IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.395 OF 1995

The State of Maharashtra] .. Appellant

vs.

Dr. Anil Pinto] .. Respondent

WITH

CRIMINAL APPEAL NO.123 OF 1996

Dr. Anil Pinto] .. Appellant

vs.

The State of Maharashtra] .. Respondent

WITH

CRIMINAL REVISION APPLICATION NO.96 OF 1995

Nagindas Harjivandas Parekh (Since deceaed)
by heirs and legal representatives] .. Applicant

vs.

Dr. Anil C. Pinto & Anr.] .. Respondents

Mr.J.P. Yagnik, APP for the State.

Mr.Siddharath Jagushte, for the Appellant in Appeal No.123/1996 and for Respondent in Appeal No.395/1995.

Mr.S.D. Dharmadhikari a/w Yogesh Birajdar for the Applicant in Revn. No.96/1995 and for the Respondent in Appeal No.1223/1996.

CORAM : BHARATI DANGRE, J

RESERVED ON : 14th September, 2023
PRONOUNCED ON 9th February, 2024

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JUDGMENT :-

1. On 18/10/1994, the Metropolitan Magistrate, 15th Court, Mazgaon, Bombay, pronounced upon the complaint filed under Section 304-A of IPC, by one Nagindas Parekh against Dr. Anil Pinto, accusing him of rash and negligent act resulting in death of his son Prakash on 20/02/1984.

On conclusion of the trial and based on the evidence placed before him, the Magistrate, in the impugned Judgment, rendered a finding that the accused/Dr. Pinto has been culpably negligent and the rash and negligent act on his part, is manifest upon the sequence of events, leading to the death of a young and otherwise a healthy man, who but for the Procedure undertaken by Dr. Pinto, would be alive. The conclusion and inference is also drawn that the surgical process carried out by Dr.Pinto was not at all necessary.

While imposing the sentence on recording the finding of guilt under Section 304A, taking note of the immense services rendered by the accused, a medical professional and at the same time trying to balance the agony of the near relatives of the deceased because of the negligence and rashness attributed to him, a deterrent fine of Rs.5,000/- was imposed as a penalty and in default it was directed that he shall undergo Simple Imprisonment for 10 days. Out of the fine amount, Rs.4,500/- was directed to be allocated to the complainant, after appeal period was over.

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2. Three proceedings are initiated on being aggrieved by the above Judgment.

Criminal Revision Application No.96/1995 is filed by the complainant, who on his death is substituted by his legal heirs by order of the Court dated 27/08/2002, praying for imposition of deterrent sentence of imprisonment on the accused, by maintaining the conviction and also seeking levying of substantial amount of fine and amount of compensation, to be paid to the family of the deceased under Section 357 of the Cr.P.C.

Advocate S.D. Dharmadhikari, represent the applicants in the said Application and I have also permitted Ms. Anita Parekh, Applicant No.2 in the Revision Application to advance her submissions as a special case since she is acquainted with the facts of the case and was examined as one of the witness in support of the case of the complainant.

Criminal Appeal No.395/1995 is filed by the State under Section 377(1) of the Cr.P.C. for enhancement of the sentence imposed vide the impugned Judgment in Case No. 63/S/1994 and I have heard Mr. J.P. Yagnik, the learned APP for the State.

Criminal Appeal No.123/1996 is filed by the Accused Dr. Pinto praying for setting aside the impugned Judgment as well as fine. However, it is informed that since the fine has already been deposited by the accused, he do not press his Appeal as regards this prayer though the finding of conviction is sought to be contested by Dr. Pinto through his counsel Advocate Mr. Siddharth Jagushte who also represent the accused in two other proceedings.

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3. To appreciate rival claims, it is necessary to refer to the background of the impugned Judgment.

Prakash, son of Nagindas Parekh, was an unmarried man aged 30, having graduated from Bombay University and engaged in the business of automotive and tractor spare parts. For the discharge of his duty, he had a regular routine of leaving the house early in the morning at about 8.00 to 8.30 a.m. and returning by 8.00 p.m., though he used to have his lunch at home in the afternoon.

On 17.02.1984, at around 4.45 p.m. a telephone call was received at the Parekh's residence, which was received by his daughter Rashmi (PW 2) from Dr. Pinto's hospital Dadar, informing that Prakash was admitted in their hospital and operated for treatment of palms sweating and during operation one of his nerve was damaged, which resulted in complications and therefore someone from the family shall reach the hospital urgently.

Rashmi conveyed the message to her elder sister Anita (PW 3) working in Bank of India and since the complainant could not be reached, Anita reached Dr. Pinto's Hospital located at Gokhale Road, Pinto Villa, Dadar, around 6.00 p.m. and was informed by a nurse that while he was operated, one nerve was damaged and some complications occurred and therefore one bottle of blood should be procured from Dr. Gharpure's hospital. She rushed to comply and, in the meantime, the complainant also reached the hospital.

Dr. Pinto called both of them in the cabin and is alleged to have narrated in a nervous and flattering voice that Prakash had

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visited him on recommendation of one Dr. Joshi for treating the sweating of his palm and he had advised to undergo a procedure (Ganglion Sympathectomy) and he got himself admitted in the hospital in the morning and was operated, but damage was caused to one of the nerve and he was trying to rectify the same. They were assured that there was no danger to his life and they were also informed that Prakash had consented for the operation.

When the complainant visited his son in the room in the hospital, he was found in unconscious condition with some tubes affixed to his right hand and a dressing held by adhesive tape was applied on his left side region, covering the operated portion and Dr. Pinto was seen repeatedly examining the left arm and palm, fingers and nails of Prakash, which had turned bluish and lifeless. Thereafter, Dr. Pinto asked to get medicine 'Lemodex' from the chemist and was informed that a doctor from KEM Hospital is called to check on him.

At around 10.00 p.m. they were informed that he is required to be shifted to KEM Hospital as there were no modern equipments in the hospital for treating the complications and qualified doctors are available at KEM Hospital. Thereafter, Prakash was shifted to KEM casualty ward in an ambulance and even Dr. Pinto followed. Prakash was admitted as indoor patient and moved to Intensive cardiac care unit for an operation.

On performing the surgery for five hours, he was brought out of the operation theater in an unconscious state in the wee hours on 18/02/1984. On the same night at 9.00 p.m., he was taken for another operation, which was performed for about 3 hours.

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On 19/02/1984, it was learnt from the hospital staff that the Prakash did not pass urine and was shifted to kidney department for further treatment and the doctor on duty assured the family of the complainant that his condition is improving. To the contrary, on 20/02/1984 at 6.40 a.m. Prakash expired and after performing postmortem, the body was handed over to his family at about 1.00 p.m.

4. Upon the death of his son Prakash, on 19/03/1984, a complaint was filed seeking issuance of process against the accused and for an investigation by independent agency into the cause of his death.

It is the case of the complainant, that perspiration of palm was not such a serious ailment warranting an operation and it was imperative for the doctor performing such a procedure to appraise Prakash of the consequences, but there was utter neglect to intimate and obtain informed consent, which is contrary to professional ethics.

The complainant also alleged that Dr. Pinto, while conducting operation of Prakash acted rashly and negligently, which resulted in cutting of a vital blood vessel which caused complications and he himself had admitted to the complainant, that his hospital was not equipped to handle the complications or rectify the damage which resulted in gangrene in the left hand and palm, as a result of which it turned bluish and motionless.

The complainant expressed an apprehension that the accused was lacking in experience, proficiency and did not possess necessary degree of skill to handle the complications

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arising in such operation and hence, he has committed an offence, which shall be dealt according to law.

Upon the complaint being filed, and upon its verification by the Additional Chief Metropolitan Magistrate, Dadar, on 14/09/1984, process was issued under Section 304(A) of the IPC to Dr. Pinto.

5. Charge was framed under Section 304 A of the IPC and Dr. Pinto faced the trial.

The prosecution in support of the charge, examined 7 witnesses, which include, the complainant himself, his daughters Rashmi (PW 2) and Anita (PW 3), Dr. Anil Tendolkar, Reader in KEM Hospital (PW 4) and Dr. Mahesh Gosavi, Junior AMO attached to KEM Hospital (PW 5). Uday Damodar Waghmare in the Office of Coroner JJ Hospital is examined as PW 6.

Dr. Bhagwant Kalke (PW 7), Consulting surgeon was examined as expert witness and it is on the basis of the evidence of these witnesses, the Magistrate reached the desired conclusion in the Judgment pronounced on 18/10/1994.

The statement of the accused was also recorded under Section 313 of the Cr.P.C., though he chose not to examine any witness.

6. Supporting the case of the complainant as narrated in the complaint, PW 2 Rashmi deposed about receipt of the phone call from Pinto Nursing Home requesting that any family member shall visit the hospital urgently and she conveyed the message to PW 3.

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PW 3 Anita actually reached the hospital and she deposed that on 16/02/1984, Prakash withdrew a sum of Rs.2,500/- from the bank and on next date i.e. on 17/02/1984, he left earlier than usual, informing that he will not be coming home for lunch. On receipt of phone call from her sister Rashmi, she rushed to Dr. Pinto's hospital at around 6.00 p.m. and arranged for blood as directed.

According to Anita, accused had informed her that Prakash had approached him through Dr. Joshi and was recommended a procedure for dealing with his problem of sweating on palms and that, he had volunteered for operation. As per PW 3, she found Prakash lying in an unconscious condition and she corroborate the version in the complaint about the events that occurred for the next two days.

She categorically deposed that Dr. Pinto had informed her that while performing the operation, a nerve was damaged, but there was nothing to be worried about and complications were being treated.

On being taken to KEM Hospital, Dr. Pinto gave history to Dr. Tendolkar (PW 4) and was heard narrating that some vital artery was cut and complications arose and he was explaining the treatment given to Prakash.

In cross-examination, PW 3 admit that she did not contact Dr. Joshi who had referred Prakash to Dr. Pinto and she was unaware that her brother had approached Dr.Pinto for a procedure and no attempt was made by the family to trace Dr. Joshi or to make necessary enquiries with him. She deposed that she carried an impression that Dr. Joshi was wrong in referring

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Prakash to Dr. Pinto and categorically deposed, that her brother had no trouble of palm sweating. She deny the suggestion, that Dr. Pinto never told the family that while operating some another vital Prakash was cut or that Dr. Pinto told the family that since there were no modern equipments in the hospital as complications developed, he need to be shifted to a hospital with expert doctors.

7. Dr. Tendolkar, a Reader in KEM Hospital was confronted with casualty papers, but he was unable to identify the signature of the doctor, however, it is not disputed by him that Prakash was admitted to KEM Hospital and he also identified the signatures on Exhibit C-4 alongwith Dr. Chincholkar.

The post-operative treatment was also admitted to be under his endorsement.

Exhibit C-6 in form of operation notes in hand-writing of Dr. Milind Chincholkar, without his signature is also proved through him alongwith the notes of Artificial Kidney Department.

Dr. Tendolkar deposed about admission of Prakash in the emergency ward of the hospital and his further transfer to Kidney department.

On being cross-examined, on the aspect of operation performed by Dr. Pinto, he admit that operation of sympathectomy may be carried out as a cure of hyperhidrosis, which is a surgery for stopping excessive sweating of the palm or the feet. Though he refused to conclusively pronounce whether hyperhidrosis of the limbs can be completely abolished by sympathectomy, he categorically deposes that if conservative

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treatment does not work, method of surgical treatment is adopted. He has specifically deposed as under: -

> *"I agree with the proposition that hyperhidrosis of the limbs can be completely abolished by symcathectomy. When sweating is sufficiently profused to cause serious mental distress, the operation should be advised.*
>
> *Survicodorsal sympathectony is performed for hyperidrosis of the palm. In the surgery, sympathectis nerve coming from spinner code from gangria are removed. There are more than two approaches to perform this surgery. The mode of surgery is depend upon the familiarity of the surgeon and the physical status of the patient. Since, I am a cardioscular surgeon, would prefer to approach through chest for a surgery. A student of general surgery will be more familiar with anatomy of neck. It is correct that in performing such operation, retraction of subclavian artery is necessary to reach the servico-doesal sypathetic chain. There is chance of subclavian artery going into the spasm on account of handling during surgery. In case of spasm of an artery, lemodax acts from improving circulation and xylocan local will relieve the spasm. In case of spasm of artery, I will personally not try for emboloctomy (removal of glods). I am not aware whether such method can be used in cases of arterior spasm. Graft will be the last method, I will apply in such cases. Before I will try other conservative methods of treatment under my supervision, my assistant performed the operation on patient, Prakash, as noted on page No.16 of the compilation. In this case, graft was done as it was found necessary."*

8. Worth it to note that PW 4 is holding qualification of MS (General Surgery) and MS Cardiothoracic Surgeon and has deposed that he performed general surgery, thoracic surgery and ear and nose surgery and is presently working as a reader in Cardiothoracic.

He also depose that Dr. Anil Pinto was a Registrar, Lecturer and Reader in KEM Hospital in General Surgery, which was a responsible post and he is also in the list of Honorary Surgeons at Cooper Hospital, which is a post of senior faculty member.

9. Dr. Mahesh Gosavi, Registrar in Anesthesia Department in KEM Hospital as on 17/02/1984 has deposed that he was not

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present in the hospital on the given day, and he was confronted with the admission papers , but he could not definitely throw any light upon the same.

In the cross-examination, he was confronted with Postmortem Report and he admit that Dr. Antia performed postmortem and deposed that terminal cardio-respiratory failure, renal failure, acute pyelonephritis not related to surgery and though it is mentioned in the hand-writing of Dr. Antia there is no signature below.

10. The star witness of the prosecution is Dr. Bhagwant Kalke, a retired Dean and Director- Professor of Department of Cardio Vascular and Thoracic surgery department. It is his evidence which is relied upon both, by the prosecution and by Dr. Pinto, the prosecution for the purpose of establishing negligence on the part of the accused, whereas, the accused rely upon the same, for his stand that there was no dereliction of duty on his part and complications while performing the process was something which could not have been avoided and there was no negligence.

11. The examination of PW 7 is extensive, so also is his cross-examination.

He has explained the term ‘Hyperhidrosis’ and its treatment to the following effect: -

> *“Treatment for Hyperhidrosis can either be medical or surgical. Before undertaking any surgical treatment, it is always customary to carry out tests to ascertain the general condition of the patient as well as certain specific tests which may help us either to prove the diagnosis or it can tell us whether the treatment that is contemplated to be given is going to benefit the patient.”*

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According to him, it is a choice between the medical treatment and surgical treatment in any disease and medical treatment will be preferred over surgical treatment and the medical treatment for hyperhidrosis has come in prominence for 15 years, before that it was customary to treat the patient surgically.

He further depose as under: -

> *"If there is failure of medical treatment then surgery is advised. The surgical treatment there may be delayed effects of thickening of skin corn formations and cracking of the skin because of the extreme dry nature of the skin, following the usually carried out operation which is called symcathectomy. If normally the physician feels that the medical line of treatment should be carried out he would refer such a patient to the specialist who usually carried out such a treatment namely skin specialist also called dermatologist.*
>
> *If such a patient is referred to the surgeon it is left to the surgeon to decide whether such a patient should be referred for medical line treatment or be treated by surgery."*

12. PW 7 has explained the concept of Cervical sympathectomy and lumber sympathectomy, by stating that the former is performed when the patient is to be treated for upper extremity and the latter is the procedure to be carried out for treating lower extremity.

According to him, injury to the subclavian artery is not usual in surgical sympathectomy operation though it call for mobilization of the artery before approaching the sympathectomy trunk and by referring to the notes of Dr.Pinto, that the subclavian artery went into spasm, whereas KEM Hospital recorded that it was injured, he gave his opinion as below: -

> *"In my opinion, the operation that was carried out was adequate and properly carried out. I would like to mention that injury to artery can occur in any surgeon's hand. Because, we have to move the artery in upward direction or sometime in a downwards direction. As per*

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Dr. Pinto's notes the subclavian artery had gone into spasm and the local treatment for such spasm which we have discussed earlier was carried out."

According to PW 7, operation was the primary cause which led to the death of the patient, though in the postmortem cause of death is given as "acute renal failure, terminal cardio respiratory failure". But this according to him, is not apparently correct diagnosis as according to him all the events which followed the original operation, were due to the operation itself.

13. Dr.Kalke was subjected to extensive cross-examination and admit that from the record it is clear that Dr. Khandeparkar, Cardio vascular and thoracic surgeon attached to the KEM Hospital was contacted by Dr.Pinto.

While commenting upon the qualification of Dr. Pinto and his experience in surgery of portal hypertension, PW 7 admit that Dr. Pinto is a well-qualified and experienced surgeon and that he had involved in surgery for portal hypertension and dillary and pancreatic surgery as well and has experience of good quality. He admit that a doctor carrying out cervical sympathectomy need not be necessarily accompanied by vascular surgeon while performing a cervical or upper dorsal sympathectomy. However, in case vascular complications develop, he should be conversant to deal with such complications, and he depose that development of vascular complications is not common in an operation of cervical sympathectomy. It is also admitted that the duration of the surgery will vary from 5 minutes to several hours and if some complications develop, the time taken for surgery may be

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prolonged. He has deposed that a surgeon in emergency, has to handle any situation that he comes across, but that do not mean that he will be able to do it competently.

14. Throwing light on the conservative treatment for a patient of hyperhidrosis, by referring to the passage from British Medical Journal, which summarizes the management of hyperhidrosis, he depose that sympathectomy is effected for palmer hyperhidrosis, and state below: -

> *"Sympathectomy is effective for palmer hyperhidrosis, but carries a small risk of operative side effects and the permanently non-sweating palm may become hyper keraptic with both featuring and scaling as distressing sequels. In the same he mentioned " contopphporesis" with water or other drugs for treatment both for palmer and planter hyperhydrosis.*
>
> *In treatment of any diseased condition the medical line of treatment is customarily tried before and only after the medical line of treatment has failed in the surgical line of treatment recommended by the doctor. However, there are certain condition where medical line of treatment does not work and it may become mandatory to resort only to surgical treatment."*

15. On being confronted with various medical journals, he has deposed that he cannot consider that sympathectomy remains the corner stone of the treatment of hyperhidrosis, but acknowledged that it is one of the treatment available for its management, though it cannot be considered as a bold standard treatment for its treatment.

However, PW 7 guardedly depose that material published undergo a change according to time and progress in the field of medicine. He admit that he is not expert on the medical line of treatment for hyperhidrosis, to both medical and surgical therapies are relevant, according to him.

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When specifically asked a question of a choice between surgical and medical line of treatment, he has responded by stating that it is a prerogative of a doctor (surgeon or physician) to decide the line of the treatment and refused to answer, a hypothetical question as to when would a physician refer a patient of hyperhidrosis to a surgeon, by saying that it is entirely the choice of the physician to decide, though when referred to Surgeon, he may evaluate the patient himself and shall not blindly follow the recommendation of the physician. He also asserts that he would personally advise sympathectomy only when he is convinced that it is to be done and the conservative treatment has failed.

16. PW 7, during the cross-examination refer to the record provided to him before he could throw light upon the correctness of the treatment offered to Prakash and state that one has to depend only on the record that is made available, and the record provided to him contained a xerox copy of Dr.Anand Joshi's letter written to Dr. Pinto on 08/02/1984, where it was mentioned that the patient complained of sweating of both palms and soles and was referred to Dr. Pinto to do the needful and there was reference to sympathectomy.

Pw 7 specifically stated in the cross-examination, where he admit that he told PW 1 and PW 3, to make available the record of Dr. Joshi to give definite opinion, but no such record was made available.

According to him, on handing over the papers to him, his opinion was sought, as to whether the death of the deceased was

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natural or unnatural and if unnatural whether the operation was, in any way connected to his death, but he did not give his opinion in writing and has chosen to stand in the witness box as he was sought to be examined as an expert witness.

17. The following court question and its response by PW 7 is very important to be taken note of: -

> *"**Q.** Is there any rash and negligence act, in the operation which was performed by the accused doctor on the victim, caused death of the victim person, in this case?*
> ***Ans**.: In my opinion, there does not appear to be any rashness in performing the operation. However, there had been an inordinate delay in treating the complication that developed as a part of the surgery which resulted ultimately in the death of the patient. The treatment for such a complication should have been prompt and is well brought out at the beginning of Chapter 11 on "Vascular Injuries" in the reference earlier quoted from Watson-Jones on Fractures and Joint Injuries and I quote "when the mischief seems to be of such nature as that gangrene and fortification are most likely to ensure, no time can be spared.......... I have already said that a very few hours make all the difference between probably safety and destruction."*

A specific question put as to what additional treatment should have been given to the patient by Dr. Pinto and the response of PW 7 is, "Since the modalities of management in the reportary of Dr. Pinto were even when it became evident that the blood supply of the limb is not likely to be established he should have been referred immediately to the specialist for the management." and since he was transferred to KEM after 9.30 p.m., there was loss of valuable time.

Responding to the question, whether the patient was properly evaluated at KEM Hospital, before attempting re-vascularization, the response is as under: -

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"There are various flows in the history taken by different doctors. Some doctors mentioned that it was arterial injury as a result of accidental damage to the left subclarial artery whereas one doctor mentioned that the artery had developed spasm during surgery. Apart from mentioning that there was no pulsation in the arteries of the affected limb with loss of sensation and absent movement everybody had mention that it was a case of volkmans ischaemic contracture. By just mentioning that it was mentioned to be a case of volkmans ischaemic contracture. With this, I do not get complete idea as to the exact condition of the limb that was present at the time of admission in KEM Hospital. It is therefore, difficult to say with this odd history whether there was any indication for further clinical evaluation or investigation in the form of arterigraphy etc."

At the end of the cross-examination, the opinion of PW 7 is to be found in the following words: -

"I have always given my dispassionate opinion. It is for this reason that I had said that it does not appear that there is any rashness on the part of Dr. Pinto during surgery. If I were biased, my opinion would not have been like that. But definitely, negligence in the form of inordinate delay in referring the patient for the care of specialist has definitely been present and I cannot change my opinion for the benefit of my Ld. Friend even if he is accusing me of having given biased opinion and not a dispassionate opinion."

18. The accused, Dr. Pinto gave his statement under Section 313 of the Cr.P.C. where he stated that Prakash was admitted in his nursing home on 17/02/1984, as he was to be operated for hyperhidrosis or excessive sweating of the palms. He commenced the operation at about 9.30 to 10.00 a.m., expecting the sectioning of the sympathetic nerve within an hour. Following the sectioning of the nerve, it was noticed by him that the subclavian artery went into spasm and to relieve the spasm, he took steps as provided in the text book, but when the spasm could not be relieved, he sent his assistant to call Dr. Khandeparkar from KEM Hospital, who came at about 1.00 p.m. and tried to relieve the spasm. Dr. Khandeparker was of the view that after finishing the

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surgery the patient should be kept under watch for a couple of hours and he agreed to come back again at 6.30 to 7.00 p.m. to review.

According to Dr. Pinto the main operation was over within an hour and Dr. Khandeparkar was sent for, relieving the spasm. He admit that when Anita (PW 3) had seen the patient, his left arm and hand had become motionless, but denied the suggestion that the nails had turned bluish and the hand had become motionless, because it was under anesthesia.

Dr. Pinto further state that he accompanied the patient to KEM Hospital and was aware that two operations were performed and as the spasm could not be relieved by conservative measures, a bye-pass graft was performed under the guidance of Dr. Tendolkar, so as to unblock the blocked by-pass graft.

Dr. Pinto did not agree with Dr. Tendolkar who had stated that in case of spasm of artery he should not have tried for embolectomy, though he agreed that grafting is last resort in such type of case and, therefore, conservative method should be adopted, but he had, in fact adopted, all the conservative methods. He also express his disagreement with Dr. Kalke that surgery is a last resort in such type of case but he would rely on British Journal of Surgery to stress upon the point that surgery is the corner stone of the treatment of hyperhidrosis. Further, he disagrees with the opinion of Dr. Kalke, on the ground that he had no seen the necessary papers and he was not present when the operation was performed, to conclude that there was no significant loss of blood.

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Though very particularly in his statement recorded under Section 313, Dr.Pinto has given the following admission :-

> *"I totally disagree with Dr. Kalke when he states that there was an inordinate delay in transferring the deceased patient to the KEM Hospital at 11 p.m. I say that I was diligently and constantly monitoring and sitting by the patient and also was in constant touch with the authorities at the KEM Hospital telling them about the progress of the patient, and when at 9.,30 p.m. Dr. G.B. Parulkar who was the Dean and the Head of the Department of Surgery thought that it would be best for the patient to be transferred to KEM Hospital and after Dr. Khandeparkar had reviewed the patient again at 10 p.m. the patient was transferred to KEM Hospital without said delay. I say that there was absolutely no delay in transferring the patient to KEM Hospital as alleged by PW 7 Dr. Kalke."*

19. Upon the necessity of performing the surgery, Dr. Pinto stated as under: -

> *"I say that the deceased patient was referred to me by a physician Dr. A.K. Joshi for the purpose of sympathectomy which meant that the medical treatment had failed. After satisfying myself, by the various tests that the patient requires surgery, surgery was fixed upon a particular day. Unforseen complications occurred and in spite of all the measures and best medical attention from both me and other members of my family who are all qualified doctors and from outside viz. KEM Hospital, the patient died at the KEM Hospital. Even while the patient was at KEM Hospital, I visited him twice, showing my interest in the patient. The loss of the patient is as much as of a loss to a doctor as it is to be relation."*

20. On appreciating the aforesaid evidence, the Magistrate has arrived at a conclusion in determination on the point. whether the accused had taken reasonable precaution expected from a prudent man in the profession of medical science and if he has not done so, would he be responsible for the omission and commission, amounting to culpable negligence in discharge of his duties.

21. Before I come to the conclusions recorded by the Magistrate, I must refer to the position of law, which by this time

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is well settled through authoritative pronouncements, as early as in the year 2005, when the question arose for determining the liability of a medical professional under Section 304A read 34 of the IPC for negligence. The Apex Court, in the case of **Jacob Mathew vs. State of Punjab and Another**, **(2005) 6 SCC 1** has provided the guidance.

On an offence being registered under Section 304A read with 34 of the IPC, challan was filed against the two doctors and they filed a revision before the Sessions Court, submitting that there was no ground for framing charge in the wake of the accusations that the oxygen cylinder brought, was found to be empty when the patient suffered breathing problem and no other alternative could be provided and in its absence the patient died.

The Revision was dismissed and the Appellant approached the High Court under Section 482 of the Cr.P.C. praying for quashing of the FIR and the High Court found that the case was for quashing was not made out and dismissed the petition.

It is in this background, the Apex Court was called upon to decide the issue by focusing upon two aspects; One- Is there difference in civil and criminal law in the concept of negligence and two, what standard is applicable for recording a finding of negligence when a professional, in particular a Doctor is to be held guilty of negligence.

Dealing with the negligence as a tort, it is held that Professional negligence consists in the neglect of the use of ordinary care and skill towards a person, to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the Plaintiff has suffered injury to his person or property.

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Reliance was placed upon Charleswoth and Percy on Negligence (10th Edn., 2001), which attributed three meanings to the term 'negligence' as (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law, and with all three meanings applicable in different circumstances, with any of them not necessarily excluding the other.

Propounding upon negligence as a tort and as a crime; the observations of Lord Atkin in his speech in **Andrews v. Director of Public Prosecutions [1937] AC 576** were reproduced:

> *"Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."*

22. Drawing a distinction between negligence in civil law, the decision in case of *Syad Akbar vs. State of Karnataka, (1980) 1 SCC 30* ,was gainfully reproduced, where it was opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings; in civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in 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.

It was thus held that the factor of negligence has thus assumed significance while drawing the distinction in actional negligence and negligence as a crime. To the latter, negligence has to be gross or very high degree.

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23. Pronouncing upon the negligence by professionals such as lawyers, doctors, architects and others, it is observed that any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing the task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with, him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution, though, he does not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence.

This is all what the person approaching the professional can expect. Judged by this standard a professional may be held liable for negligence on one of two findings; either he was not possessed of the requisite skill, which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess, and 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, and it is not necessary for every

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professional to possess the highest level of expertise in that branch which he practices.

24. The three Judges Bench made a reference to the passage defining negligence by professionals, generally and not necessarily confined to doctors as expressed in the opinion of *McNair, J. in* ***Bolam vs. Friern Hospital Management Committee, (1957) 1 WLR 582*** *:-*

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

Bingham, L.J. In his speech in **Eckersley vs. Binnie**, on taking review of various authorities, summarized 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 assiduous and intelligent members of his profession in the knowledge of the 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 must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet."*

25. The decisive standard of care required both of professional in general and medical practitioner in particular as laid down in Bolam, is widely accepted in India and was made applicable as a touchstone to test the plea of medical negligence.

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A mere deviation from normal professional practice is not an evidence of negligence. An error of judgment on part of professional is also not negligence per se. Higher the acuteness in emergency and higher the complications, more are the chances of error of judgment. As regards the negligence in the context of medical profession, who deal with life and death, day in day out, are expected to be conscious of their professional reputation as a single failure may cost him/her his career. The tendency to blame a medical professional is not uncommon when no answers can be found for loss of life or limb and since definitely something has gone wrong, someone has to be blamed.

26. To impose criminal liability under Section 304A for the act for causing death by negligence i.e by doing any rash or negligent act not amounting to culpable homicide, the act must be established to be proximate and with efficient cause, without intervention of another's negligence. It must be the causa causans; it is not enough that it may have been causa sine qua non.

> *"(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity- in principle – from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable.*
>
> *(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been*

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deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable.

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high – a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.

Indiscriminate prosecution of medical professions for criminal negligence is counter-productive and does not service or good to the society."

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27. Conclusively, certain conclusions are drawn on the aspect of negligence by the Apex Court, with reference to medical profession and it is necessary to reproduce the same:

> *(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, on 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 of omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.*
>
> *(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.*
>
> *(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.*
>
> *(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582 holds good in its applicability in India.*

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(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res Ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

The above locus classicus continue to guide in determining the culpability of medical professions under Section 304A.

28. In ***P.B. Desai vs. State of Maharashtra & Ors., AIR 2014 SC 795***, the question which arose for consideration, was answered by holding that where negligence is an essential ingredient of an offence, it shall be established by the prosecution that the negligence is gross and not merely based on error of judgment.

A renowned surgeon having been convicted for the offence under Section 338 read with 119 and being sentenced to suffer imprisonment, the question fell for consideration, whether the

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alleged role of the Appellant in not taking personal care and attention by preferring the operation himself was a rash or negligent act, so as to endanger the life of the patient.

Reliance was placed upon its earlier decision in case of ***Kusum Sharma & Ors. vs. Batra Hospital and Medical Research Centre & Ors., (2010) 3 SCC 480***, and the following observations made therein received approval from Justice A.K. Sikri , to the following effect :-

> *"45. According to Halsbury's Laws of England, 4th Edn., Vol. 26 pp. 17-18, the definition of negligence is as under:*
>
> ***22.*** *Negligence. -Duties owed to patient. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, 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. A breach of any of these duties will support an action for negligence by the patient.*

29. If the patient has suffered because of negligent act/omission of the doctor, it undoubtedly gives right to the patient for damages. This would be of a civil liability of the doctor under the law tort and/or contract. This concept of negligence as a tort is explained in ***Jacob Mathews v. State of Punjab and Anr.*** (*supra*) , in the following manner:

> *"10. The Jurisprudential concept of negligence defines any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian Jurisprudential though is well stated in the Law of Torts, Ratanial & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh).*
>
> *Negligence is the breach of a duty caused by the 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. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the Defendant owes the duty of observing ordinary care and skill, by which neglect the Plaintiff has suffered injury*

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to his person or property...

The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

Such a negligent act, normally a tort, may also give rise to criminal liability as well, though it was made clear by this Court in Jacob's Case (supra) that jurisprudentially the distinction has to be drawn between negligence under Civil Law and negligence under Criminal Law. This distinction is lucidly explained in Jacob's Case, as can be seen from the following paragraphs:

"12. The term "negligence" is used for the purpose of fastening the Defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the Respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens -rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In R. v. Lawrence Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in R. v. Caldwell and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said: (All ER p. 982e-f)

Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting

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'recklessly if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

30. In the common law case ***R.V. Adomako (1994) 3 WLR 288,*** wherein, Lord Mackay LC set the test for gross negligence in manslaughter :

> *" On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the Defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the injury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the Defendant in all the circumstances in which the Defendant was placed when it occurred. The jury will have to consider whether the extent to which the Defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal".*

31. In a recent decision, the Apex Court, in the case of ***M.A. Biviji vs. Sunita and Others, 2023 SCC OnLine SC 1363*** where medical negligence was attributed to the medical professional in treating the patient, the claim for compensation for medical negligence was allowed, as the medical negligence was held to be proved on account of unjusticiable and forceful performance of nasotrachel intubation procedure on Mrs.Sunita on 13/05/2004 at Suretech Hospital. The following observations are relevant for determining the legality of the impugned Judgment, before me:-

> *"45. As reasoned earlier, the burden of establishing negligence is on the complainant. In this case, however, Mrs. Sunita had failed to prove medical negligence by the doctors. There is no evidence to establish that the 'NI' procedure is a bad medical practice or based on unsound medical advice. None of the hospitals where Mrs. Sunita was treated prior to Suretech Hospital opined that the 'NI' procedure was not medically*

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acceptable. Additionally, none of the doctors who treated her subsequently opined that the 'NI' treatment was not a medically acceptable practice or that the said procedure had been performed negligently. On the other hand, the medical team at Suretech Hospital was able to successfully prove that due medical consideration was given before choosing the aforesaid 'NI' procedure. Therefore, no negligence was committed in opting for and/or conducting the aforesaid procedure."

It is further observed that :-

54. At this stage, we may benefit by adverting to what the renowned author and surgeon Dr. Atul Gawande had to say on medical treatment. He said "We look for medicine to be an orderly field of knowledge and procedure. But it is not. It is an imperfect science, an enterprise of constantly changing knowledge, uncertain information, fallible individuals, and at the same time lives on the line. There is science in what we do, yes, but also habit, intuition, and sometimes plain old guessing. The gap between what we know and what we aim for persists. And this gap complicates everything we do."

55. The above observation by Dr. Atul Gawande aptly describes the situation here. This is a classic case of human fallibility where the doctors tried to do the best for the patient as per their expertise and emerging situations. However, the desired results could not be achieved. Looking at the line of treatment in the present matter, it cannot be said with certainty that it was a case of medical negligence.

56. Resultantly, we hold that there was no breach of duty of care at Suretech Hospital or on part of Dr. Biviji. Dr. Jaiswal and/or Dr. Shendre. The charge of negligence is, therefore, not proved. Hence, the impugned judgment awarding Rs. 6,11,638/- as compensation @ 9% simple interest p.a. on account of medical negligence committed by the single act of performing the aforesaid 'NI' procedure, is found to be erroneous and is set aside."

32. The question which falls for consideration before me is, whether the death of Prakash, the son of the Complainant was on account of rash or negligent act of Dr. Pinto, so as to hold him guilty under Section 304A of the IPC.

The Metropolitan Magistrate arrived at a conclusion that

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Dr. Pinto was culpably negligent and for inferring so, he has rightly applied the test of a prudent man, in the profession of medical science and whether he had taken the necessary care in discharge of his duties or whether he was culpably negligent.

In deriving an inference, that Dr.Pinto has failed to discharge his duties as a professional, the Magistrate has relied upon two circumstances; (a) he had failed to inform either of the relatives or nearest friend of the patient and (b) he was in a hurry of finishing the procedure of surgery, rather than taking precaution required before conducting a surgery and has not carried out preliminary tests before actually embarking upon the surgery.

The above two factors form the essence of the Judgment by the Magistrate, in recording that the surgical procedure itself was not necessary, as the patient was not dying of any disease and the surgery would have saved his life. The Judgment record that it was an obligation cast upon him to resort to minimum invasion and this duty is not discharged by him, particularly when the deceased was healthy and was attending the work regularly, but because of the surgery, which was adopted, it resulted into a renal failure and the rashness and negligence is abundantly manifest upon the sequence of events, leading to the death of otherwise healthy and a young man.

33. The evidence of the witnesses examined by the prosecution and the expert witness has brought on record the steps taken by Dr. Pinto, when Prakash approached him on 17/02/1984 and the summary of his clinical findings is to the following effect: -

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> "H/o. Hyperhydrosis, Excessive sweating
>
> Both palm & feet since childhood.
>
> Pt. was seen depressed by this & was referred for bilateral cervical sympathectomy.
>
> No H/o thyroid disease,
>
> No H/o diabetes or hypertension
>
> H/o mental anguish due to the sweating
>
> O/E P.80/m BP 110/80 RS CVS. AS. CNS:NAD
>
> Pulsation Good."

The Admission Card of Dr.Pinto's Hospital also record the line of treatment as below :

> "Bilateral-Cervical Sympathectomy (Proposed)(L) Cervical Sympathectomy."

34. Mr. Jagushte has placed on record a compilation of documents, which include the case papers from Dr.Pinto's Hospital (Exh.D), which record the date of admission as 17/02/1984 at 7.30 a.m. and discharge on the same date at 9.30 p.m., since patient is referred to KEM Hospital.

The papers also contain a reference from Dr. Anand K. Joshi, Consulting Physician, dated 08/02/1984, referring Prakash to Dr.Pinto, as he suffered from sweating of both palm and soles and requested him to do the needful with remark "for Sympathectomy".

On the very same date, when Prakash visited Dr.Pinto for treatment of Hyperhidrosis, both hands and feet, Dr.Pinto gave the following advise: -

> "Sympathectomy Cervical.

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> Prior to this I would like to give a local block given to find out if surgery will benefit you.
>
> To come tomorrow at 5.00 p.m. for Cervical Sympathetic block to be given by Dr.Raghwan."

Prakash once again visited Dr.Pinto on 16/02/1984, when he was put on medicines and was asked to come at 7.30 a.m. on Friday 17th on empty stomach for operation.

35. Before operating, Prakash was made to sign the consent form and convey his willingness for being operated under anesthesia, with the risk and consequences having been explained to him. Prakash being a major and, since, it was his decision not to inform his family members about the procedure, it was not expected for Dr.Pinto to call his relatives and friends and inform them about the operation, and seek their permission, and the conclusion of the Magistrate in deducing negligence in not informing the relatives, in my considered opinion, is not a permissible ground in inferring negligence.

A thirty year old man, visiting a doctor for getting himself cured of some illness, without informing his family members, is not some exceptional situation and hence, the medical practitioner cannot be cast with an obligation to keep the members of the family/friends into loop before performing a surgery.

36. When Prakash visited Dr.Pinto, the treatment papers (D6) record his history, by including reference of Dr. A.K. Joshi, since

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the patient was suffering from Hyperhidrosis from early childhood. It is recorded that the patient had history of emotional upsets and he was afraid of his father and had suicidal tendencies, due to sweating and he did not want his family members to know about his surgery and had a desire not to be kept in the Hospital. It is also recorded that he was keen on doing both upper and lower limb Sympathectomy at the same time, but was advised against it.

37. In order to ascertain the preliminary fitness for the operation, the case papers of Dr. Pinto record that a stellate ganglion was given by Dr. R. Raghavan and Prakash stopped sweating almost immediately and this was applied as a pre-test for undergoing procedure.

The case papers also record that he was determined to get surgery done and though he was asked to bring along a member of the family or a friend, he came alone and signed for the procedure, the risk being explained to him.

The noting of Dr. Pinto also record that the operation commenced at 9.00 a.m. and the procedure performed is recorded as under: -

> "(L) Side started first Supraclavicular incision taken. Scaleneus anterior was cut after cutting the deep fascia. Phrenic nerve pushed aside and the ganglion was exposed after reflecting the pleura. The subclavian artery was retracted upwards.
>
> The Sympathectomy was done, lower part of stallate and the 2nd and 3rd C8, T1, T2 thoracic ganglia.
>
> On completion of the procedure the subclavian artery went into servere Spasm and the pulsation in the limb were not felt. The subclavian artery itself was not pulsating. After the usual conservative measures like putting xylocaine giving IV prescol Lemodex etc. the pulsation did not return, hence an embolectomy was decided upon."

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38. From reading of the medical notes to the above effect, from a layman's point of view, it is evident that the procedure of Sympathectomy was carried out.

The meaning assigned to the Sympathectomy when ascertained in medical terms, reflect a type of minimally-invasive procedure which involves cutting and sealing a portion of the sympathetic nerve chain that runs down the back inside the chest, parallel to the spine and it is a procedure recognized to cure Hyperhidrosis, which is a condition in which a person sweats excessively. Sympathetic nerve is a part of the nervous system that functions to produce sweat, as a response to the increase in temperature.

The Subclavian Artery is the artery that moves oxygen-rich blood from heart to upper body and Cervicodorsal Sympathectomy is a procedure that involves removing part of the cervicodorsal sympathetic nerves which surround the spinal cord and is done to treat hyperhidrosis.

Another term which find mention in the report is 'Ganglia', which is an encapsulated collection of bodies of nerve cells found on the outside of the brain and the spinal cord.

39. From reading of the medical notes of Dr. Pinto, it lead to an impression that Sympathectomy was done and on completion of the procedure, the subclavian artery went into Spasm and as a result, pulsation in the limbs was not felt and the subclavian artery, which moves oxygen-rich blood from heart to upper body

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was not pulsating.

As a conservative measure, Lemodex was administered by Dr.Pinto and as per the Medical Science, Lemodex is used to prevent and treat harmful blood clots and it assists in stopping the existing clots from getting any bigger and restricts the formation of any new clot and it is helpful in the prevention of blood clots in veins. In short, in case of Spasm in artery, Lemodex assist in improving the blood circulation. The medical notes record that despite Lemodex being given, the pulsation did not return and, hence, embolectomy was decided upon.

Embolectomy is a procedure for removing clotted blood, obstructing the circulation. The medical notes further record that on performing embolectomy, there was good retrograde flow and the artery was closed, but another clot was formed, which called for forgartycathator, which resulted restoration of flow of blood and the artery was sutured, but it got thrombosed again i.e. a blood clot again formulated.

On contacting Dr. Khandeparkar from KEM Hospital, Dr.Pinto was advised to carry out an end to end anastomosis, which is a surgical connection between two structures i.e. a connection is created between tabular structures, such as blood vessels or loops of intestine. Immediately thereafter, the patient developed Volkaman's Ischemic Contracture, which is a deformity of the hand, fingers and wrist caused by injury to the muscles of the forearm.

40. On careful reading of the medical notes, the moot question is, whether there was any negligence on part of Dr.Pinto, when

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the aforesaid situation emerged, as the subclavian artery went into Spasm and could not be revived. The step taken by Dr.Pinto to save the life of the patient is pressed by Mr.Jagushte, by arguing that Dr.Pinto has administered Lemodex, but it did not yield result and, therefore, he performed an embolectomy to remove an embolus from the subclavian artery and thus he took all possible steps as a professional surgeon. He did what was best in the interest of the patient, but unfortunately the artery could not be revived to its original state.

41. PW 7 - Dr.Kalke, a consulting surgeon of high repute, was examined and in his evidence, he has stated that when the Cervical Sympathectomy operation is carried out, injury to the subclavian artery is not usual as it is necessary to mobilize the artery before approaching the sympathetic trunk and he has categorically deposed that when the doctor dissect around the artery and during that procedure, quite often it gets into spasm and it is generally treated by applying swab soaked in local anesthesia drug or vasodilator drug and the spasm will disappear in few minutes.

PW 7 has also thrown light upon the treatment of embolectomy and according to him, if blood clot is formed in artery, it can be handled by the process known as Thrombus as the embolus, the foreign body such as clot coming to the artery from a distant area or site and the procedure for its removal is known as fogartization, though he has opened that repeated fogartization is to be avoided as far as possible.

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42. In the impugned Judgment, the learned Magistrate has determined the issue whether Dr. Pinto had taken reasonable precaution expected from a prudent man and if not, whether he could be responsible for his omission and commission by holding culpably negligent in discharge of his duties.

For recording a positive finding on this aspect, he has attributed a lapse on part of Accused in not informing his relatives or friends. I am unable to agree with the said finding as Prakash was aged 30 years, capable of taking his decisions and when he had signed the consent form, it is presumed that it was an informed consent. He himself chose not to inform his family members and Dr. Pinto was informed about his decision and in such a situation, there was no question of contacting and seeking consent of the family members before the procedure was carried out.

Another reasoning in the impugned Judgment, i.e. Dr. Pinto has proceeded in haste and had done away with preliminary test before embarking upon the surgery is also not sustainable, as it is evident from the exhibits placed before me by Mr. Jagushte that Prakash had visited Dr. Pinto on the recommendation of Dr. Joshi on 08.02.1984 on being advised to undergo sympathectomy. Exhibit D-4, the noting by Dr. Pinto where he directed patient to report on the next date so as to administer local block to find out whether surgery would benefit him. Accordingly, when Prakash visited, a stellate ganglion block was given by Dr. Raghavan to determine the suitability of the surgery and the noting of 16.02.1984 clearly refer to some medicines being advised to be

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taken with instructions to report for operation on 17th February at 7.30 a.m. on empty stomach.

Hence, it cannot be said that Dr. Pinto failed to carry out the necessary preliminary test before embarking upon the surgery, and, therefore, he was negligent in discharging his duties as a medical professional.

43. Another limb of the reasoning, in the impugned Judgment is about the patient being kept in the hospital by Dr. Pinto from 9.00 a.m. to 11.00 p.m. and despite noticing that complications have arose, he did not take necessary measures to deal with the same and rather continued with the conservative treatment. On this point, I express my agreement with the learned Magistrate as it can be clearly observed from the medical papers from Dr. Pinto's Hospital, that when Prakash was admitted for procedure in Dr. Pinto's Hospital, and the procedure started at 9.00 a.m. by giving incision to the supraclavicular nerve and phrenic nerve was pushed aside and subclavian artery was retracted upwards and sympathectomy was done, but during this process the subclavian artery went into severe spasm and pulsation in the limb was not felt and embolectomy was performed in order to remove the clot, but immediately another clot was formed. As per the advise of Dr. Khandeparkar, Dr. Pinto resorted to Anastomosis, a procedure for connecting blood vessels, but was not successful and the medical notes record that colour changed appear in Prakash's limb. It is also recorded that he suffered Volkmann Ischaemic Contracture, which is a deformative of hands, fingers and wrists, caused by

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injury to the forearm.

This was directly attributable to the spasm of subclavian artery when the flow of the blood was impacted and when the artery that move oxygen rich blood from heart to the upper body went into spasm, as a Surgeon, Dr. Pinto should have acted with expediency. As per the PW 3, when she visited the hospital in the evening after 7.30 p.m., Dr. Pinto asked her to get some medicines, which include Lemodox.

44. It has come on record that Lemodox was administered to Prakash after much time had lapsed, when the subclavian artery went into spasm and in fact this should have been done forthwith. PW 3 Anita has deposed that she repeatedly asked for some expert doctor to be called, but the response of Dr. Pinto was, they should wait for some time and Prakash would be alright and it is only at 9.00 p.m., when once again he examined Prakash, he informed that he had sent for one doctor from KEM Hospital. As per the version of PW 3, after 10.00 p.m. one doctor came and after examining Prakash there was discussion between Dr. Pinto and him and the family members were informed that Prakash will have to be shifted to KEM, as there were complications and there were no modern equipments to treat the complications. The ambulance arrived at 10.30 p.m. and thereafter, Prakash was taken to KEM, where he was admitted and attended to by Dr. Tendolkar.

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45. The medical notes from KEM Hospital dated 17.02.1984 record that the patient was admitted at 11.00 p.m., with the diagnosis of subclavian artery injury with Volkmann Ischaemic Contracture and it was recorded that his left hand was cold and was in abnormal position. The bluish discoloration of his fingertips and absence of movements and sensation minus pulses is also recorded in Medical Papers when Prakash was admitted in KEM Hospital. Dr. Chincholkar, who examined the patient expressed his diagnosis as "acute arterial insufficiency lull with Volkmans contracture".

Dr. A. Gulanikar who attended to Prakash, also recorded absence of limb, pulses with (1) subclavian injury with Volkmann contracture. The medical history recorded by KEM Hospital, note that the patient was given injunction Heparin 5000U at 6.30 p.m. and IV fluid and one 500 ml. Lemodex at 5.00 p.m.

It is, thus, evident that by time Prakash was offered treatment in KEM Hospital in form of bypass grafting, the left Subclavian artery had totally occluded and grafting could not be done, because of division and end to end anastomosis as well as deep position behind clavical. The procedure adopted is also noted in the medial papers and reveal that embolectomy was performed, both proximally and distally and this was followed by Fogartization.

Whatever could have been possible was attempted by the doctors in KEM Hospital in the night of 17th and on 18th and 19th February, however, ultimately, the patient passed away on

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account of terminal cardio respiratory failure, acute renal failure and acute polyneuritis.

46. The complications which arose are evidently attributed to the procedure that was carried out by Dr.Pinto and though I do not upheld the opinion expressed by the Magistrate that the surgery should have been avoided, in my considered opinion, Dr. Pinto was also a Surgeon and hence if he had taken a decision to perform the said surgery, no fault can be found in this decision of his.

What can be attributed to him is an act of negligence in not taking immediate steps to deal, with a situation where the subclavian artery went into spasm, while the procedure was carried out by him and though I do not doubt the capability of Dr.Pinto for deciding on the course of treatment based on his assessment, which in any case even as per PW 7, was a procedure in vogue, the act of not acting with promptness and expediency is what goes against him and I do not consider him to be negligent on the ground that someone else of better skill and knowledge would have acted in different way, but as an expert surgeon and a medical professional, it was expected for him to act promptly to tackle the damage to the artery and the long wait for more than 12 hours has definitely caused the complications, as despite grafting, the artery did not pulsate. This affected the urine flow of the patient and resulted in Volkmann Ischaemic Contracture.

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47. As expressed by Lord Denning in Hubs vs. Coal, (1968 118 New PWLJ 469)

> *"A Medical practitioners is not to be held liable simply because things went wrong from mis-chance to mis-adventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only when his conduct fell below that of standard of a reasonably competent practitioner in his field."*

The true test for establishing negligence in diagnosis of treatment on part of a Doctor is, whether he has been proved to be guilty of such failure as no Doctor of ordinary skill would be guilty of, if acting with ordinary care. Mere deviation from normal professional practice is not evidence of negligence, nor a mere accidental slip is. An error of judgment on part of the professional is also not negligence *per se*, but when an expert surgeon like Dr. Pinto leave the patient waiting, with a spasm of a vital artery and which subsequently resulted in formation of clots, definitely amounts to negligence. The most relevant period of 12 hours was allowed to pass with no serious steps being taken, with a just wait and watch policy adopted by him.

48. In the statement under Section 313 of the Code, Dr.Pinto has categorically admitted, that he started operation at about 9.30 to 10.00 a.m. and the sectioning of the sympathetic nerve was completed within an hour and at that time, it was noticed that subclavian artery went into spasm. He took steps to relieve the spasm and had sent Dr. Khandeparkar to relieve the spasm, but except bald statement of Dr. Pinto, there is no evidence of this

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fact.

Dr.Pinto specifically state that the main operation was over within an hour and he also admit that in the evening hours when Anita (PW 3) visited the patient, his left arm and hand was motionless and Prakash was admitted in KEM Hospital at around 11.30 p.m. He has also stated that the spasm could not be relieved by conservative measures and a bypass graft was performed after 12.00 p.m. If this procedure was adopted earlier, it would have been possible to revive the artery and prevent the complications, which ultimately resulted in death of the patient.

Dr. Tendolkar has expressed opinion that he would not have tried emboloctomy and grafting would have been last resort.

It in these circumstances, I find that Dr. Pinto is guilty of negligent act, not amounting to culpable homicide and I express my agreement with the learned Magistrate in finding him guilty under Section 304 A of the IPC, who directed to pay fine of Rs.5,000/- and in default to suffer SI for 10 days. I must moreover clarify that I do not agree with the Magistrate in reaching the conclusion of his culpability in his act of not informing the relatives or in performing the procedure itself. As far as the latter aspect is concerned, it is not my arena to determine the necessity of its performance, when PW 7 has not overruled the necessity of the procedure to deal with Hyperhydrosis.

49. The above circumstance were appreciated by Justice

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R.S.Dalvi (Her Ladyship Was Then), while dealing with the suit filed by Anita Nagindas Parekh & Ors. against Dr.Anil Pinto and it determined the issue, whether the Plaintiffs have proved that the Defendant was negligent in performing the surgery and not taking proper pre and post operative care. As far as the first issue of negligence is concerned, it was answered in the negative, whereas the second issue came to be answered partly in the affirmative and after referring to the sequence of events as well as the evidence brought on record, the necessary conclusions have been recorded in the judgment delivered in Suit No.510 of 1985 delivered on 10/11/2008.

50. In the Suit, the Plaintiffs relied upon the case papers right from the note of consulting physician of the deceased, Dr. Joshi, including the case papers from Dr.Pinto's clinic as well as the case papers of KEM Hospital, which were relied in criminal case.

The steps taken by Dr.Pinto while treating and performing the procedure upon Prakash were specifically highlighted in the said judgment and it is recorded that Dr.Anil Pinto, who had contacted Dr.Khandeparkar from KEM Hopsital, is not examined, but whatever was possible in the given circumstances was done by him, which include embolectomy and anastomosis, as per the advice for by pass grafting given by Dr.Khandeparkar. Evidence of Dr.Kalke, a Cardio Vascular and Thoracic Surgeon, is also considered at great length and by referring to the clinical notes, the learned Judge had examined the following aspects in concluding whether the act of Dr.Pinto constitute negligence :-

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(1) performing Cervical Sympathectomy upon the deceased;

(2) Performing Embolectomy when the conventional therapy did not cause the spasm to recede;

(3) Not causing to be removed the collection of urine of the deceased in his Clinic during the surgical procedure;

(4) Not shifting the deceased to a better hospital with better infrastructure facilities with expedition.

On exhaustively dealing with the evidence placed on record, the following observations by applying the Bolam test, need a reproduction.

"64. The procedures undertaken by the defendant being the procedure of Sympathectomy as well as Embolectomy fall completely within the parameters of Bolam test. Whether or not the plaintiff contends that the expert opinion suggests that medical treatment should be given in preference to a surgical treatment by every medical practitioner and the defendant should have embarked upon such a course and inquired whether all the medical treatment that could have been given to the deceased has been already given by the Consultant Physician who referred the case to the defendant, Dr.Kalke, the witness on behalf of the plaintiff, who is himself a Vascular Surgeon, has stated that Sympathectomy is indeed one of the procedures legitimately undertaken by a sizable surgical fraternity for the problem that the deceased suffered. The defendant, therefore, came out clear with regard to the performance of the treatment. None can raise a finger against the defendant in that regard. Mistakes do occur in every human activity, including surgery. The wisdom and profundity of the law allows the medical practitioner not to be continuously derided for legitimate mistakes. Complications do occur during surgery. In fact, that is an aspect of which Judicial Notice is required to be taken. Corrective procedures are undertaken in cases without number. Genuine errors do not get corrected in later surgical or medical procedures. Those procedures once again fall within the Bolam test. They call for the same parameters in reviewing the extent of the negligence therein. If such procedures, which a sizable medical opinion would permit, are followed, once again the surgeon would steer himself clear of the shadow of negligence. The defendant whilst performing the Embolectomy fell within those parameters. The evidence has revealed that if an embolus is detected, for whatever reason, an error in the performance of Sypathectomy or otherwise, it has to be removed. Embolectomy is one of the procedures for its removal. Even if there be other or better procedures, medical science as on the date of the surgery allowed Embolectomy to be one of them. This was performed twice because the first Embolectomy did not clear the arteries of the deceased. It was not performed again and again which could result in arterial damage as is the evidence of Dr.Kalke. Dr.Khandeparkar performed its

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once, Dr.Kalke has himself deposed that if he were to come upon such symptoms he would be constrained to perform an Embolectomy likewise. At the time of by-pass grafting in the KEM Hospital also Embolectomy had to be performed and then the two ends of the artery had to be sutured. Dr.Kalke's evidence in that regard stands to reason. A graft would be of no use if the circulation in the artery is not flawless. Any embolus or clot in the blood stream within the artery would, therefore, have to be removed before grafting is made if the newly grafted portion of the artery has to have a healthy blood circulation unobstructed by any embolus. Consequently, with regard to both procedures the defendant's act falls within the parameters of the Bokan test. He cannot be held liable for negligence for either of them."

What impressed the learned Judge in awarding damages to the tune of Rs.10,00,000/- in favour of the plaintiffs is the aspect of delay, as it is recorded that the cause of death of the deceased is renal failure, going into cardiac arrest and his kidneys were irreparably damaged and though he was put on dialysis, it did not help him. By recording that this aspect stairs in the face of the evidence and lent itself to the case of negligence, as it was not even required to be proved, the doctrine of res ipsa loquitur was applied.

51. A finding is recorded to the effect that Dr.Pinto, as a specialist Cervical Surgeon with necessary qualification was expected to have the knowledge that embolus in the blood stream requires extreme expedition for its removal and if one method does not work out, the other method, which would require better infrastructural facilities, would have to be adopted with the greatest despatch, but here he faulted. For no explicable reason, he did not shift the deceased to a better hospital and he shifted the deceased hours after irreversible damage was done and a

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finding is recorded to the following effect :-

> "67. .....The deceased was shifted hours after irreversible damage was done and his condition was beyond redemption. It is impossible to conclude that the surgeon with such special skill would allow himself to ignore the required speed with which to act while the patient was under his care and failed to put him in the care of better infrastructural facilities which alone could have saved the patient. It is impossible to conclude that the defendant could have expected the condition of the deceased to improve under his treatment after hours of having continuous embolus, one after another."

On clearing Dr.Anil Pinto on Bolam Test, his case was sought to be decided by applying the doctrine of "Res ipsa loquitur" and inference is drawn that the delay in shifting him to KEM Hospital resulted in irreversible damage, of want of any care of extrication or urine and on this count, the claim for damages was allowed, as the defendant, Dr.Pinto was found negligent on the aforesaid aspect.

52. Another important aspect is reflected in the affidavit filed by Dr.Pinto on 31/01/2023, where he has referred to his illness and the affidavit read thus :-

> "2) I say that in August 2017, I was diagnosed with Prolapsed Intervertebral Disc (PID), that is Slip Disc of L4L3, for which I was under the treatment of Dr.Shekhar Bhojraj, a renowned Orthopedic and Spine Surgeon from Lilavati Hospital. In November 2017, I had to undergo the surgery for the same, which was performed at Holy Family Hospital by Dr.Derrick D Lima. However, post operation I developed complete Paraplegia of both lower limbs and had to undergo aggressive Physiotherapy for 6 months, thereby I could barely walk with the aid of Walker/Stick.
>
> 3) I further state that I developed lot of pain and abnormal movements, for which in September 2021, I had to undergo a second Spine Surgery which was performed by Dr.Malcolm Pestonji, which was performed at Holy Spirit Hospital, Andheri on 7th of September, 2021.
>
> 4) However, to my misfortune, the said operation was not

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successful as the plates and screws used in the surgery came loose and were pressing on the nerves causing excruciating pain and bladder/bowel dysfunction and therefore I had to undergo third Spine Surgery. This third spine surgery was performed on 1st April, 2022 by Dr.Shekhar Bhojraj at Lilavati Hospital and all the screws, nuts and plates were removed. Upon my discharge I was once again advised continuous physiotherapy, which is still going on. Even presently, there is weakness in both lower extremities. There is right foot drop, loss of sensation in the feet and imbalance in GAIT, with the result I am totally confined to the room and can barely take a few steps with the help of a walker, inside the room.

5) To add to my misery, I had a Cardio Respiratory Arrest on 23rd October, 2022, which needed Resuscitation and Life Support. I was thus on Ventilator in ICCU at Holy Family Hospital for 15 days.

6) I further state that since Ejection Fraction of Heart was down to 15% from 45%, an Angiogram was done and an Angioplasty with 2 stents (LAD and L Circumflex) had to be carried out.

7) However, that was not the end of my suffering, post discharge, I developed Urinary Sepsis and Fever, and was required to be re-admitted to ICCU on 1st December, 2022.

8) During my stay in the Hospital, it was detected that I am also suffering from Cancer, as during my stay in the hospital an open Biopsy was carried out on Left Axillary Lymph Nodes, which are proved to be Non Hodgkins Lymphoma (Follicular), I was advised to take radiation and have undergone 5 sessions of Radiation from Hinduja Hospital, Shivaji Park from 27th December to 31st December, 2022.

9) I say that though I am now at home, with all the medical history, surgical procedures and radiation, I have become extremely weak and I am just surviving on the constant medication, with a bleak future, as regards my health condition.”

53. The above affidavit reflect the present condition of Dr.Pinto and, definitely deserve consideration, while holding him guilty of Section 304-A, and considering the finding in the impugned Judgment of he having rendered immense service to the society, which prompted the Magistrate to refrain from imposing sentence, but only fine of Rs.5,000/- was imposed.

54. The State of Maharashtra has also filed Criminal Appeal

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No.395/1995 for enhancement of the sentence and the learned APP Mr. Yagnik has assertively submitted that the punishment awarded by the Magistrate is inadequate as the Court has failed to take into consideration the relevant circumstances and the befitting sentence ought to be imposed upon the accused, since a young life has been lost, owing to his negligence. It is the specific submission of Mr. Yagnik that as a professional, the accused ought to have exercised necessary care and ought to have been diligent in discharge of his duties, but instead, he was culpably negligent in his act causing death of Prakash.

The arguments of Mr.Yagnik are to be appreciated in the light of the Affidavit filed by Dr. Pinto dated 31/01/2023, giving the status of his health and life and it would be highly unreasonable and unjust, if a septuagenarian with this medical condition, is sent to jail for undergoing sentence, as at present he is fighting cancer and a man who once a time was acclaimed surgeon and a Registrar, lecturer and Reader in general surgery in KEM Hospital and whose name feature in the list of honorary surgeons at RM Cooper Hospital, do not definitely deserve incarceration at the twilight years of his life and particularly when he himself is suffering from precarious ailments.

On hearing Mr. Dharmadhikari for the Complainant and Mr. Yagnik, APP for the Sate, for the aforesaid reasons, I deem it appropriate to enhance the amount of fine imposed by the Magistrate, to a sum of Rs.5,00,000/, out of which a sum of Rs.4,90,000/- shall be paid to the dependents of Prakash and legal representatives of the Applicant in Criminal Revision Application

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No.96/1995.

The fine amount shall be deposited within a period of four months from the date of receipt of copy of the order by the accused.

55. As a result, Criminal Appeal No.395/1995 and Criminal Revision Application No.96/1995 are partly allowed to the above extent.

Criminal Appeal No.123/1996 filed by the accused is dismissed.

[**BHARATI DANGRE, J**]

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