can attract the penal provisions against the present applicant. It is undisputed fact that there is no allegation that due to surgery or operation performed by the present applicant, the patient has died but the complication has occurred due to anesthesia administered to the patient. Therefore, at the best, there can be some negligence which can be attributed to the anesthetist but vicarious liability of the applicant cannot be fastened in the criminal law.

13. Considering all these aspects, I am prima facie of the opinion that the case is made out to exercise my powers under Section 482 of the Code as continuation of the present proceedings pursuant to the FIR will amount to abuse of process of law against the present applicant.

14. Now, the legal aspects and other relevant aspects are discussed hereinafter.

15. It is fruitful to refer to certain aspects involved in the facts of present case which are required to be considered accordingly.



*“The consequences of legally cognizable medical negligence can broadly be put into three categories:*

- (i) Criminal liability,*
- (ii) monetary liability, and*
- (iii) disciplinary action.*

*Criminal liability can be fastened pursuant to the provisions of the Indian Penal Code, 1860 (“IPC”), which are general in nature and do not provide specifically for “medical negligence.” For instance, Section 304A of IPC (which deals with the death of a person by any rash or negligent act and leads to imprisonment up to 2 years)*

*Civil liability, i.e., monetary compensation can be fastened under the general law by pursuing a remedy before appropriate civil court or consumer forums. An action seeking imposition of the civil liability on the erring medical professional is initiated by dependents of the deceased patient or by the patient himself (if alive) to seek compensation. Doors of permanent lok adalats, constituted pursuant to the Legal Services Authority Act, 1987, can also be knocked at by a complainant seeking relief in the relation to services “in a hospital or dispensary” which are considered to be “public utility services” within the meaning thereof, wherein first a conciliation is attempted and thereafter determination on merits of the matter is made*

*Professional misconduct by medical practitioners is governed by the Indian Medical Council (IMC) (Professional Conduct, Etiquette, and Ethics) Regulations, 2002, made under IMC Act, 1956. Medical Council of India (MCI) and the appropriate State Medical Councils are empowered to take disciplinary action whereby the name of the practitioner could be removed forever or be suspended. Professional misconduct is, however, a broad term which may or may not include medical negligence within its fold. For instance, in the context of lawyers, it is not only a professional misconduct but other misconduct also which may lead to imposition of disciplinary penalties, for example, violation of prohibition on liquor under Bombay Prohibition Act, 1949, by the advocate; and perhaps a corollary may be extended for cases of medical negligence by medical professionals.*

**Treatment without informed consent may also amount to negligence**

*The existence of doctor–patient relationship is a prerequisite to fasten liability on the doctor. The relationship is fiduciary in nature, and the obligation on the medical practitioner is greater when the patient ordinarily has an imprecise understanding of the ailment, diagnostic process, treatment, and all its attendant consequences. Duty to act in the best interest, however, cannot be stretched to a level where actions are taken against the will of the patient or without*

*the consent of the patient if the patient is capable of understanding. Every patient has a right of self-determination and to reject the treatment even if such rejection were to be considered foolish by most rationale standards, and the medical professional cannot impose his will. Medical practitioners can, however, act on the substituted consent, if the primary consent is not available for a variety of reasons such as patient being a minor, mentally unsound, and unconscious.*

### **Error of judgment**

*A doctor is not necessarily liable in all cases where a patient has suffered an injury. This may either be due to the fact that he has a valid defense or that he has not breached the duty of care. Error of judgment can either be a mere error of judgment or error of judgment due to negligence. Only in the case of the former, it has been recognized by the courts as not being a breach of the duty of care. It can be described as the recognition in law of the human fallibility in all spheres of life. A mere error of judgment occurs when a doctor makes a decision that turns out to be wrong. It is situation in which only in retrospect can we say there was an error. At the time when the decision was made, it did not seem wrong. If, however, due consideration of all the factors was not taken, then it would amount to an error of judgment due to negligence.*

16. Now, considering the various judgments cited at the bar, the judgments in the cases in case of *Martin F D'Souza V/s Mohd.Ishfaq* reported in 2009(3) SCC 1 and in the case of *Kusum Sharma And Others V/s Batra Hospital and Medical Research Centre and Others*, reported in 2010(3) SCC 480, more particularly, the judgment of *Jacob Mathew (supra)*, the doctors and nurses respectively who are professionals cannot be fastened with 'negligence' under the criminal law because the degree of negligence was not high enough or in fact there was not any negligence on their part so as to foist charges under Sections 304A and 114 of the IPC.

17. Paragraph 48 of the judgment of *Jacob Mathew (supra)* is reproduced as under:

*"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 and 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 WLR 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.*

*(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'.*

*(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.”*

18. It is also relevant to discuss some of the judgments and law relating to medical negligence which is

also under:

*“Law relating to medical negligence:*

1. *The applicant herein being a qualified doctor is facing the charge of medical negligence as provided under Section 304A of the Indian Penal Code. It is necessary to reproduce Section 304A of the Indian Penal Code which reads thus:*

*“Section 304A.Causing death by negligence.--  
Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

2. *A bare perusal of the provision says that, a person causes the death of another by such acts as are rash or negligent, but there is no intention to cause death and no knowledge, the act will cause death shall be punished with the imprisonment as prescribed.*
3. *In the case of Malay Kumar Ganguly vs. Sukumar Mukherjee reported in (2009) 9 SCC 221, the Apex Court while dealing with the case of medical negligence, prescribed three criteria to prove negligence under the criminal law*



*and held that, in order to prove negligence, the prosecution must prove (i) the existence of duty; (ii) a breach of the duty causing death and (iii) the breach of the duty must be characterized as gross negligence. The Apex Court further held that, what is or is not negligence involves a consideration of what which reasonable man would or would not have done in these circumstances. For negligence, to amount an offence, the element of mensrea must be shown to exist. A negligence which is not such high degree may provide a ground for action in civil law, but cannot form basis of prosecution. The criteria to prosecute a medical professional for which in the given facts and circumstances, require to be proved that, no medical professional in his ordinary senses and prudence would have done or failed to do so.*

4. *In the case of **Dr. Suresh Gupta vs. Government of NCT of Delhi & Anr.**, reported in **AIR (2004) SC 4091**, the Supreme Court observed that, for fixing liability on a Doctor or a Surgeon, the stand of negligence require to be proved should be so high as can be described “gross negligence”. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence, enough to fasten liability in civil law.*
5. *In the case of **P.B. Desai vs. State of Maharashtra**, reported in **AIR (2014) SC 795**, the Apex Court examined the term*

*negligence so far medical professionals are concerned and held that, where negligence is an essential ingredients of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. 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 deliberate willingness to subject others to the risk of harm. The 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.*

6. *While deciding whether the medical professional is guilty of medical negligence, the Apex Court in the case of **Kusum Sharma and others vs. Batra Hospital and Medical Research Centre and others**, reported in **AIR (2010) SC 1050**, laid down following principles namely:*

*“I. Negligence is the breach of a duty exercised 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.*

*II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.*

*III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.*

*IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.*

*V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.*

*VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher*

*chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.*

*VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.*

*VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.*

*IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.*

*X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the*

*medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.*

*XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.”*

7. *In the case of **Bombay Hospital and Medical Research Centre vs. Asha Jayswal**, reported in (2021) 0 AIJEL-SC 68074, the Supreme Court while dealing with the civil appeal against the order of the National Consumer Forum examine the scope of medical negligence and after considering the celebrated judgment reported as **Jacob Mathew (supra)**, held that, simple lack of care, an error of judgment or an accident is not proof of negligence on the part of the medical professional. It is further held by the Supreme Court that, in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that, the medical professional was negligent.*

8. *Recently, in the case of **Dr. (MRS.) Chanda Rani Akhouri***

*&Ors. vs. Dr. M.A. Methusethupathi & Ors., reported in (2022 LiveLaw (SC) 391), the Apex Court in para-31 while examining the medical negligence of the hospital and its doctors, observed that, the doctors as expected to take reasonable care, but no professional can assure that the patient will come back home after overcoming the crisis. In para-27, it is observed that, a medical practitioner is not to be held liable simply things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable cause of treatment in preference to another. In the practice of medicine, there could be varying approaches of treatment. There could be a genuine difference of opinion. However, while adopting a course of treatment, the duty cast upon the medical practitioner is that, he must ensure that medical protocol being followed by him is to the best of his skill and with competence at his command. At the given time, a medical practitioner would be liable only where his conduct fell below that of the standards of reasonably competent practitioner in his field.*

19. Considering the judgments referred to above, the case of the present applicant is required to be considered for quashing of the FIR as no criminal liability can be fastened against the professional, more particularly, when the present applicant has not performed any operation or surgery. At the best, he could have taken extra care by keeping some

physician present at the time of surgery as patient was having history of asthma but when the complication was developed after administration of anesthesia and as some respiratory complication developed, it transpires that the applicant has immediately called physician/cardiologist Dr.Kamlesh Chauhan for attending patient and even otherwise, before such surgery, it transpires that either the physician and anesthetist has to make necessary inquiries with the said patient and after giving opinion either by the anesthetist or physician, such surgery can be performed and in the present case, the anesthetist has already given opinion with a view to perform surgery.

20. One more aspect which is required to be considered for quashing of the impugned complaint is that the complaint is filed after delay of eight months and now the Hon'ble Apex Court has held in number of judgments, that such delay is required to be explained which is not done in the present case and therefore on that count also, the complaint is required to be quashed and the present petition is required to be considered.

21. In the judgment of *Inder Mohan Goswami and Another versus State of Uttaranchal* reported in (2007) 12 SCC 1, more particularly para : 23 & 24 thereof, which read

as under :

*“23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Sec. 482 CrPC. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Sec. 482 CrPC can be exercised:*

*[(i) to give effect to an order under the Code;]*

*[(ii) to prevent abuse of the process of court, and]*

*[(iii) to otherwise secure the ends of justice.]*

*24. Inherent powers under Sec. 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific*



*provisions in the statute. Discussion of decided cases.”*

22. Considering the overall aspects, factual and legal, as discussed hereinabove, and more particularly, considering the fact that the present applicant has not committed any gross negligence or any criminality can be attributed to the present applicant who has admittedly not performed any surgery and such complication has occurred prior to performance of such surgery, I am of the opinion that the present application is required to be allowed by exercising powers under Section 482 of the Code.

23. Accordingly, this application is allowed. The impugned complaint being CR No.I-46 of 2014 registered with Chandkheda Police Station for the offence punishable under sections 304A and 114 of IPC and the charge sheet filed in respect to the said FIR being Charge Sheet No.153 of 2014 and all other consequential proceedings arising out of the FIR being CR No.I-46 of 2014 read with Chandkheda police station are hereby quashed and set aside qua the applicant. Rule is made absolute. Direct service is permitted.

**(SANDEEP N. BHATT,J)**

SRILATHA