IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE
HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

MISC. CRIMINAL CASE No. 51933 of 2021

BETWEEN:-

DR. ASHARANI W/O DR. VIPIN BIHARI JAIN, AGED ABOUT 64 YEARS, OCCUPATION: DOCTOR IN GOVT. HOSPITAL AND SENIOR GYNEOCOLOGIST GANDHI COLONY, SHUJALPUR (MADHYA PRADESH)

.....PETITIONER

(BY SHRI MANISH YADAV, ADVOCATE)

AND

1. **THE STATE OF MADHYA PRADESH STATION HOUSE OFFICER THROUGH P.S. SHUJALPUR (MADHYA PRADESH)**

2. **SMT. PRITI W/O VIKAS NEMA, AGED ABOUT 39 YEARS, WAED NO. 6 PATWASERI, SHUJALPUR CITY SHAJAPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI MUKESH SHARMA- P.L./G.A. AND SHRI PIYUSH SHRIVASTAVA- ADVOCATE FOR RESPONDENT NO.2)

…….

Reserved on : 03.05.2024

Pronounced on : 06.05.2024

…….

This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court passed the following:

ORDER

Heard finally with the consent of the parties.

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2] This petition has been filed by the petitioner under Section 482 of the Cr.P.C. against the FIR dated 31.03.2017 lodged at Crime No.134/2017 at Police Station Shujalpur, District Shajapur under Sections 269, 337, 336 and 308 of the Indian Penal Code, 1860 and the consequent criminal proceedings arising out of the aforesaid crime number.

3] The allegation against the petitioner is that at the relevant time, she was posted as a doctor in Government Hospital and was working as a Gynecologist and it is alleged that the complainant Smt. Preeti Nema had labour pain and thus, was taken to the Government Hospital Shujalpur where the petitioner was posted and according to the FIR, the petitioner initially advised them to get her admitted in a private hospital, however, at the instance of the family members of the complainant, she was operated upon by the petitioner on 27.12.2016 and was discharged on 03.01.2017. In this operation, the petitioner gave birth to a child, however, as she was suffering from pain, she got herself examined through various investigating agencies and her CT scan was also conducted and it was found that she has some foreign body lying in her stomach and thus, the complainant was again operated on 11.03.2017 by Dr. Siddharth Jain of SNG Hospital, Indore and he found that cotton (sponge) was left behind in the earlier operation, which had been contaminated and had started to rot. It is alleged by the complainant that after the operation, she is continuously suffering from various problems and she is also required to defecate through an artificial

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outlet, which has also led the complainant to suffer seriously. Thus, the FIR was lodged under the aforesaid sections.

4] Soon thereafter, the petitioner filed a petition under Section 482 of Cr.P.C., M.Cr.C. No. 6228/2017, which was allowed and disposed of by this Court on 04.09.2017 in the following way:-

> "Arguments heard.
> The petitioner has challenged the registration of Crime No.134/2017 registered at Police Station Sujalpur, District Sahajapur under Section 269, 337, 336 and 308 of IPC.
> Grievance of the petitioner is that investigating officer is not adhering the documents related to the operation available in the hospital and he also does not following the pronouncement of Hon'ble the Supreme Court in the case of **Jacob Mathew vs. State of Punjab and Another** reported in **(2005) 6 SCC** and the direction given in the case of **Dr. B.C. Jain vs. Maulana Saleem** vide order dated 28.02.2017 passed in MCRC No.965/2008 by the co-ordinate Bench of this Court.
> In both of these judgments, Hon'ble the Supreme Court and the co-ordinate Bench of this Court have issued certain directions with regard to the registration of cases against doctors.
> The prosecution has fairly admitted that investigating officer has to follow these directions while investigating the case and also to collect and consider all the documents available with regard to the alleged offence. Therefore, the prosecution has no objection in issuing direction to the investigating officer to adhere the documents available on record of the hospital regarding the disputed of operation and also to follow the direction passed by Hon'ble the Courts in the aforesaid judgment.
> Therefore, the petition is allowed to the extent and it is directed that the investigating officer to adhere all the documents available in the record of the hospital related to the disputed operation and strictly follow the direction of the Court passed in the case of **Dr.B.C. Jain (Supra)** and **Jacob Mathew (supra).**
> A copy of this order be sent to the Superintendent of Police, District-Shajapur to ensure strict compliance of the guidelines of the Courts as stated above.
> With the aforesaid direction, the present petition is allowed and disposed of."

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(Emphasis Supplied)

5] Subsequently, as per the aforesaid order passed by this Court, a Medical Board was formed and in the report dated 24.04.2018, it was opined that although, it has been found that a sponge was indeed left in the petitioner's stomach at the time of her delivery, however, it cannot be said positively whether it was left in the first pregnancy or in the second pregnancy. Reference in this report was also made to the medical test by Dr. K. K. Agrawal, New Delhi and other doctors, in which it is stated that a sterilized sponge can remain in the stomach without any difficulty for years together and it can cause problem after the subsequent operation and had there been any FSL report, it would have been helpful to fix the liability of the petitioner and in the absence of the same, no positive opinion can be submitted.

6] Shri Manish Yadav, counsel appearing for the petitioner has submitted that the aforesaid report clearly reveals that the medical team comprising of three senior doctors has clearly opined that it is not possible to find out if the negligence was of the petitioner or that of the other doctor who had operated upon the petitioner during her first pregnancy and in such circumstances, no purpose would be served to prosecute the petitioner. It is also submitted that even otherwise, Section 308 of IPC would not be made out, as there was no intention on the part of the petitioner to cause such injury to the complainant.

7] Shri Piyush Shrivastava, counsel for the respondent No.2/complainant, on the other hand, has vehemently opposed the

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prayer and it is submitted that no case for interference is made out, firstly, for the reason that this petition under Section 482 of the Cr.P.C. is not maintainable as the petitioner has already availed this remedy in the earlier round of litigation in M.Cr.C. No.6228/2017, which has already been allowed by this Court on 04.09.2017 and thereafter, there is no change in the circumstances, which may be used by the petitioner to submit that there is any change in the circumstances.

8] Counsel has also relied upon the decision rendered by the Supreme Court in the case of ***Simrikhia Vs. Dolley Mukherjee and Chhabi Mukherjee and Another*** reported as ***(1990) 2 SCC 437*** para 7 as also in the case of ***State represented by DSP, SB CID, Chennai Vs. K.V. Rajendran and Others*** reported as ***(2008) 8 SCC 673.***

9] Counsel has also submitted that even otherwise, this Court ought not to have applied the ratio of the case of ***Jacob Mathew Vs. State of Punjab and Another,*** reported as ***(2005) 6 SCC,*** which is confined to Section 304-A of IPC only, as has also been held by the subsequent judgement of the Supreme Court in case of ***A. Srimannarayana Vs. Dasari Santakumari and Another*** reported as ***(2013) 9 SCC 496,*** para 9. Thus, it is submitted that the finding recorded by the Committee cannot be looked into at this stage and the matter requires to be decided after the evidence is led by the parties. It is also submitted that the evidence has also started in the case and thus, the petition is liable to be dismissed.

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10] Counsel has further submitted that the report of the Committee was already prepared even before filing of the earlier petition, on 28.04.2017, but this aspect was missed by this Court while passing the order in M.Cr.C. No.6228/2018.

11] Counsel for the respondent No.1/State has also opposed the prayer and it is submitted that no case for interference is made out, as it is apparent from the statement of Dr. Siddharth Jain recorded under Section 161 of Cr.P.C. that a sponge was found in the petitioner's stomach and in such circumstances, it is submitted that no case for interference is made out.

12] Heard counsel for the parties and perused the record.

13] So far as the maintainability of the second petition under Section 482 of Cr.P.C. is concerned, it is trite that an application can certainly be filed in the changed circumstances and considering the fact that in the earlier round of litigation in M.Cr.C. No.6228/2017, the grievance of the petitioner was that the Investigating Officer has not adhered to the decision rendered by the Supreme Court in the case of ***Jacob Mathew (Supra)*** as also the direction given in the case of ***Dr. B.C. Jain Vs. Maulana Saleem*** passed by this Court ***vide order dated 28.02.2017 in M.Cr.C. No.965/2008*** and in that case, the prosecutor had admitted that the Investigating Officer has to follow the directions given in the aforesaid decisions and thus, the petition was allowed in the aforesaid manner:-

> "……Therefore, the petition is allowed to the extent and it is directed that the investigating officer to adhere all the documents available in the record of the hospital related to

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> the disputed operation and strictly follow the direction of the Court passed in the case of **Dr.B.C. Jain (Supra)** and **Jacob Mathew (supra).**
> A copy of this order be sent to the Superintendent of Police, District-Shajapur to ensure strict compliance of the guidelines of the Courts as stated above.
> With the aforesaid direction, the present petition is allowed and disposed of."
>
> ***(Emphasis Supplied)***

14] Apparently, in the earlier round of litigation, when the matter came up for before this Court, the guidelines issued by the Supreme Court in the case of ***Jacob Mathew (Supra)*** were not followed and subsequently, when the guidelines were followed and the opinion of the medical board was obtained, in which, the medical board has opined that the responsibility of the petitioner cannot be fixed in respect of the alleged negligence, this Court is of the considered opinion that the petitioner has a fresh cause of action to file this petition and in such circumstances, the decision relied upon by the counsel for the respondent No.2 would not be applicable.

15] From the record it is apparent that the FIR has been lodged under Sections 269 and 337 of the IPC whereas, the charge-sheet has been filed under Sections 269- Negligent act likely to spread infection of disease dangerous to life, 337- Causing hurt by act endangering life or personal safety of others, 338- causing grievous hurt by an endangering life or personal safety of others and 308- attempt to commit culpable homicide. Before this Court proceeds further, it would also be necessary to address to the contention raised by the counsel for the respondent that in a criminal case other than a case under Section 304-A of IPC, the guidelines as laid down

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by the Supreme Court in the case of ***Jacob Mathew (Supra)*** would not be applicable is concerned, it would be necessary to reflect the decision relied upon by Shri Shrivastava, learned counsel for the respondent No.2 in the case of ***A. Srimannarayana (Supra)***, the relevant paras of the same read as under:-

> **"7.** Mr Rao has tried to persuade us that the judgment of this Court in *V.Kishan Rao* v. *Nikhil Super Speciality Hospital* [*Kishan Rao* v. *Nikhil Super Speciality Hospital*, (2010) 5 SCC 513 : (2010) 2 SCC (Civ) 460] has erroneously declared the earlier judgment of this Court in *Martin F. D'Souza* v. *Mohd. Ishfaq* [*Martin F. D'Souza* v. *Mohd. Ishfaq*, (2009) 3 SCC 1 : (2009) 1 SCC (Civ) 735 : (2009) 1 SCC (Cri) 958] as per incuriam, on a misconception of the law laid down by a three-Judge Bench of this Court in *Jacob Mathew* v. *State of Punjab* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] . We are not inclined to accept the submission made by Mr Rao. The judgment in *Jacob Mathew* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] is clearly confined to the question of medical negligence leading to criminal prosecution, either on the basis of a criminal complaint or on the basis of an FIR. The conclusions recorded in para 48 of *Jacob Mathew* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] leave no manner of doubt that in the aforesaid judgment this Court was concerned with a case of medical negligence which resulted in the prosecution of the doctor concerned under Section 304-A of the Penal Code, 1860. We may notice here the relevant conclusions which are summed up by this Court as under: (*Jacob Mathew case* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , SCC pp. 33-34, para 48)
>
> > "*48.* … (*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

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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 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."

8. The guidelines in para 48 were laid down after rejecting the submission that in both jurisdictions i.e. under civil law and criminal law, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. It was observed that: (*Jacob Mathew case* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , SCC pp. 16 & 22-23, paras 12 & 28-29)

"*12.* … The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for

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damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. …

* * *

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.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason—whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

9. The aforesaid observations leave no manner of doubt that the observations in *Jacob Mathew* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] were limited only with regard to the prosecution of doctors for the offence under Section 304-A IPC.

10. The aforesaid observations and conclusions leave no manner of doubt that the judgment rendered by a two-Judge Bench of this Court in *Martin F.D'Souza* [*Martin F. D'Souza* v. *Mohd. Ishfaq*, (2009) 3 SCC 1 : (2009) 1 SCC (Civ) 735 : (2009) 1 SCC (Cri) 958] has been correctly declared per incuriam by the judgment in *V. Kishan Rao* [*Kishan Rao* v. *Nikhil Super Speciality Hospital*, (2010) 5 SCC 513 :

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> (2010) 2 SCC (Civ) 460] as the law laid down in *Martin F. D'Souza* [*Martin F. D'Souza* v. *Mohd. Ishfaq*, (2009) 3 SCC 1 : (2009) 1 SCC (Civ) 735 : (2009) 1 SCC (Cri) 958] was contrary to the law laid down in *Jacob Mathew* [*Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] .
>
> **11.** In view of the above, we are of the opinion that the conclusions recorded by the National Commission in the impugned order [*A. Srimannarayana* v. *Dasari Santakumari*, RP No. 2032 of 2010, order dated 15-7-2010 (NC)] do not call for any interference. The civil appeals are dismissed."
>
> ***(Emphasis Supplied)***

16] It is found that the aforesaid decision was rendered against an order passed by the National Consumer Disputes Redressal Commission, in respect of a consumer dispute relating to medical negligence and the Supreme Court was distinguishing the facts of Jacob Mathew's case *vis-à-vis* the judgement of the Supreme Court in the case of ***V. Krishna Rao Vs. Nikhil Superspeciality Hospital*** reported as ***(2010) 5 SCC 513,*** and while doing so, the Supreme Court in the case of ***A. Srimannarayana (Supra)*** has observed that '*the judgment in Jacob Mathew is clearly confined to the question of medical negligence leading to criminal prosecution either on the basis of a criminal complaint or on the basis of an FIR'* and, while making the aforesaid observations, the Supreme Court has also reflected upon the fact that the case of ***Jacob Mathew (Supra)*** is concerned with the case of medical negligence which resulted in the prosecution of the doctor concerned under Section 304 of the IPC, whereas, in para 9, again it has been reiterated that the aforesaid observations made by the Supreme Court in the case of ***Jacob Mathew (Supra)*** were limited only with regard to the prosecution of doctor for the offences under Section 304-A of the IPC.

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17] In the considered opinion of this Court, the interpretation as put forth by the counsel for the respondent that the guidelines in the case of ***Jacob Mathew (Supra)*** would only be applied in a case falling under Section 304-A of the IPC, cannot be countenanced in the light of the earlier observations made by the Supreme Court in para 7 as above. Needless to say, any judgement has to be read as a whole and it is not open for the reader to pick and choose, and to read only the lines, which according to such reader, are in his favour. Thus, merely because in the case of ***Jacob Mathew (Supra),*** s.304-A of IPC was involved, it cannot be said that it would only be applicable in such cases of alleged medical negligence where the death of a patient is caused, and not to other cases of alleged medical negligence.

18] So far as the merits of the case are concerned, it is found that it is not disputed that some sponge was left in the stomach of the complainant, which has resulted in extreme pain to the complainant, the only question is whether *prima facie* the petitioner can be prosecuted for the offences alleged against her, who was the treating doctor of the complainant in her second pregnancy. So far as the opinion given by the Medical Board of Ujjain is concerned, following opinion has been given:-

"अभिमत

प्रकरण में संबंधित/चिकित्सकों/कर्मचारियों द्वारा दिए गए कथन एवं उनके द्वारा उपलब्ध दस्तावेज, संचालक, ग्लोबल हॉस्पिटल द्वारा श्रीमती प्रीति नेमा पति श्री विकास नेमा द्वारा के उपचार के

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संबंध में उपलब्ध कराए गए दस्तावेजों के अवलोकन उपरान्त जांच समिति का अभिमत निम्नानुसार है:-

ग्लोबल हॉस्पिटल इंदौर जहां श्रीमती प्रीति नेमा का ऑपरेशन हुआ के द्वारा उपचार संबंधी उपलब्ध कराए गए दस्तावेज एवं शल्य किया करने वाले चिकित्सक डॉ. सिद्धार्थ जैन के कथनानुसार यह स्पष्ट होता है कि श्रीमती प्रति नेमा के पेट में स्पंज था जिसे डॉ. सिद्धार्थ जैन द्वारा ऑपरेशन करके बाहर निकाला गया।

उक्त संबंध में यह सिद्ध करना संभव नहीं है कि स्पंज मरीज के प्रथम प्रसव(एलएससीएस) के समय छुटा है अथवा द्वितीय प्रसव(एलएससीएस) के समय डॉ. आशारानी जैन, स्त्री रोग विशेषज्ञ द्वारा छोडा गया है क्योंकि एम.एल.सी प्रकरण नहीं होने के कारण ग्लोबल हॉस्पिटल से मरीज श्रीमती प्रीति नेमा के स्पेसीमेन को एफएसएल में परीक्षण हेतु नहीं भेजा गया।

डॉ. आशारानी जैन, स्त्री रोग विशेषज्ञ, सिविल हॉस्पिटल शुजालपुर द्वारा अपने कथन के संलग्न उपलब्ध कराए गए डॉ. राजीव जैन, एसोसिएट ऑफिसर अरविंदों मेडिकल कॉलेज इंदौर तथा पद्मश्री डॉ. के.के. अग्रवाल, नई दिल्ली एवं अन्य चिकित्सकों द्वारा प्रकाशित जानकारी में स्पष्ट उल्लेख है कि स्टरलाईज्ड स्पंज वर्षो बिना किसी तकलीफ के पेट में रहते है एवं दूसरी बार किए गए ऑपरेशन पश्चात् मरीज को तकलीफ दे सकते है।

यदि श्रीमती प्रीति नेमा के स्पेसीमेन का एफएसएल होता हो ऑपरेशन में छुटे गए स्पंज की अवधि एवं अन्य जानकारी स्पष्ट रूप से मिल जाती। एफएसएल रिपोर्ट के अभाव में उक्त संबंध में स्पष्ट अभिमत दिया जाना संभव न होकर न्यायोचित नहीं है।"

(Emphasis Supplied)

19] Although the counsel for the respondent has submitted that the opinion of the Board was already obtained by the Investigating Officer and thus, there was no necessity for this Court to direct that

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a fresh opinion be sought. So far as the opinion given by the Medical Board, Indore on 08.04.2020 is concerned, they have given the following opinion:-

"प्रति

अधिष्ठता महोदय,
म.गा. स्मृति चिकित्सा महाविद्यालय,
इन्दौर

विषय:-पीड़िता प्रीति नेगा पति विकास निवासी शुजालपुर का मेडिकल परीक्षण पश्चात मेडिकल रिपोर्ट थाना शुजालपुर के संबंध में।

संदर्भ:- आपका पत्र क. 165-71/गोप./2017 दि.26.04.17।

महोदय,

उपरोक्त विषय एवं सदर्भ में लेख है कि जॉच समिति के सदस्यों की बैठक दिनांक 26.04.17 को डा. निलेश दलाल, प्रोफेसर एवं विभागायक्ष के ओ.पी.डी. कक्ष में हुई। जॉच समिति के समस्त सदस्यों की सहमति के आधार पर उक्त प्रकरण में थाना प्रभारी शुजालपुर जिला शाजापुर द्वारा पूछे गए निम्न बिन्दुओं पर स्पष्ट अभिमत निम्नानुसार है:-

1. दिनांक 27.12.2016 को महिला डा. आशारानी जैन द्वारा प्रसव ऑपरेशन में उक्त स्पंज छूटना संभव हो सकता है।
2. यह कि पस कम से कम 7-15 दिन में बनना संभव है।
3. यहि स्पंज नहीं निकाला जाता तो उससे पीड़िता की जान को खतरा था।
4. <u>उक्त स्पंज कितना पुराना है, इस बारे में स्पष्ट अभिमत देना संभव नहीं है। इस पर स्पष्ट अभिमत के लिए डा. सिद्धार्थ जैन द्वारा दिनांक 11.03.2017 को ऑपरेशन के द्वारा निकाले गए स्पंज का फारेंसिक लैब में परीक्षण कराया जावे।</u>
5. लिखित रिपोर्ट के आधार पर सोनोग्राफी एवं सी.टी स्केन रिपोर्ट में suggestive of gossypiboma होना बताया गया है एवं डा. सिद्धार्थ जैन द्वारा एस.एन.जी. हॉस्पिटल इन्दौर में दिनांक 11.03.17 को ऑपरेशन कर स्पंज निकाला गया। दिनांक

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14.03.17 को हिस्टोपेथोलाजी रिपोर्ट में स्पंज का होना पाया गया है।

धन्यवाद।"

(Emphasis Supplied)

20] Admittedly, the aforesaid opinion was either not brought to the attention of this Court in M.Cr.C No.6228/2017 or the State also believed that the said opinion cannot be said to be the proper compliance of the decision rendered by the Supreme Court in the case of ***Jacob Mathew (Supra)*****.** It is found that in the earlier report, only a possibility has been expressed that such sponge might have been left by the petitioner, although it was also stated that it is not possible to opine as to how old was the sponge and the sponge be sent for forensic report, which was taken out by Dr. Siddharth Jain in a surgery, which took place on 11.03.2017 and as per the Histopathology report, it was found to be a sponge whereas, the report prepared by the Medical Board at Ujjain is a detailed report also emphasizing that as per the medical journals that a sterilized sponge can remain in the stomach without any difficulty for years together, however, it can cause trouble in the subsequent operation and it could have been verified only in the FSL report and in the absence of the same, it is difficult to give any positive opinion. Thus, in both the reports, the doctors have emphasized on requisitioning the FSL report, which admittedly, is not available on record, as the sponge was never sent to the forensic laboratory. In such circumstances, when the criminal liability is required to be

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fixed on the petitioner, it has to be seen whether there is sufficient material available on record to bring home the charges levelled against her and in this regard, reference may also be had to the same decision in the case of ***Jacob Mathew (Supra),*** wherein, the Supreme Court has also dealt upon the degree of proof in civil and criminal liability. The relevant paras of the same read as under:-

> ***Negligence — as a tort and as a crime***
>
> **12.** The term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In *R.* v. *Lawrence* Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R.* v. *Caldwell* and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said: (All ER p. 982*e-f*)
>
> > "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an

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> ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, may be motivated by thrill-seeking. These are clearly reckless.

xxxxx

38. The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In *Kurban Hussein Mohammedali Rangwalla* v. *State of Maharashtra* [(1965) 2 SCR 622 : (1965) 2 Cri LJ 550] while dealing with Section 304-A IPC, the following statement of law by Sir Lawrence Jenkins in *Emperor* v. *Omkar Rampratap* [(1902) 4 Bom LR 679] was cited with approval: (SCR p. 626 D-E)

> "To impose criminal liability under Section 304-A, Penal Code, 1860, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*."

xxxxxx

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

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attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(*2*) Negligence in the context of the 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 case* WLR at p. 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

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> 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 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.
>
> ***(Emphasis Supplied)***

21] So far as the decision relied upon by the counsel for the respondent No.2 in the case of ***Simrikhia (Supra)*** is concerned, the same relates to inherent powers of High Court under Section 482 of Cr.P.C. and also provides that such power does not extend to what is expressly barred under the Code and hence, the said powers cannot be exercised to review High Court's own order under Section 362 of Cr.P.C., which provides that Court is not to alter its judgement.

22] So far as the decision rendered in the case of ***K.V. Rajendran (Supra)*** is concerned, its findings are identical to that of ***Simrikhia***

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(Supra). Thus, both the judgements are not applicable to the facts and circumstances of the case.

23] From the perusal of the record, it is apparent that after the investigation, the charge-sheet has been filed on the premise that the negligence to leave the sponge in the complainant's stomach was on account of the negligence of the petitioner, however, in the absence of the FSL report of the sponge, it is impossible to establish that the sponge was left behind by the petitioner after operation of the complainant. In such circumstances, this Court is of the considered opinion that the charges so framed against the petitioner would not be made out even assuming the case of the prosecution to be correct as the Medical Board in its report dated 24.04.2018, after citing various journals has clearly opined that a sterilized sponge can remain in stomach for years together without any complication to the patient, however, it may cause trouble in the second operation. The Board has also opined that had the specimen obtained from the petitioner's stomach been sent to FSL, in that case, the period of time for which the sponge was left in the stomach could have been ascertained, however, in the absence of the FSL report, such finding is not possible and not justifiable.

24] In such facts and circumstances of the case, this Court is of the considered opinion that no purpose would be served to prosecute the petitioner when the prosecution itself has not filed any document on record to demonstrate that the time for which the sponge remained in the complainant's stomach was relatable to the time when the petitioner performed operation on the complainant.

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In such circumstances, even though various allegations have been levelled by the complainant in the FIR, this Court is of the considered opinion that no purpose would be served to allow the trial to proceed further against the petitioner.

25] Accordingly, the petition stands ***allowed*** and the FIR dated 31.03.2017 lodged at Crime No.134/2017 at Police Station Shujalpur, District Shajapur under Sections 269, 337, 336 and 308 of the Indian Penal Code, 1860 as also the charge-sheet and the consequent criminal proceedings arising out of the aforesaid crime number are hereby ***quashed.***

26] However, this Court is also of the considered opinion that the degree of proof in criminal trial which is *beyond reasonable doubt* is much more stringent than the degree of proof as is required in a civil case, which is *preponderance of probability*. In such circumstances, liberty is reserved to the complainant to proceed against the petitioner by taking recourse of the civil remedies available to her under law, if not already initiated, in which, the time spent in prosecuting the criminal proceedings shall stand excluded from the period of limitation.

27] With the aforesaid directions, the petition stands ***allowed*** and ***disposed of.***

(SUBODH ABHYANKAR)
JUDGE

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