

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**  
**AT JAMMU**

OWP No.214/2015

Reserved on : 19.12.2022  
Pronounced on : 26.12.2022

Poonam Sharma and others

...Petitioner(s)

Through:- Mr. Ashok Sharma, Advocate

V/s

State of J&K and others

...Respondent(s)

Through:-Mr. Amit Gupta, AAG for R-1 to 3  
Ms. Monika Kohli, Sr. AAG for R-4 to 7  
Mr. D.S.Chauhan, Advocate with  
Ms. Damini Chauhan, Advocate

**Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE**

**JUDGMENT**

1. Through the medium of present writ petition, the petitioners besides seeking direction to the respondents to pay compensation to the tune of Rs.20.00 lacs to them against the death of Sh. Jai Kumar S/o Rajinder Parkash, who died due to negligence of respondent No.8, seek issuance of a writ of mandamus directing respondent Nos. 4 to 7 to register a case and investigate the matter and arrest respondent No.8 for his criminal negligence causing death of deceased Jai Kumar.

2. The facts leading to the filing of present petition, as projected by the petitioners in the writ petition, are that the husband of petitioner No.1, father of petitioner No.2 and son of petitioner Nos. 3 and 4, namely Jai Kumar was detected with Gallbladder stone and was admitted to

Government Hospital Sarwal on 09.01.2013. On 10<sup>th</sup> January, 2013, said Jai Kumar was operated upon for removal of stone by laser procedure by respondent No.8, who was then posted as Consultant Surgery in Sub District Government Hospital, Sarwal. According to the petitioners, while conducting surgery, respondent No.8 cut the CBD (**Common bile duct**) of the deceased Jai Kumar, which was not required. This resulted in serious problem to said Jai Kumar. On 19.01.2013, said Jai Kumar was referred by respondent No.8 to Medical College Hospital, Jammu where he was admitted in Emergency. During hospitalization in Government Medical College, Jammu, said Jai Kumar remained under the treatment of Dr. Sanjay Gupta and various tests were conducted. On 22.01.2013, deceased Jai Kumar was discharged from Government Medical College, Jammu and as per the petitioners, Dr. Sanjay Gupta, who was attending the deceased, advised to go to a private Nursing Home being run by Dr. Anil Singh at Pathankote on the pretext that the laparoscopic system in the Government Medical College was not functioning properly.

3. The deceased was taken home and the family members of the deceased consulted Dr. Manoj, who was posted in Government Hospital at Gandhi Nagar, Jammu, who advised to get the said Jai Kumar admitted in Government Hospital, Gandhi Nagar, Jammu for further tests and treatment. Said Jai kumar remained admitted in Government Hospital, Gandhi Nagar w.e.f. 23.01.2013 to 11.02.2013 and thereafter discharged from hospital. On 14.02.2013, said Jai Kumar died at home. According to the petitioners, deceased Jai Kumar died because of criminal negligence of

respondent No.8 and accordingly, the matter was reported to Police but no action was taken. Thereafter a complaint was filed before the learned Chief Judicial Magistrate, Jammu, who directed the Station House Officer, Police Station, Bakshi Nagar to investigate the matter in light of the guidelines laid down in AIR 2005 SC 3180. Thereafter an application came to be filed before the Chief Judicial Magistrate, Jammu seeking a direction to the SHO to file status report. Even application for initiating contempt proceedings against the SHO was filed but all in vain. All this compelled the petitioners to approach this Court to seek necessary action against respondent No.8 as also to seek a direction to the respondents to pay compensation to the petitioners for losing bread earner of their life due to the negligence of respondent No.8, who was working under the control of Government of J&K.

4. On being put on notice, respondent Nos.1 to 3 have filed their reply. Respondent No.8 also filed his objections. It is submitted by respondent Nos. 1 to 3 that on the request of Medical Superintendent, Government Hospital, Sarwal, Jammu vide letter No.SHJ/1871 dated 16.02.2013 to conduct an independent enquiry into alleged negligence during operation on 10.01.2013 by respondent No.8 and subsequent death of the deceased Jai Kumar on 14.02.2013, an Inquiry Committee was constituted by respondent No.2 vide order No.DHSJ/5100/3762-68 dated 01.03.2013. The Inquiry Committee after going through the all available records as well as after recording the statements of various functionaries. The report of the Inquiry Committee reads thus:-

- “1. *Sh. Jai Kumar S/o Sh. Rajinder Parshad was admitted in Govt. Hospital Sarwal Jammu as Jai Kumar S/o Inder Parkash (wrongly written) R/o Sarwal 35 years old under MRD No.7647 on 29.11.2012 as a case of Cholelithiasis under Dr. Shyam Kumar Gupta Consultant Surgeon for Lap Cholecystectomy.*
2. *All the routine and specific investigations required for conducting Lap Cholecystectomy under General Anaesthesia stands conducted.*
3. *Pre anesthesia check up was also conducted.*
4. *The patient was operated for Lap Cholecystectomy on 10-1-2013 along with two more patients who had been listed for surgery by Dr. Shyam Kumar Gupta on that day.*
5. *On 1<sup>st</sup> post operative day the patient was progressing well and was allowed oral soft diet.*
6. *On 3<sup>rd</sup> post operative day bilious discharge was noticed in the drain which depicts that some injury to the common bile duct has been caused and the treatment for controlling sepsis with antibiotics was continued.*
7. *As per the available reports on 5<sup>th</sup> post operative day the patient was subjected to the Ultrasonic examination also which revealed minimal free fluid in the abdomen and no significant organized fluid collection was seen. The blood reports were also significantly normal.*
8. *Since the patient did not show any improvement, the patient was referred to Govt. Medical College, Hospital Jammu a Tertiary care Centre.*
9. *The patient was admitted in Govt. Medical College Hospital, Jammu on 19-1-2013 under MRD No.648879 in surgical unit VI headed by Dr. Suleman Choudhary as a case of controlled drain fistula. The treatment procedure conducted in the Govt. Medical College Hospital, Jammu can't be commented upon as the patient absconded from Govt. Medical College Hospital on 23-1-2013 along with hospital file and all the medical records as reported by Dr. Anchal Kotwal, Registrar of the unit through the Head Department of Surgery and Medical Record Officer, Govt. Medical College Hospital, Jammu.*
10. *On 23-1-2013 the said patient got himself admitted in Govt. Hospital Gandhi Nagar, Jammu under MRD No.5589 under the supervision of*

*Dr. Manoj Gupta Gastro Intestinal Surgeon as a case of Viliary Fistula (Post Lap Cholecystectomy) in Ward No.2.*

11. *As per the ERCP report dated 19-1-2013 there was a complete cut off of the CBD and the MRCP of the patient was inconclusive.*
12. *Ultra Sound examination dated 23-1-2013 revealed free fluid in perihepatic region and minimal interloop fluid.*
13. *Patient was put on Anticiotics besides other palliative therapy to control the sepsis.*
14. *High Risk exploratory Laprotomy of the patient was done on 28-1-2013 at 10.00 PM in the hospital by Dr. Manoj Gupta which revealed bile in the peritoneal cavity with multiple adhesions and pus flakes as the patient had gone in shock and the drain was blocked and the patient had to be revived prior to surgery.*
15. *The patient was discharged from the hospital on 11-2-2013 as the condition of the patient was haemodynamically stable, tolerating orals, passing flatus and stools and afebrile.*
16. *The patient was asked to have regular follow-up in the OPD for deciding about the definitive repairs of the injury in due course of time after the closure of Biliary fistula which is a normal protocol in the patients with CBD injury.*
17. *The definitive treatment protocol for the CBD injury was also enquired from Dr. Manoj Gupta, Gastro Intestinal Surgeon who is authority on the subject and has also pointed out that the incidence of bgiliary injuries following laparoscopic cholecystectomy is 0.4-0.7% (Krahenbuhi etal world J Surg 2001;25.1325-1330, Fletcher Dr. Etal Ann Surg 1999: 229:449-457, Windsor JA ak Aust NZ J surg 1998:68 186-189)*
18. *The patient expired on 14-2-2013 at his residence.*

### **Opinion**

*From the perusal of records from Govt. Hospital Sarwal, Govt. Medical College Hospital, Jammu, Govt. hospital Gandhi Nagar, Jammu, the reply submitted by Dr. Shyam Kumar Gupta, who is a trained*

*laparoscopic Surgeon who has sufficient experience in the conducting laparoscopic surgery the CBD may have been injured during surgery which do happens in the best centres of the world also. Since there were lot of adhesions of omentum around calot's triangle, the injury to the CBD can happen. The doctor tried to manage the patient as per standard protocols of the CBD injury in his set up but once it was found that things are beyond his control he shifted the patient to Govt. Medical College Hospital, Jammu a tertiary care hospital. Further after the patient absconded from Govt. Medical College Hospital, Jammu he was treated by a trained GI Surgeon at Govt. Hospital Gandhi Nagar, Jammu & after treatment the patient was discharged on 11-2-2013 from the hospital in satisfactory condition. After four days the patient died at his residence, the cause of which could not be ascertained as no postmortem has been conducted which could have revealed the cause of death. However in the opinion of the committee though the CBD was injured by Dr. Shyam Kumar Gupta while conducting Lap Cholecystectomy which is a known complication in complicated cases, no negligence seems to have been done as the doctor has taken due pre operative and post operative case and followed the standard protocols of treatment for saving the life of the patient."*

5. Respondent No.8 has also filed his objections, contending that the writ petition is based on false, frivolous, incorrect, vexatious and concocted facts and propositions of law, as such, may be dismissed with exemplary costs. It is contended that besides the Inquiry Committee constituted by respondent No.2, which has found no negligence on part of respondent No.8 while conducting laparoscopic procedure on the deceased, a Special Medical Board of expert doctors was also constituted for giving opinion to ascertain the reasons for cause of death of deceased Jai Kumar. The Special Medical Board after going through the history and relevant material reported that ***"there was no negligence on part of respondent No.8 and since no post-mortem/autopsy was done, so it is difficult to ascertain the***

*reason for cause of death of Jai Kumar, who died at home on 14.02.2013 some 34 days after he was operated in Govt. Hospital Sarwal on 10.01.2013*". An FIR bearing FIR No.60/2017 was also registered with Police Station, Bakshi Nagar Jammu against respondent No.8 for offence under Section 304-A RPC. It is submitted that as against the order passed by the Chief Judicial Magistrate, Jammu dated 24.04.2017 in File No.Nil/Misc.dated 17.03.2013 titled Rajinder Parkash v. Dr. Shyam Kumar Gupta and FIR No.60/2017, respondent No.8 has preferred a petition 561-A No.625/2017. This Court vide judgment dated 26.12.2017 allowed 561-A No.625/2017 and the FIR No.60/2017 registered at Police Station, Bakshi Nagar and all the proceedings emanating therefrom have been quashed.

6. Heard learned counsel for the parties and perused the material on record.

7. Insofar as relief of compensation sought for by petitioners is concerned, the same is dependent upon the proof of negligence on part of respondent No.8 in causing death of deceased Jai Kumar.

8. In order to ascertain whether there was any medical negligence on the part of respondent No.8 during treatment/operation of Sh. Jai Kumar on 10.01.2013 in Govt. Hospital Sarwal, Jammu, an Inquiry Committee comprising of Dr. Ramesh Gupta, Medical Superintendent, Govt. Hospital Gandhi Nagar, Jammu (chairman), Dr. Anoop Singh Manhas, State Veneriologist, DHS, Jammu (Member) and Dr. Rakesh Gupta, Consultant Govt. Hospital, Gandhi Nagar, Jammu (member) was constituted by

respondent No.2 vide order dated 16.02.2013. The Inquiry Committee submitted its report on 09.03.2013. The Inquiry Committee while giving complete history of the case, opined that the patient was managed as per the standard protocol and no negligence on the part of the treating doctor was found by them. Another enquiry conducted by the Special Medical Board constituted to ascertain the cause of death of deceased Jai Kumar revealed that *“the patient was discharged from Gandhi Nagar Hosptial on 11.02.2013 when he was haemodynamically stable, tolerating orally, afebrile, passing flauts and stools which shows his bowels were functioning normally. After 11.02.2013 no record was available and also no post-mortem has been conducted, so it is difficult to ascertain the reason for cause of death of the deceased.”*

9. The operative portion of the judgment dated 26.12.2017 passed in 561-A No.625/2017 reads as under:-

*“21. Reverting back to the facts of the petition before me, pursuant to the complaint before the Director of Health Department, the Director of Health Services, Jammu constituted an enquiry Committee comprising of three senior doctors who examined the case of the deceased in compliance with the mandate of the guidelines laid down by the Supreme Court. The Committee of the Experts, which comprised of three Heads of the Departments of Surgery including the Medical Superintendent, State Veneriologist and Consultant Surgeon, after giving a complete background of the case, opined that the patient was managed as per the standard protocol mentioned in the literature. No negligence on the part of the treating Doctors, who was involved in the management of the case, was found by them. The other enquiry revealed that the patient was discharged from Gandhi Nagar hospital on 11.02.2013 when he was*



*haemodynamically stable, tolerating orally, afebrile, passing flauts and stools, which shows his bowels were functioning normally. Discharge Report of G.N. Hospital annexure 'C'. There are no records available after 11.02.2013 and also no post-mortem autopsy has been done, so it is difficult to ascertain the reason for cause of death of Sh. Jai Kumar who died at home on 14.02.2013, some 34 days after he was operated in Govt. Hospital, Sarwal on 10.01.2013. On the face of these reports of the team of Experts, constituted on the subject on which they alone could delve, that is whether the act attributed to the doctor, did or did not, constitute gross negligence on his part, the proceedings initiated against the petitioner on the basis of FIR No. 60/2017 registered against him at Police Station Bakshi Nagar, Jammu, cannot survive. The surgery having been conducted and the deceased having been referred to Government Medical College, Jammu, and thereafter he having been operated again at Gandhi Nagar, hospital, whereafter he was discharged from there on 11.02.2013 in a condition which has been termed to be stable how can the case of the petitioner be brought within the range of medical negligence. No post mortem of the deceased has been conducted to ascertain the cause of his death as can be seen from the enquiry report which is second in point of time. The deceased died after a period of four days from the date he was discharged from Gandhi Nagar, hospital and after a gap of more than a month from the date he was operated by the petitioner. The report of the doctor relied upon by the Court below pales into insignificance when tested on the parameters of the reports laid down by the Board of Doctors on two occasions. Lack of necessary care, attention or skill in treating the patient, has been completely ruled out by the Committee of the Experts.*

23. Viewed in the context of what has been said and done above, the petition No. 625/2017 under [Section 561-A](#) of the Code of Criminal Procedure filed by the petitioner, Dr. Shyam Kumar Gupta, is allowed on the analogy of the law cited above, as a sequel to which, the FIR bearing FIR No. 60 of the year 2017 registered against the petitioner at Police Station, Bakshi Nagar, Jammu and all the proceedings emanating therefrom are quashed.”

10. The question as to how and by which principle, negligence of a professional doctor is to be decided and hold him liable for his medical acts/advice is no longer *res integra* and settled long back by series of English Decisions as well as decision of the Supreme Court. The classic exposition of law on this subject is first laid down in a decision of Queens Bench in a leading case of **Bolam vs. Friern Hospital Management Committee [1957]1WLR 582**. McNair J., in his opinion, explained the law in the following words:

*“.....Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”*

11. The aforesaid principle of law was reiterated and explained by **Bingham L.J. in his speech in Eckersley vs. Binnie (1988) 18 Con LR 1(CA)** in the following words:

*“From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He*

*should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.”*

12. Hon’ble the Supreme Court in the case of **Jacob Mathew v. State of Punjab and another, (2005) 6 SCC 1** in paragraph No.18 defines negligence by professionals. Para 18 of the aforesaid judgment is reproduced hereunder:-

*“18.In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what*

*the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd., [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid, Para 8.03)*

13. Further in paragraph Nos. 25, 26, 28, 48, of the Jacob Mathew (supra) has observed as follows:-

“25.....At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. 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. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person incharge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional

negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of *res ipsa loquitur*.

27. ....

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

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.....

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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, 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.”

14. In the case of Jacob Mathew (supra), the Supreme Court has issued certain guidelines which are reproduced hereunder:-

“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 rash or negligent act within the domain of criminal law under [Section 304-A](#) of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

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.

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

15. The Supreme Court in the case of *Martina F. D Souza v. Mohd. Ishfaq*, (2009) 3 SCC 1, noticed the aforesaid guidelines with approval. Para 29 of the judgment is relevant and is reproduced as under:-

*“29. Before dealing with these principles two things have to be kept in mind : (1) Judges are not experts in medical*



*science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.”*

16. It is apparent that after considering and appreciating the two inquiry reports, this Court has allowed the petition filed by respondent No.8 challenging the FIR No.60/2017 and further proceedings emanating therefrom. It is settled proposition of law that *only experts can certify whether there was any negligence on part of the doctor or not and it is apparent from enquiry reports conducted by the experts in the field that there was no negligence on part of respondent No.8 while treating the deceased-Jai Kumar. Since the experts have found no negligence on part of respondent No.8, no further enquiry or investigation is required in the matter. Furthermore, the FIR lodged against respondent No.8, too, stands quashed along with proceedings emanating therefrom.*

17. The claim of the petitioners, when considered in the light of the two inquiry reports submitted by the expert bodies, merits rejection as the two expert bodies have exonerated the respondent No.8 and no negligence on his part was found. Even the FIR registered against respondent No.8 stands quashed. When negligence of respondent No.8 was not proved and he was given clean chit by the experts in the field, question of compensation on account of alleged negligence on part of respondent No.8 does not arise.

18. For all what has been stated above, the writ petition is found to be devoid of any merit, hence dismissed along with connected applications.

**(Wasim Sadiq Nargal)**  
**Judge**

Jammu.  
26.12.2022  
Vinod.

Whether the order is speaking : Yes  
Whether the order is reportable: Yes