

IN THE HON'BLE HIGH COURT OF DELHI

TEAM CODE-

IN THE MATTER OF

THE STATE (DELHI ADMINISTRATION)

...APPELLANT

V.

DR. K. K. SINHA & ORS

...RESPONDENTS

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENTS

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LIST OF ABBREVIATIONS

| | |
|---------|---------------------|
| & | And |
| ¶ | Paragraph |
| AIR | All India Reporter |
| Anr. | Another |
| Art. | Article |
| Co. | Company |
| CompLJ | Company Law Journal |
| Corpn. | Corporation |
| Cr. | Criminal |
| Edn. | Edition |
| Govt. | Government |
| Hon'ble | Honourable |
| i.e. | That is |
| Ltd. | Limited |
| No. | Number |
| Pvt. | Private |
| QB | Queens' Bench |
| SC | Supreme Court |
| SCC | Supreme Court Cases |
| v. | Versus |
| Vol. | Volume |
| www | World Wide Web |

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STATEMENT OF JURISDICTION

THE APPELLANT HAS APPROACHED THIS HON'BLE HIGH COURT OF DELHI UNDER SECTION 378¹ OF THE CODE OF CRIMINAL PROCEDURE 1973.

¹ 378. Appeal in case of acquittal.

(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under subsection (1) or under sub-section (2).

STATEMENT OF FACTS

For the sake of brevity and convenience of this Hon'ble Court the facts of the present case are summarise as follows:

1. Mr. Rajendra Prasad, met with an accident on 10.10.2012 while he was driving his car along the Daryaganj Road. As a result of the accident, he sustained injuries for which he was taken to a small hospital, Don Bosco Hospital. As there was no advanced equipment in that hospital, he was rushed to Nelson Smith Hospital.
2. At Nelson Smith, his X-rays, scans and other tests were carried out whereby a fracture of the mid-shaft of the right femur was detected. Thereafter, he was referred to specialist hospital namely Dr. B.N. Sandok Memorial Hospital and Dr. K.K. Sinha who was well-known orthopaedic surgeon, took charge of the patient under personal care. At the time of admission in the hospital he was conscious, then Dr. Sinha decided to conduct open reduction of fracture and internal fixation under anaesthesia. As operation procedure was on, they found that some equipment was not performing at optimal level.
3. But, Dr. Sinha was of the view that level of performance of equipment was manageable, so they go ahead with the operation, in view of the urgency of the situation. The equipments involved included the machines used for monitoring of oxygen supply and the retention level of anaesthesia. After the operation the patient was kept under the observation but he did not regain consciousness for 24 hours, for which he was referred to Rajiv Gandhi Multi-Specialty Hospital, on the ground that respirator was not functioning in the Sandok Hospital.
4. A team of three senior doctors, with no anaesthetic among them made an investigation on the patient, before commencing any treatment and held that the operation procedure followed by Sandok Hospital was extremely deficient, that the doctors put into service equipment that they knew to be defective, yet they proceeded to operate on the patient and that now second operation was now inevitable, although the chance of survival is lesser now. But it was conducted on urgent basis, however the patient did not survive the operation. The relatives filed an FIR complaining of murder by management and doctors of Sandok Hospital with charges of criminal negligence of murder. Though Sessions Court did not found sufficient evidence against accused and acquitted them. The case is now on appeal before the High Court of Delhi.

STATEMENT OF ISSUES

- I. DOCTOR SINHA AND MANAGEMENT ARE NOT LIABLE FOR CULPABLE HOMICIDE NOT AMOUNTING TO MURDER U/S 304**
- II. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE NOT LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304A**

SUMMARY OF ARGUMENTS

I. DOCTOR SINHA AND MANAGEMENT ARE NOT LIABLE FOR CULPABLE HOMICIDE NOT AMOUNTING TO MURDER U/S 304.

For proving an offence under culpable homicide not amounting to murder the prosecution must prove- that there exists knowledge of the act which in proximity likely to cause death. It is unreasonable to consider that the purported act has been done by Doctor Sinha with the knowledge that in all probability it would result in the death of the patient. The act done by Mr. Sinha does not intend to cause death of the patient, nor the knowledge of likely to be causing death, performed in good faith for the best interest of the person. The act was such that the probability of the death arising due to such cannot be seen in close proximity as the condition of the patient before the operation procedure was not critical to the extent that it might risk the life if amounted to operation.

II. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE NOT LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304A.

For proving negligence under the criminal law, the prosecution must prove- that there exists a duty, there was breach of the duty causing death and that breach to be characterized as gross negligence. To impose criminal liability, under Section 304A, it is necessary that the death would be direct result of the negligent act of the doctor, and the act must be proximate and efficient cause without the intervention of another's negligence. Dr. Sinha acted in a professional manner, trying his best to redeem the patient out of his suffering took the step of operating the patient for which he could not be made criminally liable as the negligence in such instances is based upon the best judgment of the practitioner considering the relevant precautionary measures taken in the due course which needs to be considered by Court before implementing such liability.

ARGUMENTS ADVANCED

I. DOCTOR SINHA AND MANAGEMENT ARE NOT LIABLE FOR CULPABLE HOMICIDE NOT AMOUNTING TO MURDER U/S 304.

1. Section 304 provides punishment for culpable homicide not amounting to murder-

“Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injuries as is likely to cause death.”

2. For proving an offence under culpable homicide not amounting to murder the prosecution must prove- that there exists knowledge of the act which in proximity likely to cause death. It is unreasonable to consider that the purported act has been done by Doctor Sinha with the knowledge that in all probability it would result in the death of the patient. In the case of *Mahadev Prasad Kaushik v. State of U.P.*² the court cautiously pondered upon the facts, wherein *prima facie* it was observed that the condition of the patient was not of such serious nature which would result in death during the treatment. Thereby the appeal was dismissed and so far as the issuance of process for offence punishable under Section 304 is concerned it was quashed on grounds of lack of knowledge on part of the medical staff.
3. Further, in case of *Dr. Gangadhar Behra v. State of Orissa*³, since no offence under Section 304, Part II, was made therefore the cognizance under the said section was set aside as there was nothing on record that the doctor operated the patient with the knowledge that the act was likely to cause death. In the instant matter, the operation was proceeded after consideration of the critical situation of the patient wherein delay might have resulted in further complications. The presumption of the knowledge on part of the hospital management as to the act likely to cause death is not viable for the reason of proximate cause of the death which was the result of the second operation conducted by the Rajiv Gandhi Hospital.
4. The Halsbury’s Laws of England⁴ provides that a person is not liable for the act for the reason someone else of greater skill and knowledge would have prescribed

² AIR 2009 SC 125, 2008 (4) RCR (Criminal) 801, 2008 (13) SCALE 356.

³ Gangadhar Bahera v. State of Orissa, 2001 CrLJ 2643 (Ori).

⁴ The Halsbury’s Laws of England, Edn. 4th, Vol. 30, Para 35.

different treatment or operated in different manner. Thereby for establishing the liability it has to be shown that the person has not acted in the professional manner which was presumed to be as that of prudent person with reasonable care. Lord Denning in the case of *Hucks v. Cole and Anr.*⁵ opined that a medical practitioner was not to be held liable for reason of error of judgment in choosing one reasonable course of treatment in preference of another.

5. Further, the provisions⁶ forming part of the Indian Penal Code, gives adequate protection to the medical professional wherein provided that it needed to be ensure that people who act in good faith should not be punished. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure.⁷ Also, in the case of *Dr. Mrudla Suresh Deshpande v. The State of Maharashtra*⁸, the Court came to conclusion that the injuries was caused neither with the intention of causing the same or with the knowledge that by such act the patient was to meet his death.
6. The act done by Mr. Sinha does not intend to cause death of the patient, nor the knowledge of likely to be causing death, performed in good faith for the best interest of the person. The decision of House of Lords in the case of *R v. Adomako*⁹ elucidates that a doctor cannot be held criminally liable for the patient's death unless his incompetence showed such disregard of life and safety of the patient as to amounting crime against the state.
7. In light of the above mentioned provisions and judicial pronouncements, it can be contended that Dr. Sinha acting in a professional manner, trying his best to redeem the patient out of his suffering took the step of operating the patient for which he could not be made criminally liable as the negligence in such instances is based upon the best judgment of the practitioner considering the relevant precautionary measures taken in due course. The act was such that the probability of the death arising due to such cannot be seen in close proximity as the condition of the patient before the operation procedure was not critical to the extent that it might risk the life if amounted to operation.

⁵ (1968) 118 New LJ 469.

⁶ Sections 88, 92 and 370.

⁷ *Kusum Sharma and Ors. v. Batra Hospital and Medical Research Centre and Ors.*, AIR 2010 SC 1050.

⁸ 2001 (3) BOMLR 205.

⁹ [1994] (3) All E.R. 79.

II. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE NOT LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304A.

8. Section 304A provides punishment for causing death by negligence-

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

9. For proving negligence under the criminal law, the prosecution must prove- that there exists a duty, there was breach of the duty causing death and that breach to be characterized as gross negligence.¹⁰ In order to constitute negligence, simple lack of care is not sufficient, the negligence must be of high degree to amount an offence with element of mens rea¹¹. The Supreme Court in the case of *Jacob Mathew vs. State of Punjab*¹² that the essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.¹³
10. In the case of *Umesh Chandra Samal v. State of Bihar*¹⁴ the complaint was filed against the doctor for negligence in treatment of the deceased but the order of cognizance was quashed as the negligence alleged was not of the nature to fasten criminal liability on the doctor. In another such case, of *Suresh Gupta v. Government of N.C.T of Delhi*¹⁵ it was held that the act attributed to the doctor though could be best described as negligent but not so reckless or grossly negligent as to make him criminally liable.
11. To impose criminal liability, under Section 304A, it is necessary that the death would be direct result of the negligent act of the doctor, and the act must be proximate and efficient cause without the intervention of another’s negligence (*novus actus interveniens*). In other words, a doctor is not criminally liable for the patient’s death, unless his negligence or incompetence showed such disregard for life and safety as to amount to a crime against State.¹⁶

¹⁰ Malay Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162: AIR 2010 SCW 769: 2009 (10) SCALE 675: 2009 (9) SCC 221: 2009 (3) CPJ 17 (SC).

¹¹ Bolam v. Friern Hospital, (1957) 2 All ER 118.

¹² Jacob Mathew v. State of Punjab, 2005 (3) CPJ 9: 2005 ACJ 1840: 2005 (3) CPR 70: 2005 (1) CTJ 1085: AIR 2005 SC 3180: 2005 (6) SCC 1.

¹³ P.B. Desai v. State of Maharashtra, AIR 2014 SC 795: 2013 (4) CPJ 63: 2013 (12) JT 425: 2013 (11) SCALE 429 (SC).

¹⁴ 2006 (39) AIC 453 (Pat.).

¹⁵ AIR 2004 SC 4091: 2004 Cri LJ 3870: 2004 SCC (Cri) 1785.

¹⁶ Lakshmanan Prakash v. State, 2001 ACJ 1204: 1999 CriLJ 2348: 1999 (4) Crimes 404 (Mad. -HC).

12. The *Black's Law Dictionary* defines Negligence as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinary regulate the human affairs, would do or the doing of something which a reasonable and prudent man would not do.¹⁷ The General Exceptions which can be taken as a defence against the imposition of the charge of criminal negligence on the management and doctors of the Sandok Hospital would render that the Hospital has acted in the best interest of the patient in the critical condition and would thereby quash any such false charges.

A. THE ACT OF RESPONDENT WAS UNDER MEDICAL NECESSITY

13. It is pertinent to note that in the course of an operation if there is a medical emergency requiring a medical procedure, the doctor can operate on the patient without his consent, and is protected by the defence of the medical necessity.¹⁸ As reiterated in the case of *Arun Balakrishnan Iyer v. Soni Hospital*¹⁹ that in case of emergency the situation arising during the surgery, doctor can proceed beyond the consent and can do whatever is necessary in the best interest of the patient. In the instant matter, though the medical equipment was not at optimal level but in view of the urgency of the situation, operation was conducted which doesn't encumber the liability on the hospital management as they proceeded for the best interest of the patient considering he was brought to the hospital 3 days after the accident, entailing the critical condition of patient.

14. In the case of *Pt. Parmanand Katara v. Union of India and Ors*²⁰ the Apex Court held that, "Every doctor whether at a Government Hospital or otherwise has the professional obligation to extend his services for protecting life. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise cannot be sustained and, therefore, must give way."

15. Further, an act likely to cause harm, but done without criminal intent and to prevent other harm is not an offence.²¹ The provision laid down that such an act done without any criminal intention to cause harm, and in good faith for the purpose of preventing other harm not to be an offence. In the instant matter, Dr. Sinha acted under such

¹⁷ Black's law Dictionary, 6th Edn.

¹⁸ Jonathan Herring: Medical Law and Ethics, 4th Edn. 2012, p. 167, Oxford University Press, Oxford (UK).

¹⁹ AIR 2003 Mad 389.

²⁰ 1990 CriLJ 671.

²¹ Sec.- 81, Indian Penal Code, 1860.

medical necessity as the condition of the patient has worsened to the extent that operation needs to be conducted to avoid greater harm to the patient's life.

B. THE RESPONDENT DID THE ACT WITH REASONABLE CARE

16. The 'duty to treat' there would be a corresponding 'duty to take care' upon the doctor qua his patient. Whenever the principle to duty to take care is founded on contractual relationship, it acquires a legal character. The *Halsbury Laws of England*²² had said a medical practitioner holding himself ready to give medical advice owes his patient 'a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment.' In the instant matter, Dr. Sinha took charge of the patient under personal care when referred to from another hospital and was even monitored before the operation procedure. Further, after being satisfied about the manageable condition of the equipment only, the doctors proceeded for the operation for the reason of deteriorating condition of the patient, which implies such act done in reasonable manner.
17. The Court in the case of *Dr. Suresh Gupta v. Govt. of NCT of Delhi and Anr.*²³ opined that the carelessness or want of due attention and skill cannot be described to be reckless or grossly negligent as to make the doctor criminally liable. Thereby, any act performed in furtherance of lack of care even does not amounts to criminal liability on the medical professionals. Further, Lord Atkin, in case of *Andrews v. Director of Public Prosecutions*²⁴ stated that simple lack of care in imposing criminal liability is not enough as a very high degree of negligence is required to be proved before commission of an offence is established. Thus, considering the quantum of care and precaution taken by the management of Sandok Hospital while operating the patient would not criminal negligence as they acted in the best interest of the patient with the indulgence of standard care in the process.

C. FLAWED INVESTIGATION REPORT

18. The investigation conducted by the team of Rajiv Gandhi Hospital on the patient before commencement of any treatment clinched that the operation procedure followed by Sandok Hospital was extremely deficient as to the doctors put into

²² Halsbury, 3rd Edn Vol 26, 17 para 22.

²³ 2004 CriLK 3870.

²⁴ [1937] A.C. 576.

service equipment which they knew to be defective. It is pertinent to note that such investigation has been conducted in absence of an anaesthetic which opined that machines used, including the one used for retention level of anaesthesia, was not performing at optimal level.

19. As per the GMC²⁵ guidelines, the onus of obtaining consent for intervention lies on the doctor providing treatment and capable of performing the procedure. In the instant matter, Dr. Sinha decided to proceed with the operation when he was satisfied as to the level of performance of the equipment was manageable. Also, the condition of the equipment not working at the optimal level was identified while the operation procedure was on, which made it viable to proceed with the operation, considering the urgency of the matter and the critical condition of the patient. Further, in the case of *Jacob Mathew vs. State of Punjab & Anr.*²⁶, the doctor was charged with medical negligence for the non-availability of the oxygen cylinder, but the court quashed the proceedings as that do not made out case of criminal rashness or negligence. Thereby in the light of relevant parameters, it is contended that on the basis of such flawed investigation report, Dr. Sinha and the management of Sandok Hospital could not be held liable for such grievous act of criminal negligence.

D. THE ACT WAS DONE IN GOOD FAITH

20. The concept of good faith in respect of criminal liability operates differently, as nothing is said to be done or believed in ‘good faith’ which is done or believed without due care and attention.²⁷ Further it has been provided- ‘*Nothing which is not intended to cause death is an offence by reason of any harm which it may cause, or known by the order to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.*’²⁸
21. Lord Denning as expressed in the case of *Hucks v. Cole*²⁹ that a medical practitioner cannot be held liable merely because things went wrong from the mischance or through an error of judgment, but would be liable only where his conduct fell below to that of the standards of a reasonably competent practitioner. In the instant matter,

²⁵ General Medical Council, Seeking Patient’s Consent, The Ethical Considerations, General Medic.

²⁶ *Supra* Note- 3.

²⁷ Section 52, Indian Penal Code, 1860.

²⁸ Section 88, Indian Penal Code, 1860.

²⁹ [1968] 118 New LJ 469.

the conduct of the hospital management in no course fall below the standard of reasonability but was mere error of judgment as to the usage of the equipment which was though in first instance in the benefit of the patient and after the satisfaction of it being manageable. Thus person acting under such principle of good faith cannot be determined under the criminal negligence, otherwise it would vitiate the relation of a doctor with his patient which is that of *uberrimae fidei*, that is, of utmost and abundant confidence.

E. PROFESSIONAL NEGLIGENCE

22. The assurance of a professional subsists that he would be exercising his skill with reasonable competence, wherein he would be held liable for the negligence of either not possessing the requisite skills which he professed to have possessed or not exercising with reasonable competence in the given circumstances.³⁰ A professional man owes to his clients a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.³¹ Though doctors can be found guilty only if he falls short of the standard of reasonable skilful medical practice.³²
23. In the case of *K.Sadanand v. Lisie Hospital*³³, negligence was alleged as the patient became unconscious till death after surgery due to failure in proper administration of anaesthesia, wherein the complainant though failed to prove as to what the anaesthetic was not supposed to do, thereby no negligence was imposed by the court.
24. When reasonable care, expected of medical professional is not rendered it comes within mischief of negligence as to not performing the duty properly which was expected of him under the law.³⁴ Though, an error of judgment on part of a professional is not evidence of negligence *per se*.³⁵ No sensible professional would intentionally commit such an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. In the instant matter, it is pertinent to note that Dr. Sinha was a well-known orthopaedic surgeon, so the competence cannot be challenged as to the inability in operating the patient due to lack of skill or practice.

³⁰ Michael Hyde and Associates v. J.D. Williams & Co. Ltd. [2001] P.N.L.R. 233, CA Sedley L.J.

³¹ Indian Medical Association v. V.P. Shantha, 1995 (8) JT 119; AIR 1996 SC 550; 1995 (6) SCC 651.

³² Dr. Lakshmanan Prakash v. State, 2001 ACJ 1204; 1994 CriLJ 2348; 1999 (4) Crimes 404 (Mad.).

³³ 2006 (1) CPJ 24; 2006 (1) CLT 357 (NCDRC).

³⁴ P.B. Desai v. State of Maharashtra, AIR 2014 SC 795; 2013 (4) CPJ 63; 2013 (12) JT 425; 2013 (11) SCALE 429 (SC).

³⁵ *Supra* Note- 2.

25. Thus rendering the offence of a negligent act on a professional person and ordinary prudent man differs as to the degree of establishing such negligence act is higher in the professional conduct. Also, a medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering as he has nothing to gain by acting negligently or by omitting to do an act.³⁶ Thereby considering the above parameters, it is contented that Dr. Sinha acting in a professional manner, trying his best to redeem the patient out of his suffering took the step of operating the patient for which he could not be made criminally liable as the negligence in such instances is based upon the best judgment of the practitioner considering the relevant precautionary measures taken in the due course which needs to be considered by Court before implementing such liability.

F. DIFFERENCE IN CIVIL AND CRIMINAL NEGLIGENCE

26. The degree of negligence as requisite for the criminal liability is higher than as required in tort. The act to be imposed under criminal negligence needs to be gross.³⁷ The Supreme Court in the case of *Syad Akbar v. State of Karnataka*³⁸ opined- "*in the criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be gross and not the negligence merely based upon an error of judgment.*"
27. Section 304A of the Indian Penal Code, 1860 while pondering upon the aspect of 'gross negligence' enumerates that the act should be reckless in nature as to constitute criminal negligence having higher degree, wherein even the element of mens rea must be shown to exist. Thus considering all the averments made in this regard, it is thereby established that no such case of criminal rashness or negligence on the part of Dr. Sinha and the management of Sandok Hospital can be made. While enticing upon the *Bolam's test* it can be reasonably argued that the professional practitioners cannot be held liable for the act done in manner for the best interest of the patient with reasonable care rendering the obligation for safeguarding the life of patients in situations which demands speedy approach.

³⁶ *Supra* Note- 3.

³⁷ *Supra* Note- 13.

³⁸ 1979 CriLJ 1374; see also *Bhalchandra Waman Pather v. State of Maharashtra*, Mh L.J. 423.

PRAYER

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsels on behalf of the Respondents humbly pray before this Hon'ble Court that it may be pleased to adjudge and declare that:

1. The Appeal is dismissed.

Or pass any other order that the court may deem fit in the light of equity, justice and good conscience and for this Act of kindness of Your Lordships the Respondents shall as duty bound ever pray.

Sd/- _____

Counsels for Respondents.