(2022) 03 KL CK 0052

High Court Of Kerala

Case No: Criminal Miscellaneous Petition No. 6272 Of 2017

Dr.K.Mohandas		APPELLANT
	Vs	
State Of Kerala		RESPONDENT

Date of Decision: March 7, 2022

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 173(8) , 197, 239, 258, 468, 470, 470(4), 473, 482
- Indian Penal Code, 1860 - Section 304A, 338

Hon'ble Judges: Ziyad Rahman A.A., J

Bench: Single Bench

Advocate: Shyam Padman, C.M.Andrews, Boby M.Sekhar, P.N.Harish Babu, Neethu Ravikumar, Shaji Thomas, Rahana Jose

Final Decision: Disposed Of

Judgement

Ziyad Rahman A.A., J

1. The petitioner is the accused in C.C.No.521 of 2009 on the file of the Judicial First Class Magistrate Court-I, Kozhikode. The aforesaid case arises

from Crime No.105 of 2004 of Kozhikode Town Police Station. The said crime was registered on the basis of the information furnished by the 2nd

respondent as to the death of one Bindu on 03.04.2004, while she was undergoing treatment after a Mini lap surgery which was conducted at

Government Hospital, Kottaparamba. Annexure-A1 is the final report submitted by the police in the aforesaid case, wherein the petitioner, who was

the duty doctor in the hospital at the relevant time, was implicated as the accused for the offence punishable under Section 304 A of IPC.

2. The facts which lead to the filing of this Crl.M.C. is as follows:Â On 31.03.2004, Smt.Bindu who is a relative of the n2d respondent/de facto

complainant, was admitted at Government Hospital, Kottathaparamba for a Mini lap surgery and the said surgery was conducted on 01.04.2004 by

one Dr.Nandini. After the surgery, during the night, patient developed diarrhea and vomiting and her condition became worse. It was alleged that the

duty nurse informed the duty doctor, the petitioner herein, as to the critical condition of said Bindu, but the petitioner failed to attend the patient. Later,

the patient was referred to Medical College Hospital, Kozhikode, where she died on 03.04.2004. After completing the investigation, police submitted

Annexure-A1 charge sheet before the Judicial First Class Magistrate Court-I, Kozhikode and cognizance thereon was taken as C.C.No.521 of 2009.

3. After appearance, the petitioner filed an application seeking discharge from the prosecution on various grounds such as, there was no sanction

obtained, as contemplated under Section 197 Cr.P.C. and it was also contended that the materials available on record do not constitute the offence

alleged against the petitioner.TheÂ contentionÂ ofÂ theÂ petitionerÂ was accepted by the learned Magistrate and accordingly, an order was

passed on 11.02.2014, discharging the petitioner, mainly on the ground that no sanction as contained under Section 197 Cr.P.C. has been obtained.

Prosecuting agency filed Crl.R.P.No. 23 of 2016 before the Sessions Court, Kozhikode challenging the aforesaid order and it resulted in Annexure-A4

order. In the said order, learned Sessions Judge found that the finding that the sanction was required as contemplated under Section 197 Cr.P.C is not

correct and on that ground alone the petitioner is not entitled for an acquittal. It was also found that the order passed by the learned Magistrate

discharging the accused was passed by invoking powers under Section 239 Cr.P.C., which is applicable only in respect of warrant cases. As this is a

summons case, said provision cannot be made applicable. In such circumstances, the order passed by the Magistrate discharging the accused under

Section 239 Cr.P.C. was set aside and the matter was remanded back to the Magistrate for fresh disposal in accordance with law under Chapter 20

of Cr.P.C.

4. After remand, the petitioner filed Annexure-A5 application which is numbered as Crl.M.P.No.1690 of 2016 under Section 258 Cr.P.C. to stop the

proceedings in the matter. While the aforesaid application was pending consideration, the prosecuting agency filed Annexure-A6 petition which is

numbered as C.M.P.No.794 of 2017 under Section 173(8) Cr.P.C., seeking further investigation in the matter. Further investigation was sought mainly

on two reasons. The first reason is that, they have already forwarded the relevant records for obtaining sanction for prosecution under Section 197

Cr.P.C. to the appropriate authority and the second reason is that, certain documents relating to the surgery of the deceased and also relating to the

conduct of persons who were on duty during the post surgical period of the deceased, are to be produced before the court.

5. This Crl.M.C. is filed by the petitioner at that juncture, seeking to quash the entire proceedings against him on the ground that no case as against

him is made out from the materials available on record.

6. Heard Sri.Syam Padman, learned counsel for the petitioner, Sri.Shaji Thomas, learned counsel for the 2nd respondent and Sri.Sudheer

Gopalakrishnan, learned Public Prosecutor for the State.

7. The learned counsel for the petitioner contended that the prosecution itself is bad for want of sanction as contemplated under Section 197 Cr.P.C. It

is also pointed out that the cognizance was taken beyond the statutory period of limitation as contemplated under Section 468 Cr.P.C. and it is hit by

limitation. While filing the final report, mandatory procedure contemplated by Government, through various Government Orders issued in relation with

the matter of prosecution against the medical professionals and also the guidelines formulated by the Honourable Supreme Court in Jacob Mathew v.

State of Punjab and Others [(2005) 6 SCC 1] were not followed. It is also pointed out that the materials available on record do not disclose any gross

negligence on the part of the petitioner, which is a mandatory requirement to attract any culpability, warranting any criminal prosecution against

medical professionals. It was also pointed out that, the husband and children of the petitioner earlier filed a civil suit numbered as O.S.No.259 of 2006

before the Sub Court, Kozhikode, seeking damages, alleging negligence on the part of the doctor who performed the surgery and as part of the

proceedings in the said suit, the medical experts were examined and their depositions were produced in this Crl.M.C. as Annexures-A8 and A9. It

was pointed out that, after examination of the said medical experts, the plaintiffs therein sought permission to withdraw the aforesaid civil suit on the

ground that, no purpose would be served in proceeding further with the above matter, as the plaintiffs would not be able to succeed in the above

matter. Hence, the plaintiffs therein have decided to abandon their claim and withdraw the suit. As the aforesaid suit was submitted on behalf of the

minor children of the deceased as well, an affidavit of the husband of the deceased and that of another person supporting the reasons for withdrawing

the suit were also filed. Annexures-A10(a) and A10 (b) are the aforesaid affidavits and there also, the husband of the petitioner has clearly stated that

no purpose would be served by proceeding with the case. Accordingly, the suit was dismissed. It was also contented by the learned counsel for the

petitioner, in Annexure-A13 affidavit filed by the husband of the deceased before the learned Magistrate in C.C.No.521 of 2009 that, it is stated that,

as they are convinced that there was no negligence on the part of the petitioner doctor, the prosecution need not be continued. By placing reliance

upon the above, the learned counsel for the petitioner seeks for quashing the proceedings against the petitioner.

8. On the other hand, the learned counsel for the 2nd respondent opposes the contentions put forward by the learned counsel for the petitioner.

According to him, the prayer sought for by the petitioner is to quash Annexure-A1 final report which is not complete. The prosecuting agency has

already taken steps for further investigation so as to enable them to produce further documents in support of the allegations against the petitioner

herein. Therefore, what is sought to be quashed is an incomplete final report and unless the prosecution is granted sufficient opportunity to produce

evidence in support of the allegations, serious prejudice would cause to them. The learned counsel also pointed out that, right from the inception there

were measures being taken by the authorities concerned to protect the accused persons by delaying the investigation and also by not obtaining

sanction for prosecuting the petitioner herein. It is pointed out that, the final report itself was submitted only after the intervention of this Court as per

judgment dated 05.02.2008 in W.P.(C).No.9249 of 2006, which was filed by the husband of the petitioner, wherein, this Court directed the

investigating agency to complete the investigation within a period of three months from the date of judgment. As regards the sanction under Section

197 Cr.P.C., my attention was brought to Annexure-R2(a), which is an order dated 28.09.2019 issued by the Government granting sanction for

prosecution against the petitioner herein. In such circumstances, it was pointed out that the question of lack of sanction does not arise. With regard to

the question of limitation, it is pointed out that, Section 470 (4) Cr.P.C., provides for exclusion of time taken for obtaining sanction from the

Government for prosecution of the offence against a public servant and therefore the period taken by the prosecution has to be excluded while

computing the period. It is also pointed out that, by virtue of provisions contained in Section 473 of Cr.P.C., the interference on the ground of limitation

cannot be invoked, as there are justifiable reasons in taking cognizance. In such circumstances, the learned counsel for the petitioner seeks for

dismissal of the Crl.M.C.

9. Thus, the question that arises is as to whether the petitioner is successful in making out a case for invoking powers of this Court under Section 482

Cr.P.C. and thereby to get an order for termination of the proceedings, prematurely. One of the contentions put forward by the learned counsel for the

petitioner is regarding the delay in taking cognizance of the offence and the applicability of the stipulations contained in Section 468 Cr.P.C. It is

pointed out that, the FIR was registered on 03.04.2004 and the final report was submitted in the year 2008. As per Section 468 of Cr.P.C. in respect

of the offence punishable with imprisonment for a period exceeding one year but less than three years, the period of limitation prescribed is three

years. It is pointed out that Section 468 Cr.P.C. mandates that no court shall take cognizance of the said offence beyond the period stipulated therein.

The contention of the learned counsel for the 2nd respondent is that, while computing the period of limitation, the time taken for obtaining sanction for

prosecution has to be excluded, by virtue of the stipulation contained in Sub-section 4 of Section 470 of Cr.P.C. It is also the case of the learned

counsel for the 2nd respondent that, there was delay on the part of the prosecution in completing the investigation and filing the final report and only

when this Court directed as per judgment in W.P.(C).No.9249 of 2006, the investigating agency to submit the final report within three months, it was

submitted. The aforesaid writ petition was filed by the husband of the deceased. It is further pointed out that, while submitting the final report in

compliance of the aforesaid judgment, the prosecuting agency did not care to obtain sanction as envisaged under Section 197 Cr.P.C. On the contrary,

the prosecution had taken a stand that no sanction is required for prosecuting the petitioner and the same is evident from the proceedings which

resulted in Annexure-A4 order in Crl.R.P.No.23 of 2016 by the Sessions Court, Kozhikode. Later, only when the 2nd respondent as well as the

husband of the victim regularly followed up the matter, the application in this regard was submitted and ultimately sanction was obtained as evidenced

by Annexure-R2(a) dated 28.09.2019. It is discernible from the said document that the application in this regard has been submitted on 03.07.2017,

which is much after the date of taking cognizance of the said offence. When we consider the contention of the learned counsel for the 2nd respondent

as to the exclusion of the time required for obtaining sanction, it is a relevant fact that the cognizance was taken by the trial court at a time when no

application for sanction was even filed. As on the date of taking cognizance, no application for sanction was submitted and there are no records

indicating that any steps were taken by the prosecuting agency to obtain such sanction. The application was submitted much belatedly and the specific

stand taken by the prosecuting agency is that no such sanction was required. In such circumstances, the question of exclusion of time, as

contemplated under Sub-section 4 of Section 470 does not arise in this case.

10. It is evident from the records that the final report was filed and the cognizance was taken after the period of limitation prescribed under Section

468 Cr.P.C. Thus crucial question that arises here is, whether the act of taking cognizance and further proceedings thereon are vitiated for that

reason. While considering the said question, the stipulation contained in Section 473 Cr.P.C. is having some relevance. The aforesaid provision

contemplates for extension of period of limitation in certain cases. It provides that notwithstanding anything contained in the forgoing provisions of

Chapter XXXVI, the court can take cognizance of offence after the expiry of the period of limitation if the court is satisfied on the facts and in the

circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice. The aforesaid provision

starts with a non obstante clause and it empowers the court concerned to take cognizance, irrespective of the period of limitation in proper cases as

mentioned above. However, in this case, it is discernible from the records that the court has not considered the question as to whether there were

circumstances existing which justifies condonation of delay in filing the charge sheet and also whether it was necessary so to do in the interest of

justice. No such exercise has been done by the Magistrate and the cognizance is seen to have taken without considering the aforesaid aspect.

11. In George V.V v. State of Kerala [2015 KHC 423], it was held by this Court that once trial court has taken cognizance without condoning delay,

the said court cannot trace back its steps and condone the delay at post cognizance stage. In this case, the trial court did not consider the delay in filing

final report and the cognizance was taken after the said period. Therefore, going by the principles laid down in George V.Vâ€™s case (Supra), the

learned Magistrate cannot retrace its steps. However, I am of the view that since the stipulation contained under Section 473 Cr.P.C. provides wide

powers to the court to examine whether there are any reasonable explanation for the delay or to consider whether it is necessary to take cognizance

in the interest of justice, an examination as to the necessity to take cognizance, can be made by this Court, when a prayer for quashing the

proceedings on the aforesaid ground is raised, for invoking the inherent jurisdiction of this Court under Section 482 Cr.P.C. In my view, the stipulations

contained under Section 473 Cr.P.C. reflects the intention of the Legislature to provide an opportunity to the court to examine whether there are

justifiable reasons for the court to condone the delay in completing the investigation and filing charge sheet, and also to examine whether it is

necessary to take cognizance irrespective of the delay, in the interest of justice. Thus, expressions used in Section 473 Cr.P.C. are wide enough to

take into consideration all relevant aspects which caused the delay in filing the final report and also to take cognizance despite the delay in the interest

of justice. Gravity of the offence and other attending circumstances for arriving at the conclusion in this regard are relevant while considering theÂ

same.Â AsÂ mentioned above,Â itÂ isÂ theÂ boundenÂ dutyÂ ofÂ the court which is taking cognizance to look into question as to the delay in

completing the investigation and filing the charge sheet. Merely because of the reason that the court concerned failed to exercise such power, the

result cannot always be the quashing of the complaint in a technical manner. This Court is armed with powers to examine the matters which ought to

have been considered by the trial court while taking cognizance, at the time of exercising the powers under Section 482 Cr.P.C. The expression used

in section 473 Cr.P.C ; â€œâ€¦.. or that it is necessary to do so in the interests of justiceâ€, is very wide and it clearly conveys the intention of the

legislature to enable the courts to exercise the judicial discretion for that purpose even in case no explanation is offered by the prosecuting agency for

the delay. The non obstante clause contained in section 473 Cr.P.C., makes it more clear. In my view, since the learned Magistrate has taken

cognizance without adverting to the aforesaid aspect, the said exercise has to be done at this stage, as nothing prevents this court in considering the

said aspect while invoking its inherent powers under section 482 Cr.PC. Since section 473 of Cr.PC provides for taking cognizance even after the

period of limitation, if it is necessary to do so in the interest of justice, this court has an obligation to consider the same, while exercising its inherent

powers.

11. In such circumstances, the question as to whether it was necessary to take cognizance beyond the period of limitation in this case, has to be

considered in this Crl.M.C. While considering the aforesaid aspect, there are certain aspects which are very much relevant in connection with the

aforesaid issue. It is evident from the records that, right from the inception, the 2nd respondent herein as well as the husband of the victim, were

diligently pursuing the matter as is evident from various litigations instituted at their instance for expediting the investigation and also to ensure the

propriety of the same. The writ petition which I have already referred above, is a writ petition filed by the husband of the deceased praying for

effective and proper investigation in the aforesaid crime, which resulted in a judgment directing the investigating agency to conduct the investigation

within a time frame. W.P.(C).No.2815 of 2009 is another writ petition filed by the husband of the victim which relates to missing of crucial documents

relating to the aforesaid offence from the Taluk Office, Kozhikode. The aforesaid writ petition resulted in judgment dated 01.04.2009 and the

observations made therein indicates that, the documents relating to the aforesaid offence were apparently gone missing while the same was being

transmitted for the purpose of obtaining expert opinion from the medical experts in compliance with various Government Orders issued with regard to

the manner of prosecution against the medical professionals. It is discernible from the judgment in W.P.(C).No.2815 of 2009 that, an inquiry was

ordered by this Court, through the Director General of Police. Apart from the above, even though, the investigating agency initially taken a stand that,

no sanction is to be obtained under Section 197 Cr.P.C., later they have submitted an application and obtained the same, though belatedly. The

petitioner also has a case that, the sanction was obtained, as he was continuously pursuing the matter. All these facts clearly indicate some lapses on

the part of the prosecuting agency. On the other hand the de facto complainant as well as the husband of the victim were diligent enough to pursue the

matter right from the inception. Therefore, if at all there is any delay on the part of the investigating agency, that can only be attributed against the

officers concerned and their lapses cannot result in any benefit to the petitioner herein as the same would prevent the victim from getting justice. This

is particularly because, right from the inception, the de facto complainant as well as the husband of the victim were diligently pursuing the matter. It is

true that the petitioner has a right for speedy trial. Even while ensuring a speedy trial to the accused, it is also to be ensured that the justice is

administered to the victims as well, which is as equally important as the other. Therefore, when we consider the right of speedy trial, the

consequences of denial of the same cannot always result in the benefit of the accused in a mechanical fashion, without there being any examination of

the reasons for causing such delay. The interest of justice is also yet another consideration, which obviously takes within it, the interest of accused and

the victim. While exercising such powers, It is to be ensured that, the rights of the victims are also protected, particularly in cases where they were

anxiously pursuing their remedies in a diligent manner.

12. In such circumstances, if the proceedings against the accused were terminated prematurely, on the mere ground of delay, when there are

materials indicating possibility of purposeful lapses on the part of the investigating agencies, that would result in gross injustice. The spirit of Section

473 Cr.P.C. is to eliminate such injustice and the said provision gives wide powers to the court concerned to take cognizance of the offence

irrespective of the delay, if it is necessary so to do in the interest of justice. Considering the facts and circumstances of this case as mentioned above,

I am of the view that, this is a case in which the cognizance is to be taken despite the delay in filing the final report, as it is necessary so to do in the

interest of justice. In such circumstances, I do not find any ground to interfere with the act of taking cognizance by the learned Magistrate even

though the same was after the period of limitation prescribed.

13. Another contention put forward by the learned counsel for the petitioner is that, while initiating prosecution against the petitioner who is a doctor,

the relevant guidelines prescribed in this regard by the Honourable Supreme Court in Jacob Mathew v. State of Punjab and Ors. [(2005) 6 SCC 1] and

various Government Orders issued in this regard were not followed. It was also pointed out by the learned counsel for the petitioner that, the

prosecution against a medical professional can be launched for negligent act while discharging his duty, only if it is shown that the alleged negligence is

gross and it amounts to a reckless act.

14. When we consider the question as to the procedure contemplated for prosecuting medical professionals, it is to be noted that, the Government of

Kerala has issued various Government Orders in this regard prescribing the manner in which such prosecution has to be initiated. The learned counsel

for the petitioner brought my attention to the decision of a Division Bench of this Court in Suvarna v. Reni Philip [2014 (1) KLT 799]. In the said

judgment, a detailed discussion has been made with reference to all the relevant circulars issued by the State of Kerala in this regard and the manner

in which the same have to be implemented are also specifically stated. It is discernible from the same that, before initiating the prosecution against a

doctor, the prosecuting agency has to refer the case to an expert panel consisting of following three members (1) District Medical Officer of Health

(Convenor), District Government Pleader/Public Prosecutor and Forensic expert from the nearest Medical College. This stipulation is contemplated in

Circular Memorandum No.41801/SSB3/2000/Home dated 17.01.2004. Since the incident occurred in this case was on 31.03.2004, this circular was in

operation at the relevant time. In the aforesaid circular, it is further provided that, in case the views of the members of the panel differ, they will

immediately refer the issue for the opinion of the Apex Body consisting of four members, namely; Director of Health Services (Convenor), Director of

Medical Education, Additional Director of Health Services (Vigilance) and the Director General of Prosecution. Apex body can, depending on

circumstances, get expert opinion from the specialists in the private sector also. The affected doctors were also were granted opportunity to approach

the Apex Body with appeal against the decision of expert panel.

15. The contention of the learned counsel for the petitioner is that even though an expert panel was constituted as envisaged above, a unanimous

decision was pronounced by such expert agency stating that they could not find out any negligence on the part of any medical professional in the death

of the deceased. Despite the same, the matter was referred to an Apex Body, when such reference was insisted, only if, the decision of the expert

committee was not unanimous. It was also pointed out that even in the report of Apex Body, no specific conclusion as to the culpable negligence on

the part of the petitioner or any other medical professional can be find out. Annexure-A11 is the report of the Expert Committee and Annexure-A12 is

the report of State Level Apex Committee. On examining the contents of Annexure-A11, it can be seen that the contention of the learned counsel for

the petitioner as to the unanimous decision of the said authority is not correct. The forensic expert Dr.Sherly Vasu has clearly opined that the medical

care providers to the deceased during the night hours following the surgery should be considered to be responsible for her fluid and electrolyte

imbalance condition which might have developed due to diarrhea in the night hours. On the other hand, other members in the panel were having

different opinion. Thus, even though, the conclusion of the said report does not name any specific person as responsible, with culpable negligence, it

indicates an opinion by one of the members as to the negligence of the persons who were on duty during the night hours of the deceased after

surgery. When we consider Annexure-A12 report of the State Level Apex Body, it can be seen that the conclusion expressed by the said committee

is as follows:

â€œThe actual cause of death of Smt.Bindu could be inferred from the record available. However, some kind of laxity and negligence though it is not willful and

without bad intention can be seen on the part of the Medical Officers and staff during the post operative period. An attempt is seen made to manipulate the treatment

records. The correction of blood test result of â€˜Dengue Feverâ€™ from â€˜Negativeâ€™ in to â€˜Positiveâ€™ should be investigated.â€

16. Even though, no one was pin pointed by the expert committee as the persons responsible for the same, it also indicates laxity and negligence,

though it was referred as not willful and without bad intention on the part of the medical officers attended her during the post operative period.

Therefore, there were differences of opinion among the members of expert committee and therefore the the constitution of Apex Committee, is

justified for the said reason. The findings entered into by both the committees indicate certain negligence on the part of the persons who were on duty

during the post surgical period of the deceased at night. It is true that no one was specifically named. It is also discernible from the aforesaid reports

that, the major exercise was done by both the committees were to find out whether there were any lapses on the part of the doctors who conducted

surgery of the deceased. It was found that the decision as to the surgical procedures and the execution of the same were in order and there were no

negligence on the part of the doctors who performed the surgery. However, the question which is the subject matter of this case, is not relating to the

negligence during the course of surgical procedure or the decision taken for conducting such surgery on the deceased. In this case, the specific

allegation against the petitioner is that, despite being the person responsible for taking care of the deceased, during post surgical treatment, he did not

care to attend her, even though he was informed of the critical condition of the deceased by the staff nurse. Therefore, this is a case in which the

question is not relating to the mistakes on the part of the doctor while performing his duties, but on the other hand, it is a case where the doctor who

was responsible to take care of the patient, failed to attend the patient. In my view, considering the peculiar nature of the case, the negligence on the

part of the petitioner as alleged by the prosecution is whether a civil wrong or it amounts to culpable negligence so as to attract offence punishable

under Section 304A IPC is a matter of evidence which can be considered only during the trial.

17. The learned counsel for the petitioner relies on the observations in Jacob Mathewâ€™s case (supra) in which the judgment of the Honourable

Supreme Court in Suresh Gupta v. Govt. of N.C.T of Delhi and Ors.[(2004) 6 SCC 422] was upheld. It is true that the Honourable Supreme Court

categorically observed that a mere negligence is not sufficient to initiate criminal prosecution against the doctor and it is to be established that there is

gross negligence on the part of such medical professional.

18. Aforesaid question was again considered by the Honourable Supreme Court in P.B.Desai v. State of Maharashtra and Ors. [(2013) 15 SCC 481].

In the said decision, the Honourable Supreme Court considered the question as to whether omission on the part of the doctor would amount to rash

and negligent act so as to attract the offence under Section 338 of IPC. While considering the said issue, the Honourable Supreme Court considered

the matter, by raising six points such as:

(1) The Doctor-Patient Relationship.

(2) Duty of care which a doctor owes towards his patient.

(3) When this breach of duty would amount to negligence.

(4) Consequence of negligence: Civil and Criminal.

(5) When criminal liability is attracted.

(6) Whether Appellant criminally liable Under Section 338 Indian Penal Code, in the present case?

19. In relation to point No.2, i.e. duty of care which a doctor owes towards his patient, it is observed in paragraph No.40 as follows:

â€œ40. Once, it is found that there is â€˜duty to treatâ€™ there would be a corresponding â€˜duty to take careâ€™ upon the doctor qua/his patient. In certain context,

the duty acquires ethical character and in certain other situations, a legal character. Whenever the principle of â€˜duty to take careâ€™ is founded on a contractual

relationship, it acquires a legal character. Contextually speaking, legal â€˜duty to treatâ€™ may arise in a contractual relationship or governmental hospital or hospital

located in a public sector undertaking. Ethical â€˜duty to treatâ€™ on the part of doctors is clearly covered by Code of Medical Ethics, 1972. Clause 10 of this Code

deals with â€˜Obligation to the Sickâ€™ and Clause 13 cast obligation on the part of the doctors with the captioned â€œPatient must not be neglectedâ€. Whenever

there is a breach of the aforesaid Code, the aggrieved patient or the party can file a petition before relevant Disciplinary Committee constituted by the concerned

State Medical Council.â€

20. In point No.3 of the said decision the question as to when this breach of duty would amount to negligence was considered. After referring to the

judgments in Kusum Sharma v. Batra Medical Research Centre, [(2010) 3 SCC 480] as well as Halsburyâ€™s Laws of England, 4th Edn.Vol.26

pp.17-18 and also the Bolam v. Friern Hospital Management Committee (Queenâ€™ Bench Division) it was observed that: â€œA man need not

possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an

ordinary competent man exercising that particular art.

21. In point No.4, consequence of breach was considered. It was observed that if the patient has suffered because of negligent act/ omission of the

doctor, it undoubtedly gives right to the patient to sue the doctor for damages. This would be a civil liability of the doctor under the law tort and/or

contract. In point No.5 the circumstances when the criminal liability is attracted are considered. After referring to various principles in paragraph

No.46 and 47 it was observed as follows:

â€œ46. The only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate

willingness to subject others to the risk of harm. Negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another

to the risk of harm where the actor is aware -of the existence of the risk and, nonetheless, proceeds in the face of the risk. This, however, is the classic definition of

recklessness, which is conceptually different from negligence and which is widely accepted as being a basis for criminal liability.

47. The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and

recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be

described as merely negligent. If, however, there is nothing to suggest that the actor was aware of the risk deliberately taken, then he is morally blameless and should

face, at the most, a civil action for damages.â€

22. Thus the question raised in this case as to whether the prosecution against the petitioner is justified or not, is to be decided on the basis of the

above principles. The specific case of the learned counsel for the petitioner is that, the allegation against the petitioner, the finding of the expert

committee and also that of the Apex Committee, do not indicate a gross negligence which amounts to recklessness so as to attract the rigor of Section

304 A IPC. At the most it can be a civil wrong. However, when we consider factual situation in this case, it is a crucial aspect to be noticed that, here

it is a case where the allegation is that doctor who was on duty and under obligation to attend the patient, did not do so, despite being informed. The

lack of timely attention of the patient resulted in worsening her condition which ultimately lead to her death. Therefore, the question as to the gravity of

such negligence and as to whether the same is a mere negligence attracting only civil consequences or whether the same is a culpable negligence

amounting to recklessness warranting a criminal prosecution is a question of fact. It is true that the Expert Committee as well as Apex Committee did

not pin point any specific person as responsible for the incident. However, the findings by the aforesaid authorities do indicate certain negligence on

the part of the persons who attended the deceased during the post operative period. Therefore, merely because of the reason that no persons were

specifically named in this report by the expert committees the prosecution against the petitioner cannot be terminated prematurely, by invoking the

powers under section 482 Cr.P.C, without even giving the prosecution to substantiate the same by adducing evidence.

23. It is also discernible from the guidelines formulated by the Honourable Supreme Court that the purpose of seeking opinion from the expert panel,

before the criminal prosecution is initiated against the doctor, is for aiding the investigating officer and to ensure that only in those cases where a prima

facie gross negligence is established, proceedings are initiated. It is not contemplated that the finding of the expert committee or Apex committee is

the final word. Investigating officer has to take a decision on the basis of materials provided through the said reports and arrive at a just opinion as to

whether it is necessary to proceed or not. When the aforesaid aspect is considered, it can be seen that, in this case, there are justifiable grounds for

the investigating agency to proceed further, even though the expert opinion does not specifically name the petitioner as culprit. At the same time,

aforesaid report indicates negligence on the part of the persons who attended the deceased during the post operative period and admittedly the

petitioner was the duty doctor at the relevant time. Therefore, it is also a question of fact which is to be decided during the course of trial. Merely

because of the reason that, his role is not specifically named in the reports of expert committee as well as apex committee, the proceedings against

him cannot be quashed.

24. There is yet another aspect which fortifies my views as above. As rightly contended by the learned counsel for the 2nd respondent, the

investigating agency has already submitted an application as evidenced by Annexure-A6 for further investigation in the matter under Section 173(8) of

Cr.P.C. The reasons stated for the same are two fold, firstly, the investigating officer has already taken steps for obtaining sanction for prosecution

and secondly, they want to produce certain documents concerning the matters in connection with the procedure adopted during the post operative

period of the deceased. As far as the first issue is concerned, already a sanction has been obtained. The second aspect is relating to an opportunity for

production of certain documents to establish the allegations raised against the petitioner. Therefore, it is evident that, there are more materials available

with the prosecuting agency which according to them are relevant for substantiating the aforesaid offence and they are seeking for an opportunity to

produce the same. Thus, as contended by the learned counsel for the 2nd respondent, it is an incomplete final report and unless those materials are

also made as part of the said records, the question as to the involvement of the petitioner cannot be considered. Therefore, a premature termination of

the prosecution would deny them an opportunity to adduce such evidence. In the peculiar facts and circumstances of the case, I do not find any

reason to deny such opportunity to the prosecution in this case. Even while, ensuring that no innocent person is convicted, the court also has a duty to

ensure that no culprit escapes from the clutches of law. In such circumstances, a proper and fair opportunity has to be granted to the prosecuting

agency to adduce evidence. While making the aforesaid observations, I am conscious of the fact that there occurred long delay in prosecution, but, I

am of the view that the delay by itself cannot be a ground to interfere in this case for the reasons which I have observed in earlier paragraphs.

Therefore, it is only proper that the prosecution is to be granted a further opportunity to adduce evidence as sought for in Annexure-A6.

25. The learned counsel for the petitioner also placed reliance upon Annexure-A13 affidavit filed by the husband of the victim on 28.01.2014 in

C.C.No.521 of 2009 before the learned Magistrate. It is true that in the said affidavit, the husband of the deceased stated that he is convinced of the

fact that the death of the deceased was not due to negligence on the part of the petitioner herein. However, that affidavit by itself cannot be treated as

a ground to quash the proceedings. The question as to whether an offence is attracted or not and whether this is a case where powers of this Court

under Section 482 Cr.P.C. is to be invoked or not, are to be decided, based on the materials available on record. I have already found that the

contentions put forward by the learned counsel for the petitioner in this regard are basically factual contentions which can be gone into only during the

course of trial. Therefore, interference cannot be done merely on the basis of the affidavit before the learned Magistrate by the husband of the victim.

26. Another contention of crucial importance is lack of sanction under Section 197 Cr.P.C. As per Section 197 Cr.P.C., it is mandatory for the court

to obtain prior sanction from the Government for taking cognizance in respect of an offence alleged against a public servant. It is a special protection

provided to the public servant to ward off unnecessary prosecution. If it is shown that the act which forms the basis of the offence is reasonably

connected with his official duty, he is entitled for such protection. In State of Orissa v. Ganesh Chandra Jew [AIR 2004 SC 2179] the Honourable

Supreme Court was pleased to observe as follows:

â€œThe section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent

then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Sessions under Section 193, as it cannot take cognizance, as a

Court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a

Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information

received from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned the

cognizance of any offence, by any Court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to

have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the

conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a

public servant is brought out by the expression, ""no Court shall take cognizance of such offence except with the previous sanction"". Use of the words, 'no' and 'shall'

make it abundantly clear that the bar on the exercise of power by the Court to take cognizance of any offence is absolute and complete. Very cognizance is barred.

That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means ""jurisdiction"" or ""the exercise of jurisdiction"" or

power to try and determine causes"". In common parlance it means taking notice of. A Court, therefore, is precluded from entertaining a complaint or taking notice of

it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.â€

27. This judgment was relied on by this Court on various decisions including Shoukathali v. State of Kerala [2005 (3) KLT 634]. Thus it is evident that

cognizance taken in the absence of previous sanction under Section 197 Cr.P.C vitiates entire proceedings. In this case, the cognizance was taken in

the year 2009 whereas the order of sanction is obtained only on 28.09.2019, i.e. ten years later. Anneuxre-R2 (a) is the aforesaid order and it is

discernible there from that, the application for the same was submitted on 03.07.2017. Thus it is evident that the sanction was applied for and obtained

after cognizance was taken in this case. Going by the principles laid down by the Honourable Supreme Court as per the judgment referred above, the

cognizance is not proper and the further proceedings are vitiated. In such circumstances, I am of the view that the act of taking cognizance by the

Judicial First Class Magistrate Court-I, Kozhikode as C.C.No.521/2009 is not proper for want of sanction and liable to be set aside. However, as the

order of sanction has already been obtained, nothing precludes the learned Magistrate from taking fresh cognizance thereon and initiating further

proceedings pursuant to the same.

In the result, this Crl.M.C. is disposed of, by quashing the proceedings in C.C.No.521/2009 and with a direction to the Judicial First Class Magistrate

Court-I, Kozhikode to reconsider the question of taking cognizance on the final report in Crime No.105 of 2004 of Kozhikode Town Police Station, on

the basis of sanction obtained as per order dated 28.09.2019, and proceed with the matter further, in accordance with law. Nothing in this order shall

preclude the police from conducting further investigation on the basis of Annexure-A6.