(2012) 08 MAD CK 0020

Madras High Court

Case No: Criminal O.P. No. 8284 of 2009

Dr. J.S. Rajkumar and Another		APPELLANT
	Vs	
Assistant Commissioner of Police, Cyber Crime Cell, Central Crime Branch, Chennai and Another		RESPONDENT

Date of Decision: Aug. 3, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 161, 207, 227, 482
- Penal Code, 1860 (IPC) - Section 304A

Citation: (2013) 2 ACC 239 : (2012) MLJ(Cri) 654

Hon'ble Judges: S. Nagamuthu, J

Bench: Single Bench

Advocate: B. Kumar, for Xavier Felix, for the Appellant; M. Maharaja, Additional Public Prosecutor and Sathish Parasaran, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Nagamuthu, J.
This is a case of medical negligence. The 1st petitioner is a surgeon. The 2nd petitioner is the hospital of which, the 1st

petitioner is the Managing Director. They face prosecution for offence u/s 304-A I.P.C. Seeking to quash the said proceedings, the petitioners are

before this Court with this petition. The case of the prosecution is as follows:

The 2nd respondent had a son by name Vignesh, who was then aged 20 years. He was a B.Com., graduate. Unfortunately, he was suffering from

abnormal obesity and his weight was 211 Kgs. The deceased was advised by one Doctor J.S. Roy that he could undergo a surgery known as

weight loss surgery"". He was also informed that the 1st petitioner was competent to do the said surgery. Thereafter, the deceased approached the

1st petitioner in his hospital and sought for his opinion. The 1st petitioner, after having conducted preliminary examinations, advised him to undergo

the said surgery which is of two stages. The first stage of the surgery is known as ""bariatric surgery"". The deceased was informed that within a

period of three to six months after the first stage of surgery, he would lose at least 50 Kgs of weight. He was also informed that the said surgery

did not involve any complication and it would be enough for him to stay in the hospital as inpatient for a week''s time. He was also informed that

the cost of the surgery would be around 3.25 lakhs. The 2nd respondent namely, the father of the deceased, the deceased and the other family

members were convinced by the words of the first accused and so, they agreed for surgery proposed by the first accused. Accordingly, the

deceased was admitted in the 2nd petitioner hospital on 4.4.2006 by the 1st petitioner. It was planned to have the surgery on the morning of

5.4.2006. Accordingly, on 5.4.2006, the 1st petitioner conducted the surgery viz., ""duodenal switch gastrectomy"". He informed the deceased and

his parents that the second procedure viz., ""duodenal laparoscopic sleeve gastrectomy"" might not be needed for the patient. After the surgery, Mr.

Vignesh was moved to the Intensive Care Unit and was later shifted to the ward on 6.4.2006 and he was under the care of the first accused.

2. On 8.4.2006, Vignesh complained of severe abdominal pain. The 1st petitioner examined him and suspected that there was fluid collection in

the abdomen. But the cause for the fluid collection could not be diagnosed. Therefore, he wanted to go for ""exploratory laparatomy"" surgery to

find out the cause for leakage. Accordingly, on 8.4.2006, the first accused conducted ""exploratory laparotomy"" and in the said process, he drained

the fluid collection in the abdomen cavity. The first petitioner later told that he had noticed a perforation in the stomach and the same was closed by

appropriate stitching. He also told that the perforation was due to punching of staple.

3. After the said surgery was over, the condition of the patient became some what critical. He was maintained in the Intensive Care Unit for

support of vital parameters. On 11.4.2006, the patient had septic shock. The treatment continued for reducing the septic shock. On 21.4.2006,

tracheotomy was done and the patient was put on ventilation.

4. On 22.4.2006, it was diagnosed that even after the second surgery, there was intra abdominal leak from the anatomosis or staple line. On

25.4.2006, the relatives of the patient were informed by the 1st petitioner that the leak was persistent as the patient was suffering from ""gastric

fistula"" for which he needed a morphine, a cleaning up procedure on the operation theater for about 45 minutes which would help him to recover

faster. It was actually planned for a third surgery to explore the cause for the leakage and the fluid collection in the abdominal cavity. But the

Anesthetist, after having examined him, opined against giving anesthesia to the patient. Therefore, the plan to go in for third surgery was given up.

Thereafter, there was no improvement in the condition of the patient and it was worsening.

5. On 26.4.2006, at the request of the parents of the deceased, he was discharged and moved to Apollo hospital, Greams Road, Chennai. Of

course, he was taken in clinical condition to the said hospital. The Doctors at Apollo Hospital could not go in for surgery because of the bad

condition of the patient. The Doctors in Apollo Hospital diagnosed that there was severe infection and opined that if only infection was reduced

and brought under control, further surgery could be done to correct the source for leakage. Unfortunately, due to septic shock the patient died on

26.4.2006 evening itself. The Doctors at Apollo Hospital certified the death of the deceased as follows:

Morbid obesity - Explorative Laparotomy on 8.4.2006 (Done Elsewhere) Post operative Gastric fistula/""Sepsis"".

6. Alleging that the death of the deceased was due to the gross medical negligence on the part of the 1st petitioner herein, a complaint was made

by the 2nd respondent to the jurisdictional Magistrate, who in turn forwarded the same u/s 156(3) of Cr. P.C. to the police, viz., Central Crime

Branch, Egmore, Chennai on which the present case was registered.

7. During the course of investigation, the Investigating Officer examined a number of witnesses of whom 32 witnesses have been cited in the charge

sheet. Apart from the family members and other independent witnesses, he has examined a total number of 14 doctors of whom five are expert

doctors, from whom, he has obtained opinion. On completing the investigation, the 1st respondent filed final report before the learned Judicial

Magistrate, Alandur, alleging that the petitioners are guilty of gross negligence punishable u/s 304-A IPC. The learned Judicial Magistrate, having

found sufficient materials on record, has taken cognizance and has issued summons to the petitioners. Accordingly, they have made appearance

also.

8. In this original petition, it is contended that there was no negligence, much less, a gross medical negligence on the part of the 1st petitioner so as

to allow the accused to face the prosecution for offence u/s 304-A IPC.

9. In order to substantiate the said contention, Mr. B. Kumar, the learned senior counsel appearing for the petitioners, would take me through the

statements of almost all the witnesses more particularly, the Doctors and would submit that absolutely there is no material even to infer that there

was gross medical negligence on the part of the petitioners. The learned senior counsel relied on a few judgments of the Hon''ble Supreme Court

as well as the other Courts about which, I would make reference at the appropriate stages of this order.

10. The learned Additional Public Prosecutor, appearing for the 1st respondent, would vehemently oppose this petition. According to him, there

are more than sufficient materials available on record, which were collected during investigation, and the same would go to show that the 1st

petitioner is guilty of gross medical negligence. In order to substantiate his contention, the learned Additional Public Prosecutor has taken me

through certain materials filed before the trial Court about which also, I would make reference at the appropriate stages of this order.

11. Mr. Sathish Parasaran, the learned counsel for the 2nd respondent would resist this petition. He would submit that based on the medical

records, many expert doctors have given opinion stating that the 1st petitioner is guilty of gross negligence. He would however fairly concede that

three doctors, who were examined during the course of investigation, have given opinion that there was no negligence on the part of the 1st

petitioner. But he would further submit that when there are such conflicting opinions between two or more experts, it would be appropriate only to

leave the matter for the decision of the trial Court. He would further point out that in a proceeding u/s 482 Cr. P.C., this Court cannot make a

roving enquiry so as to take the task of appreciating the evidences as though it is a trial Court or a Court of appeal. The learned counsel has relied

on a few judgments of the Hon''ble Supreme Court as well as this Court to substantiate his contentions about which also I would make reference at

the appropriate stages of this order.

12. I have considered the rival submissions and also perused the records carefully.

13. Before going into the facts of the case, let me first have a look into the legal position regarding medical negligence warranting prosecution for

offence u/s 304-A of IPC. The learned senior counsel appearing for the petitioners would rely on the much celebrated Constitution Bench

judgment of the Hon''ble Supreme Court in Jacob Mathew Vs. State of Punjab and Another, wherein, the Hon''ble Supreme Court has held thus:

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society. 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. 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.

14. Referring to the above observations of the Hon''ble Supreme Court, the learned counsel would further proceed to rely on the observation

made in para 34 of the aforesaid judgment wherein, the Hon''ble Supreme Court has held as follows:

34. The criminal law has invariably placed medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as

far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not

intended to cause death, done by consent in good faith for person''s benefit. Section 92 provides for exemption for acts done in good faith for the

benefit of a person without his consent though the acts cause harm to the person and that person has not consented to suffer such harm. There are

four exceptions listed in the Section which are not necessary in this context to deal with. Section 93 saves from criminality certain communications

made in good faith. To these provisions are appended the following illustrations:

Section 88

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause

Z''s death, and intending, in good faith, Z''s benefit, performs that operation on Z, with Z''s consent. A has committed no offence.

Section 92

(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z''s death, but in good faith,

for Z''s benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to

apply to the child''s guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child''s benefit. A has

committed no offence.

Section 93

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has

committed no offence, though he knew it to be likely that the communication might cause the patient''s death.

15. Thus, the Hon''ble Supreme Court has distinguished an ordinary negligence giving rise to a cause of action for a civil claim and gross negligence

which gives rise to a cause of action for criminal prosecution. The Hon''ble Supreme Court went on to say that though the word gross is not found

in Section 304-A of IPC, when the question of prosecuting a medical practitioner for medical negligence comes, the word ""gross"" should be read

into Section 304-A of IPC. The Hon''ble Supreme Court has further held that gross negligence is a higher degree of negligence than ordinary

negligence. In other words, ""gross"" means ""reckless"" or ""callous"". The Hon''ble Supreme Court has finally held that to maintain the prosecution of a

medical practitioner for medical negligence, it should be found that there are materials to show that the medical practitioner has committed not an

ordinary negligence but, a gross negligence. In paragraph No. 48 of the judgment, the Hon''ble Supreme Court has concluded as follows:

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 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 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.

16. In paragraph No. 49 of the judgment, the Hon''ble Supreme Court has expressed agreement with the principles of law laid down in Dr. Suresh

Gupta Vs. Govt. of N.C.T. of Delhi and Another, In paragraph No. 52 of the judgment, the Hon''ble Supreme Court has issued a direction thus:

...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 the Bolam test to the facts collected in the investigation....

17. Jacob Mathew v. State of Punjab (supra) case, referred to above, was concerned with criminal prosecution. In Martin F. D''Souza Vs. Mohd.

Ishfaq, the question of negligence came up for consideration in a compensatory claim made before the consumer forum. In that case, the Hon''ble

Supreme Court extended the scope of the directions issued in Jacob Mathew v. State of Punjab (supra) case to the claims before the consumer

forums also. According to the said judgment, before entertaining any complaint regarding medical negligence, the Consumer Forum shall call for a

report from a committee of competent doctors. To be precise, in para 106, of the said judgment, the Hon''ble Supreme Court has held as follows:

106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or

National) or by the criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum

or the criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the

medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice

be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent.

We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew

case, otherwise the policemen will themselves have to face legal action.

18. Subsequently, Martin F. D''Souza v. Mohd. Ishfaq (supra) case, again came up for consideration before a Division bench of the Hon''ble

Supreme Court in V. Kishan Rao Vs. Nikhil Super Speciality Hospital and Another, After having elaborately made a scientific analysis of the law

on the subject, the Division Bench has held that the directions issued in Martin F. D''Souza v. Mohd. Ishfaq (supra) case impelling the consumer

forums to get an opinion before the team of doctors before entertaining the complaint is per incurium. The Hon''ble Supreme Court accordingly,

held in paras 33 and 34 as follows:

33. Eckersley v. Binnie summarised the Bolam test 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 a polymath and prophet.

34. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error

of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of

the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after

an operation, vide Achutrao Haribhau Khodwa v. State of Maharashtra or operates on the wrong part of the body, and he would be also

criminally liable if he operates on someone for removing an organ for illegitimate trade.

19. However, the Hon''ble Supreme Court followed, with agreement, the directions issued in Jacob Mathew case that during the course of

investigation, the Investigating Officer should get opinion from a committee of three un-biased doctors regarding the alleged medical negligence on

the part of the doctor.

20. From the above judgments, it is crystal-clear that the law has been well settled by the Hon''ble Supreme Court in respect of medical

negligence. For the purposes of our case, I may say only the following:

(i) For prosecuting a doctor for medical negligence, there should have been collected materials showing not an ordinary negligence but a gross

negligence committed by him;

(ii) Before prosecuting a doctor, for medical negligence before a criminal Court, the Investigating Officer should have obtained independent opinion

from unbiased doctors; and

(iii) The doctors do tremendous yeomen service to the society and therefore, they should be protected from unscrupulous prosecution and so, the

police as well as the Courts should guard themselves from being swayed by ill-founded allegations against the doctors.

21. With the above principles in mind, let us now move on to the facts of the case and the rival submissions made by the learned counsel on either

side.

22. Admittedly, on 4.4.2006, the deceased was admitted and the 1st petitioner conducted surgery on him on 5.4.2006. It is not the case of the

prosecution that the 1st petitioner is incompetent to do the surgery. To the contrary, the case of the prosecution is that the surgery was not

conducted in the manner expected of from him and that the post-operative management was not done with due diligence and this act of the 1st

petitioner is gross in nature making out an offence u/s 304-A of IPC. After the first surgery, the patient was moved to Intensive Care Unit and

thereafter, to the ward. On 8.4.2006, he complained of abdominal pain. According to the medical records available in this case, on the same day,

the 1st petitioner diagnosed that there was fluid collection in the abdominal cavity. Admittedly, the fluid collection in the abdominal cavity was due

to the leakage through a perforation in the stomach. The leakage point could not be diagnosed because both ""Methylene Blue Test"" and ""Ultra

Sound Examination"" could not reveal the seat of perforation. Therefore, the 1st petitioner was right in moving the patient to the theatre and to do

exploratory laparotomy surgery.

23. It is the claim of the petitioner that during the said second surgery, the entire abdominal cavity was cleaned, the collection was drained, the seat

of perforation was noticed in the stomach, the same was also stitched and thus, it was closed. Then the patient was kept under Intensive Care.

24. From this, it is clear that there was no other source for fluid collection in the abdominal cavity after the second surgery. However, the patient

became critical and therefore, he was put on ventilation. This continued for many days. It was the 1st petitioner, assisted by a team of doctors,

who had extended the post operative care. But, the fact remains that fluid started collecting again in the abdominal cavity. The abdomen was

distended and as a result, the deceased was not able to breathe freely. Here, had it been true that perforation had been closed properly, there was

no chance for further leakage and further collection of fluid in the abdominal cavity. The contaminated materials were getting collected in the

abdominal cavity which resulted in severe infection in the abdominal cavity. The 1st petitioner attempted to go in for another surgery. But

unfortunately, it could not be done, because the Anesthetist gave opinion against the same.

25. Now, it is crystal clear that on one side, the fluid was getting on collected in the abdominal cavity and on the other side the infection was

becoming severe. After this development, the only treatment given by the 1st petitioner was antibiotic to control the sepsis. He did not do anything

to find out the source for the leakage.

26. It is also on record that the drainage tube which had earlier been fixed for draining the fluid collection in the abdominal cavity was removed by

the 1st petitioner. It is not known as to why the drainage tube was removed when the fluid was still getting collected in the abdominal cavity. In this

regard, Dr. R. Surendran has stated as follows:

The abdominal drain was removed on 17.4.2006 even while the patient was critical. Within 3 days i.e. On 20.4.2006 (sic) feeding was started

despite the fact that the main would was soaked with discharge which may be an indicator or an intra abdominal catastrophe. In such case feeding

would further aggravate the problem.

From these findings of Dr. R. Surendran, one thing is clear i.e., one side oral feeding was not stopped and so, whatever was fed was leaking

through the perforation. The fluid collection could not be drained as he had already in a reckless manner removed the drainage tube. As a result,

the infection was progressing severe. These acts at least constitute gross negligence.

27. In his opinion, Dr. R. Surendran has further stated that the cause for the post operative sepsis is leak from the anatomosis or staple lines. Even

until 22.4.2006 i.e. more than 2 weeks after the second surgery the same was not suspected and treated. Any doctor of normal prudence would

have suspected that the sepsis was due to the leak from anatomosis or staple lines. Dr. Surendran has further stated as follows:

the reference letter to apollo hospital mentions a plan to do? Gastrostomy? Gastrectomy? Cervical oesophagostomy for suspected gastro

cautaneous fistula and intra abdominal collection. Dr. Surender has further stated that this suspicion of intra abdominal collection does not feature

anywhere on the case sheet nor any investigative steps for its diagnosis ever done. The diagnosis of the intra abdominal collection and plan for

another surgery features only on the reference letter to appollo hospital. He has further stated that the case sheet shows that measures were taken

for treating the sepsis without addressing the cause for the sepsis i.e., intra abdominal collection from a leaking staple line.

28. Dr. Surendran has finally opined as follows:

Hence my opinion which is based on the available records, the patient and their relatives were not adequately informed and prepared for the high

risk surgery that was done. Even during re-exploration, especially when pus was found in the abdomen, suturing the hole will result in failure-in-

stead a controlled fistula to drain should have been done. When the patient did not improve even with the highest antibiotics and antifungal agents,

he should have been investigated for persistent or recurrent intra abdominal collection of pus. The collection could have been drained with CT/MRI

guidance which would have prevented further complications and probably have been life saving.

29. Similar opinion has been given by Dr. T.K. Chattopadhyay, Professor & Head, Department of G.I., Surgery, AIIMS, Ansari Nagar, New

Delhi, as follows:

After carefully going through the copy of the case sheets provided Anti-obesity surgery needs careful evaluation by repeated sessions of

discussions with the patient and his relatives because they should clearly understand the problem of the condition and the need for therapeutic

intervention. It should be made clear to them what to expect following intervention. There is no mention if these were done. Success of any anti-

obesity measures largely depends on patient motivation. This too does not seem to have been evaluated. All patients of obesity should be offered

non-surgical treatment options before surgical treatment is considered. Even if it fails, it convinces the patient of the possible benefits of surgical

treatment. At the same time, it gives the physician an opportunity to assess the compliance of the patient to pursue change in life style so very

important for success of any anti-obesity therapy including surgery. As per records available, this was not done. In the preoperative work up of a

patient of severe obesity there is need for a team approach. Before operation, opinion of cardiologist, Pulmonologist, Psychiatrist are routinely

sought in this condition. It is not clear if all these were obtained before the operation because the patient was admitted on the 4th and operated on

the 5.4.2006. It is not clear if the gastric leak was pre operatively detected by any contrast study before the second surgery. Similarly before

allowing feeds, leaks should have been excluded by some investigations other than ultra sound which is not a good tool for post operative

evaluation for such purpose. The patient was on endotracheal tube for over 2 weeks. Tracheostromy which was eventually done should have been

electively done at an earlier date particularly when wearing off the ventilator done at an earlier date particularly when wearing off the ventilator has

not been possible. When the patient continued to have intra-abdominal sepsis, a vigorous search for the cause could have been done so as to

tackle the source with better planned strategy.

30. Thus, the above two experts have given opinion that there was medical negligence on the part of the 1st petitioner. But the learned senior

counsel appearing for the petitioners would submit that three other doctors, who were examined during investigation, have stated that there was no

negligence on the part of the 1st petitioner. Dr. A. Rathnaswami, Professor of Surgical Gastro Enterology, Kilpauk Medical College, Chennai in his

statement u/s 161 of Cr. P.C. has stated thus:

He underwent surgery-laparoscopic sleeve Gastrectomy for morbid obesity on 5.4.2006 at Life Line Multi Specialty Hospital, Perungudi. On the

third post operative day that is on 8.4.2006, he developed gastric perforation which was immediately detected and treated by surgery perforation

closure on 8.4.2006 from the available records before me, I find that the subsequent management of the patient has been appropriate and proper

31. Dr. Srikumari Damodaran, Professor & Head of Surgical Gastroenterology, Madras Medical College, Chennai has given her opinion in her

statement u/s 161 of Cr. P.C. as follows:

On 8.6.2006 Thiru. Vignesh underwent the second operation or Gastric perforation and followed on to gastric fistula with sepsis. Throughout the

period in the hospital, Thiru. Vignesh has received intensive postoperative care, with antibiotics, supportive therapy and ventilatory support. When

needed. Specialists of various disciplines have been called and have given opinion, which was carried out. Thiru. Vignesh expired on 26.4.2006. I

have given opinion as ""Adequate medical and surgical management has been at all times. There does not appear to be any lapse or medical

negligence in the treatment for Thiru. Vignesh as per the case records.

32. Dr. Thiyagavalli Kirubakaran, Director of Medical Education, Chennai-10 has given her opinion as follows:

I gave opined on 31.8.2007 that it is considered that the opinion given by the majority of the doctors were accepted and concluded that there is no

negligence on the part of the medical officer for giving treatment to the said patient Thiru. Vignesh.

33. Relying on these three opinions of the Doctors in their respective statement recorded u/s 161 of the Cr. P.C., the learned senior counsel would

submit that absolutely, there was no negligence, much less, gross negligence on the part of the petitioners.

34. In this regard, I may refer to the judgment of the Hon''ble Supreme Court in B. Jagdish and Another Vs. State of A.P. and Another, In that

case, before the Hon''ble Supreme Court, there were two conflicting opinions given by two different Doctors. It was also a case where the criminal

prosecution was sought to be quashed on the ground that there were two opinions of which one opinion was in favour of the Doctor.

35. In paragraph 24 of the said judgment, while considering the limited jurisdiction of this Court u/s 482 of Cr. P.C., the Hon''ble Supreme Court

has held as follows:

29. The question is as to whether the High Court should have interfered with the order summoning the appellant at this stage? It is now a well

settled principle of law that at the stage of quashing of an order taking cognizance, an accused cannot be permitted to use the material which would

be available to him only as his defence. In his defence, the Court would be left to consider and weigh materials brought on record by the parties for

the purpose of marshaling and appreciating the evidence. The jurisdiction of the Courts, at this stage, is limited as whether a case of reckless/gross

negligence has been made out or not will depend upon the facts of each case.

(emphasis supplied)

36. In the same judgment, the Hon''ble Supreme Court has relied on the earlier judgment in State of Orissa Vs. Debendra Nath Padhi, wherein in

paragraphs 21 and 23 the Hon''ble Supreme Court has held as follows:

21. It is evident from the above that this Court was considering the rare and exceptional cases where the High Court may consider unimpeachable

evidence while exercising jurisdiction for quashing u/s 482 of the Code. In the present case, however, the question involved is not about the

exercise of jurisdiction u/s 482 of the Code where along with the petition the accused may file unimpeachable evidence of sterling quality and on

that basis seek quashing, but is about the right claimed by the accused to produce material at the stage of framing of charge.

22....

23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no

right to produce any material. State of Madhya Pradesh Vs. Mohanlal Soni, holding that the trial Court has powers to consider even materials

which the accused may produce at the stage of Section 227 of the Code has not been correctly decided.

37. Applying the standard of examination which the High Courts can undertake u/s 482 of Cr. P.C. as held in State of Orissa v. Debendra Nath

Padhi (supra) case cited supra, in para 28 of the judgment, while considering the conflicting opinion from two sets of Doctors, the Hon''ble

Supreme Court has held as follows:

Keeping in view the facts and circumstances of this case, we are of the opinion that it cannot be said that the materials brought on record by the

complainant, even if given face value and taken to be correct in their entirety do not disclose an offence. We say so because there are two sets of

opinions; one in favour of the complainant and another in favour of the appellants. Which opinion would ultimately prevail is essentially a question

to be determined by the learned Trial Judge upon considering the evidence adduced by the parties hereto in their entirety.

(emphasis supplied)

38. In the case on hand, of course, it is true, that there are two opinions from two sets of Doctors. As I have already extracted, Dr. R. Surendran

and Dr. T.K. Chattopadhyay have opined that there was negligence on the part of the 1st petitioner. As a matter of fact, Dr. Surendran has

enumerated a long list of deficiencies which were noticed in the post operative management done by the petitioner constituting gross negligence.

Dr. T.K. Chattopadhyay has also given such a detailed opinion. It is, of course, true that three other Doctors mentioned above, who have been

sited as witnesses in the charge sheet, have offered opinions which go in favour of the petitioner. At this stage, when this Court is called upon to

exercise its inherent jurisdiction u/s 482 of Cr. P.C. this Court cannot make a roving enquiry so as to give a finding as to which among the two

opinions offered by different set of Doctors is acceptable. To put it otherwise, it falls within the realm of appreciation of evidence at the time of

trial. For a moment, I am not prepared to say that the opinions offered against the 1st petitioner are acceptable to the Court and the opinions

offered in his favour are liable to be rejected. I only say that among these opinions, which is to be accepted and which is to be rejected, should be

left to the trial Court to decide on evidence to be let in on either side. That is what has been preciously held by the Hon''ble Supreme Court in B.

Jagdish v. State of Andhra Pradesh (supra).

39. Nextly, the learned senior counsel relied on the statements of yet another Doctor by name Dr. C.M.K. Reddy, who has not been cited as a

witness by the prosecution. In this regard, I want to reiterate that this Court can look into only the documents filed by the police and relied on by

them as provided in Section 207 of Cr. P.C. This Court cannot look into any document produced by the accused, unless the said document is

impeccable in nature. If there is any dispute regarding any particular document, then, it is not permissible at all for this Court to rely on such

document when this Court is called upon to exercise its inherent power u/s 482 of Cr. P.C. In the case on hand, Dr. C.M.K. Reddy has not been

cited as a witness in the charge sheet. Therefore, such material cannot be looked into by this Court at all. If Dr. C.M.K. Reddy could offer any

opinion which would be helpful for the Court to come to a right conclusion, it will always be open for the petitioners to examine him as a defence

witness before the trial Court. Therefore, I am not prepared to make any reliance on the statement recorded u/s 161 of Cr. P.C. from Dr. C.M.K.

Reddy.

40. Nextly, the learned senior counsel for the petitioner placed reliance on an article under the heading ""Gastric Leakage after sleeve gastrectomy -

Clinical presentation and therapeutic options, etc."" appeared in a journal and authored by Christian Jurowich - Andreas Thalheimer - Florian

Seyfried - Martin Fein -Gwendolyn Bender - Christoph - Thomas Germer - Christian Wichelmann. When I asked the learned senior counsel as to

who the authors are and what their competence is, the learned senior counsel is not in a position to say anything. The contents of the said article

can be treated only as the opinion of the authors of the article. If they are celebrated authors, the article can only guide the trial Court to come to a

right conclusion. Even then the opinion offered in the said article should be put to the Doctors who will be examined in Court and their further

opinion should be called for in respect of the opinion expressed in the article. Thus, any article appearing in a journal will be of use either for

prosecution or for defence only at the time of trial to gather further opinion elicited from the Doctors who are going to be examined. For these

reasons, in this proceeding, I am not able to attach any importance to the said article placed by the learned senior counsel for the petitioners.

41. Nextly, the learned senior counsel for the petitioners would rely on the judgment of the Hon''ble Supreme Court in U.P. Judicial Officers''

Association v. Union of India, JT 2002 (8) SC 133. In that case, the Hon''ble Supreme Court has issued a direction that in the event of the police

proposing to prosecute any Judicial Officer, it should be done only with the consent of the Hon''ble Chief Justice of the High Court concerned.

Relying on the said judgment, the learned senior counsel would submit that though there is no statutory provision which prohibits a Magistrate from

taking cognizance of an offence against Judicial Officers, the Hon''ble Supreme Court has made it a law that such prosecution can be launched only

after obtaining necessary permission from the Hon''ble Chief Justice of the respective High Court. The learned senior counsel would submit that the

purpose behind the same is to avoid unscrupulous prosecution against the Judges as they may be targeted by aggrieved litigants who have lost their

litigation before the Judges. Referring to the above said judgment, the learned counsel would submit that applying the same principle in the case of

a Doctor also, if there is medical opinion in favour of the Doctor, the Judicial Magistrate should not take cognizance on the final report submitted

by the police. In other words, the contention of the learned senior counsel is that not only the Investigating Officer, but the Judicial Magistrate is

also bound by the opinion of a team of doctors from whom opinion is obtained as directed in Jacob Mathew v. State of Punjab (supra) case cited

supra. In the case on hand, admittedly, from three Doctors opinions were obtained by the Investigating Officer during the course of investigation

wherein they have given opinions in favour of the petitioners. It is because of this, the learned senior counsel would submit that the investigating

officer ought not to have laid charge sheet against the petitioners and the learned Magistrate, in turn, ought not to have taken cognizance. But, I am

not persuaded by the said argument of the learned senior counsel. The directions of the Hon''ble Supreme Court in U.P. Judicial Officers''

Association v. Union of India (supra), case as well as Jacob Mathew v. State of Punjab (supra) case are with a laudable purpose. It is common

knowledge that the members of the family of the victim, clouded by grief and actuated by emotion, may allege medical negligence on the part of the

Doctor who treated the deceased. If the police officer who receives the complaint acts swiftly and in a hurried manner, arrests the doctor and lays

final report against him, it will be injurious, not only to the reputation of the Doctor, but also to the society at large. Therefore, in those

circumstances, out of abundant caution, the Hon''ble Supreme Court has directed in Jacob Mathew v. State of Punjab (supra) case that the

investigating officer should get opinion from an unbiased preferably Government doctors. In this case, of course, there is such opinion obtained.

But quite contrary to this opinion, opinion has been offered by two other expert Doctors by name Dr. Surendran and Dr. T.K. Chattopadhyay,

who are also unbiased Doctors. When there are such conflicting opinions from two different team of competent doctors, then, the police officer

cannot simply close the case by accepting the opinion offered by the Doctors in favour of the petitioners. Doing so, will only result in great injustice

to the family of the victim. In such an event, therefore, he is bound to file final report leaving it open to the decision of the trial Court. It is for the

trial Court to resolve the issue ultimately giving a clear finding as to whether the Doctor who treated the deceased was grossly negligent or not.

Thus, in this case, the trial Court was right in taking cognizance of the offence on the police report. Therefore, this argument of the learned senior

counsel is also rejected.

42. Yet another main argument advanced by the learned senior counsel is that assuming that there was some negligence as spoken to by the Dr.

Surendran and Dr. T.K. Chattopadhyay, that will not make out a case of gross negligence. Therefore, at least on this point, according to the

learned senior counsel, the petitioners should succeed. This argument also does not persuade me. The difference between the ordinary negligence

and gross negligence is not very wide. When there are two sets of Doctors offering two conflicting opinions, at this stage, that too, at the thresh-

hold of the proceeding itself, it cannot be stated that the negligence is not gross in nature. In Jacob Mathew v. State of Punjab (supra) case the

Hon''ble Supreme Court quashed the proceeding at the thresh-hold of the case because, on facts, the Hon''ble Supreme Court was convinced that

the negligence attributed against the Doctor was not gross in nature. In that case, in para 53 of the judgment, the Hon''ble Supreme Court has

expressed that there was no negligence on the part of the Doctor. In that case what happened was that when the patient was undergoing post

operative treatment, suddenly, he developed breathing trouble. But there was no oxygen cylinder in the hospital to give oxygen support

immediately. The patient ultimately collapsed. Therefore, the Hon''ble Supreme Court has held that for the non-availability of oxygen cylinder either

because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty, the Doctor cannot be held

responsible. Thus, in Jacob Mathew v. State of Punjab (supra) case, the Hon''ble Supreme Court was fully convinced that the Doctor was not

responsible for the death of the patient. It was in those circumstances, the Hon''ble Supreme Court has quashed the proceeding against the Doctor.

But, in the instant case, it is not such a clear case where one can say that there was no gross negligence on the part of the 1st petitioner. Therefore,

this argument is also liable to be rejected.

43. Now coming to the case of the 2nd petitioner, it is the hospital where the deceased was treated. When a specific query was made to the

learned Additional Public Prosecutor as to how the hospital can be held liable for punishment u/s 304-A of IPC, the learned Additional Public

Prosecutor, after going through the case records and after getting instructions from the Investigating Officer Dr. Sudhakar, who is present in Court,

would fairly concede that there is no case made out as against the 2nd petitioner and so, he has no objection for quashing the proceeding insofar as

it relates to the 2nd petitioner. The learned counsel appearing for the 2nd respondent would also be fair enough to concede that there is no case as

against the 2nd petitioner and, therefore, he has also no objection for quashing the case as against the 2nd respondent alone. I do find that there is

no material available on record to maintain the prosecution as against the 2nd petitioner and, therefore, I am of the view that the criminal

proceeding against the 2nd petitioner alone is liable to be quashed. But, as I have concluded earlier, there are sufficient materials to make out a

prima facie case of gross medical negligence on the part of the 1st petitioner and so, the case cannot be quashed as against him.

44. In the result, the criminal original petition is partly allowed in the following terms:

(i) The case in C.C. No. 520 of 2008 pending on the file of the Judicial Magistrate, Alandur, is hereby quashed insofar as it relates to the 2nd

petitioner/Second Accused alone is concerned.

(ii) This original petition is dismissed insofar as it relates to the 1st petitioner/First Accused is concerned.

(iii) The trial Court will be at liberty to proceed against the 1st petitioner/First Accused in accordance with law.

It is made clear that any observation made in this order is only for the purpose of deciding the issues involved in this original petition and, therefore,

no observation made in this order shall influence the mind of the trial Court. The trial Court shall independently appreciate the evidences to be let in

before it on either side and decide the case in accordance with law. Since, this case is pending from the year 2008, the trial Court is directed to

expedite the trial.