Simply Because Patient Didn't Respond Favourably To Treatment Or Surgery Failed, Doctor Cannot Be Held Negligent: Kerala High Court

2023 LiveLaw (Ker) 61

IN THE HIGH COURT OF KERALA AT ERNAKULAM
DR. JUSTICE KAUSER EDAPPAGATH; J.
Crl. A No. 22 of 2014; 2 February 2023
DR. BALACHANDRAN *versus* **STATE OF KERALA**

Appellant / 1st accused by Advs. S. Sreekumar (Sr.), P. Martin Jose, M.A. Mohammed Siraj

Respondent by Advs. Sr. Public Prosecutor T.V. Neema

J U D G M E N T

Though doctors' aura of Godliness and holiness is a myth, they are volunteers who take the risk of dealing with the most intricate, delicate, and complex machine on earth - the human body. Any surgical procedure or medical intervention on this highly compound machine carries some inherent risk. There is always the chance that the treatment does not go as planned. When things go wrong, it is not always the fault of the doctor. A complication by itself does not constitute negligence. There is a big difference between an adverse or untoward event and negligence. However, there is a growing tendency to accuse the doctor of an adverse or untoward event. Nothing can be more professionally damaging and emotionally draining than being arrayed as an accused in any such action. A surgeon, under fear of facing criminal prosecution in the event of failure for whatever reason – whether due to his fault or not- cannot perform at his best. The Judicial Forums, in the process of fixing parameters of liability in the cases of medical negligence, must aim at striking a careful balance between the autonomy of a doctor to make judgments and the rights of a patient to be dealt with fairly, recognizing the complexity of the human body, inexactness of medical science, the inherent subjectivity of the process, and genuine scope for error of judgment. However, while dealing with criminal prosecution for medical negligence, the trial courts often ignore these principles. The subject matter of these appeals is one such typical case.

2. One Smt.Mini Philip, a young lady aged 37 years, walked to the operation theatre at Deen Hospital, Punalur, on 25 /9/2006 at 3.30 p.m. to undergo sterilization by laparoscopy, a procedure that provides permanent birth control, with the hope that she could safely return home after few hours. But destiny had something else in store for her. After the surgery, she developed respiratory complications and was put under oxygen support. Though she was shifted to Poyanil Hospital, Punalur, at 9.00 p.m. and then to Ananthapuri Hospital, Thiruvananthapuram, at 11.30 p.m. for expert management, her life could not be saved. She breathed her last on the next day at 5.30 p.m. at Ananthapuri Hospital.

3. On 26/9/2006, the Vanchiyoor Police registered a crime under section 174 of Cr.PC based on Ext.P1 FI statement given by the uncle of the deceased (PW 1) alleging medical negligence on the part of the doctors who conducted surgery and administered anesthesia as well as the nurses who assisted them. Later Punalur Police reregistered the case as Crime No.590/2006 and conducted the investigation. PW17, the investigating officer, in accordance with the direction of the Apex Court in ***Jacob Mathew v. State of Punjab and Another*** (AIR 2005 SC 3180), requested the District Medical officer, Thiruvananthapuram, to constitute an Expert Panel and to give their views on the allegation of medical negligence. Accordingly, a five-member Expert Panel was constituted, and the committee forwarded Ext.P4 report on 16/6/2007. The matter was again referred to the Apex Body, and two reports of the Apex Body marked as Ext.P15

dated 3/8/2010 and Ext.D9 dated 20/4/2009 were obtained. Based on the reports, PW17 incorporated the offences under sections 304 and 201 r/w 34 of IPC. After investigation, final report was filed at the Judicial First-Class Magistrate Court III, Punalur, against the accused, six in number, who are the doctors and nurses at Deen Hospital. The learned Magistrate, after complying with the statutory formalities, committed the case to the Additional Sessions Court V, Kollam (for short 'the court below') for trial and disposal.

4. All the accused appeared at the court below and they faced trial for the offences punishable under sections 304 and 201 r/w 34 of IPC. After full-fledged trial, the court below found that the offence under section 304 of IPC was not attracted. However, it found that there is evidence to show that the accused have committed the offences punishable under sections 304A and 201 r/w 34 of IPC, and they were convicted for the said offences. All of them were sentenced to undergo simple imprisonment for one year for the offence under section 304A r/w 34 of IPC and simple imprisonment for three months for the offence under section 201 r/w 34 of IPC. Challenging the conviction and sentence, the accused No.1 preferred Crl.Appeal No. 22/2014, the accused No.2 preferred Crl.Appeal No. 23/2014, the accused No.3 preferred Crl.Appeal No.1/2014 and the accused Nos.4 to 6 preferred Crl.Appeal No. 25/2014. Challenging the finding that section 304 of IPC was not attracted, the victim preferred Crl.Appeal (V) No.589/2015.

5. Since there was no continuous representation for the victim, I appointed Sri. V. Vinay as Amicus Curiae.

6. I have heard Sri.S.Sreekumar, the learned Senior Counsel appearing for the accused No. 1, Sri. Jayanth Muthuraj, the learned Senior Counsel appearing for the accused No.2, Sri. P. Vijayabhanu, the learned Senior Counsel appearing for the accused No.3, Sri. S. Ananthakrishnan, the learned Counsel appearing for the accused Nos. 4 to 6, the learned Amicus Curiae Sri. V. Vinay and Smt.T.V.Neema, the learned Senior Public Prosecutor.

7. The learned counsel for the accused impeached the findings of the court below on appreciation of evidence and the resultant finding as to the guilt. They submitted that in the absence of any evidence on record to prove culpable negligence against the accused, the court below grossly erred in convicting them. The learned Senior Public Prosecutor Smt.T.V.Neema, on the other hand, supported the findings and verdict handed down by the court below and argued that necessary ingredients of sections 304A and 201 r/w 34 of IPC had been established, and the prosecution had succeeded in proving the case beyond a reasonable doubt. The learned Amicus Curiae Sri. V. Vinay submitted that the court below grossly erred in not convicting the accused under section 304 of IPC. Both sides cited several decisions of the Apex Court in support of their submission, which will be referred to hereinafter in due course.

8. This is an unfortunate case where a 37- year-old healthy lady lost her life following a simple procedure for laparoscopic sterilization. The records show that the complication developed immediately after the surgery, and despite earnest efforts, her life could not be saved. The prosecution attributed negligence to the doctors who were part of the surgical team as well as the nurses who assisted them. The accused No.3 is the doctor who did the procedure, and the accused No.1 is the doctor who administered anesthesia. The accused Nos.4 to 6 are the nurses who assisted accused Nos.1 and 3. Even as per the prosecution version, accused No.2, the gynaecologist, was in no way involved in the surgical procedure. The role attributed to her is that the deceased consulted her a week ago, and she admitted the deceased to the hospital for laparoscopic sterilization. As against accused No.3, there is no specific allegation of negligence. The accused No.4 is a qualified nurse, and the accused Nos. 5 and 6 are nursing assistants who only assisted

the accused Nos.1 and 3. The prosecution has no case that they did something or failed to do something which ought to have caused the death of the deceased. The main allegation is against accused No.1. It is alleged that accused No.1 is not a qualified anesthesiologist, and he administered spinal anesthesia instead of general anesthesia. It is also alleged that he did not do a proper pre-operative evaluation of the patient. On evaluation of the evidence, the court below entered into the following findings:

(i) The accused No.1 was not a qualified anesthesiologist and thus incompetent to administer anesthesia to the deceased.

(ii) The accused No.1 gave spinal anesthesia instead of general anesthesia, and the defective anesthesia administration ultimately resulted in the death of the patient.

(iii) There were lapses in the pre-operative and postoperative management of the patient.

(iv) The doctors involved in the procedure were not trained in laparoscopy, and the hospital had no accreditation to conduct laparoscopic surgery.

(v) The surgery and nurses' notes were not kept properly. Based on these findings, the Court below concluded that all the accused are liable for criminal negligence and causing the disappearance of the evidence of the commission of the offence.

9. Negligence, simply put, is a breach of duty of care resulting in injury or damage. Per se, carelessness is not culpable or a ground of legal liability, except in those cases where the law has imposed a duty of carefulness. The duty of care implies the responsibilities of individuals towards others within society. The duty of care may be understood as a legal obligation imposed on an individual requiring adherence to a standard of reasonable care while doing any act, particularly when lack of care could cause harm to someone else. When there is a legal duty not to do a thing on purpose, there is commonly a legal duty to take care not to do it accidentally.

10. In civil law, a duty of care is a legal obligation imposed on an individual requiring that he/she exercises a reasonable standard of care while performing any act that could foreseeably harm others. In medical practice, the law has imposed a duty of care on the doctors for treating patients. The duties that a doctor owes to his patient are clear. They include 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 the administration of that treatment. A breach of any of these duties gives the patient a right of action for negligence.

11. The jurisprudential concept of negligence differs in civil law and criminal law. Ordinary negligence is such failure to use care as would render a person civilly but not criminally liable. Criminal negligence is a greater failure and a greater falling below the standard of care and renders a man guilty criminally. The degree of negligence should be much higher for an act to amount to criminal negligence. Negligence not of such a high degree may provide a ground for action in civil law but cannot form the basis of criminal prosecution. The factor of grossness or degree does assume significance while drawing a distinction between negligence actionable in tort and negligence punishable as a crime.

12. The medical negligence jurisprudence in India is characterised by a reliance on the "Bolam test". ***Bolam v. Friern Hospital Management Committee*** {[1957] 1 W.L.R. 582} , a landmark English case on medical negligence, laid down the principle that "A Doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...". This principle has been widely accepted as decisive of the standard of care expected from medical practitioners. The courts in India, including the Apex Court, invariably applied Bolam Rule

as a touchstone to test the pleas of medical negligence. In ***Jacob Mathew*** (supra), a three-judge Bench of the Apex Court upheld the standard of the ordinary competent medical practitioner exercising an ordinary degree of professional skill, as enunciated in ***Bolam*** (supra). It was held that the standard of care must be in accordance with 'general and approved practice'. The Apex Court affirmed the judgment in ***Jacob Mathew*** (supra) in ***State of Punjab v. Shiv Ram and Others*** [(2005) 7 SCC 1], ***Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*** [(2009) 6 SCC 1] and ***Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others*** (AIR 2010 SC 1050).

13. The question of degree has always been considered relevant to fasten criminal liability on medical negligence. The Privy Council in ***John Oni Akerele v. The King*** (AIR 1943 PC 72) put the standard for fastening criminal liability on a high pedestal and required the medical negligence to be "gross". It was held that a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State. The Apex Court in ***Syad Akbar v. State of Karnataka*** (1980 KHC 527) opined that where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. In ***Bhalchandra Waman Pathe v. State of Maharashtra*** (1968 Mh. LJ 423), it was held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. In ***Dr. Suresh Gupta v. Govt. of NCT of Delhi*** [(2004) 6 SCC 422], the Apex Court held that the degree of negligence required should be gross or reckless. A mere lack of necessary care, attention, or skill was considered insufficient to hold one criminally liable for negligence. It was observed that mere inadvertence or want of a certain degree of care might create civil liability but will not be sufficient to attract criminal liability. The soundness of this view of the Apex Court was subsequently doubted, considering that word "gross" is absent in section 304A IPC and that different standards cannot be applied to actions of the negligence of doctors and others. Consequently, the matter was placed for reconsideration before a Bench of higher strength. Three-judge Bench (Bench strength in Dr. Suresh Gupta was two) in ***Jacob Mathew*** (supra) on a reconsideration endorsed the approach of the high degree of negligence being the prerequisite for fastening criminal liability as adopted in ***Dr. Suresh Gupta*** (supra). It was held that "In order to hold the existence of criminal rashness or criminal negligence, it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent." It was observed that the subject of negligence in the context of the medical profession necessarily calls for a treatment with a difference.

14. Every death of a patient cannot, on the face of it, be medical negligence. There must be sufficient evidence to prove that the death is due to the alleged medical negligence. The death should be the direct or proximate result of the negligent act alleged. A medical professional cannot be held liable simply because things went wrong from mischance or misfortune. A mere deviation from normal professional practice is not necessarily negligence. Nor could mere accident or untoward incident be termed

negligence, also an error of judgment is not negligence per se. To convict a medical professional for criminal negligence, the prosecution must prove culpable and gross negligence beyond a reasonable doubt. It must also be shown that the medical professional did or failed to do something which, in the given facts and circumstances of the case, no ordinary skilled medical professional would have done or failed to do.

15. The court below heavily relying on the oral evidence of PW 9 and Exts. P4, P6 and P19 found that accused No.1 was not qualified or competent to give anesthesia, and he wrongly gave spinal anesthesia instead of general anesthesia, which led to complications and the death of the patient. The learned Senior Counsel for the accused No.1, Sri. S.Sreekumar, submitted that the Expert Panel constituted as per the direction of the Apex Court opined that the accused No.1 was competent to give anesthesia and, as such, the finding of the court below that he was not a qualified anesthetist and not competent to administer anesthesia is wrong. The learned Senior Counsel further submitted that there is absolutely no evidence to show that the complication developed, which ultimately resulted in the death of the patient, was a result of the defective anesthesia administration. The Counsel also submitted that the finding of the court below that accused No.1 gave spinal anesthesia instead of general anesthesia is against the evidence on record. Per contra, the learned Senior Public Prosecutor Smt. T.V. Neema as well as the learned Amicus Curiae Sri. V.Vinay relying on the observations in ***Jacob Mathew*** (supra), vehemently argued that any task which is required to be performed with a special skill by a medical professional would generally be undertaken to be performed only if he/she possesses the requisite qualification and skill for performing that task and a medical professional can be held liable for criminal negligence if he/she was not possessed of the requisite skill which he/she professed to have possessed. According to them, an Anesthesiologist who has a postgraduation or Diploma in Anesthesiology alone is qualified to administer anesthesia and since accused No.1 did not possess either of these qualifications, he was incompetent to administer anesthesia to the deceased. They further submitted that the evidence on record establishes that the wrong administration of anesthesia by an incompetent person resulted in the death of the patient.

16. Admittedly the accused No.1 is only having an MBBS degree. He does not have either a diploma or a post-graduation in anesthesia. However, the documents on record would show that he had undergone sufficient training in anesthesiology and had vast experience in administering anesthesia. Ext.D2, the proceedings of the Principal, Medical College, Trivandrum and Ext. D3, the certificate issued by the Principal, Medical College, Trivandrum, establish that he was selected in the branch of anesthesia for Senior House Surgency, and he underwent it successfully. Ext. D4 is the certificate issued by the Professor of Anesthesia, Department of Anesthesia, Medical College, Trivandrum on 31/10/1980, stating that the accused No.1 had worked as a Senior House Surgeon from 31/10/1979 for a period of one year; he has proved himself reliable and can manage cases independently and confidently. Ext. D5 is the certificate dated 1/11/1980 issued by the Associate Professor, Department of Anesthesiology, Medical College, Trivandrum, certifying that accused No.1 had intensive training in all the routine and special techniques in anesthesiology. Ext.D7 certificate and Ext.D8 series case list would show that he had administered anesthesia to several patients.

17. The court below relied on Exts.P19 and P4 to conclude that the accused No.1 was not a qualified anesthetist. Ext.P19 is the information given by the Medical Council of India under the RTI Act. It only says that a graduate of MBBS is required to complete an MD degree in the speciality of anesthesia or a Diploma in the speciality of anesthesia to be qualified as an anesthesiologist. There is no quarrel with the proposition that to be qualified as an anesthesiologist, an MBBS graduate should either obtain an MD degree

in anesthesia or a Diploma in anesthesia. But the crucial question is whether a doctor who graduated in MBBS and underwent sufficient training in anesthesiology is competent to administer anesthesia.

18. Ext.D9 is the copy of the report of the Apex Body meeting held on 20/4/2009. In the said report, it was found that as per the guidelines issued by the Research Studies and Standards Division, Ministry of Health and Family Welfare, Government of India, in October 2006 (Ext.P16), the qualification prescribed for sterilization procedure is the proper training in administering anesthesia and the period of training prescribed by the department of Health Service is four months either in Medical College or in major hospitals. After scrutinising various rules and regulations relating to the prescribed qualification for an anesthetist, it was reported that a doctor who has passed MBBS and has training in anesthesiology is qualified to give anesthesia to a patient. The Apex Body, on perusal of various records, concluded that the accused No.1, after his MBBS, had undergone one-year Senior House Surgency in anesthesia at Medical College, Thiruvananthapuram, and he had the requisite qualification for giving anesthesia to the patient.

19. Ext.D7 is a copy of the minutes of the meeting of the Council of Modern Medicine held on 22nd November 2007. Considering the representation given by the Indian Medical Association, it was resolved in the said meeting that doctors with MBBS registration are qualified to give anesthesia. This piece of evidence was discarded by the court below on the ground that the resolution was passed on 22nd November 2007, after the date of the incident. But it is to be noted that the representation moved by the Indian Medical Association was to define the practice of anesthesia. Accordingly, it was resolved that the doctors with MBBS registration are qualified to give anesthesia. Thus, in fact, as per the said resolution, the Council of Modern Medicine was recognizing the qualification of doctors with MBBS registration to administer anesthesia irrespective of their date of degree or certificate of registration.

20. Ext.P4 is the first report of the Expert Panel. In the said report, it is stated that as per the Quality Assurance Manual for Sterilization published by the Government of India in 2006, only anesthesiologists are considered qualified to administer anesthesia for electro laparoscopic sterilization. But the said finding is factually incorrect. Ext.P16 is the Quality Assurance Manual for Sterilization published by the Government of India in 2006. It is nowhere stated in the said Manual that anesthesiologists alone are considered qualified to administer anesthesia for electro laparoscopic services. On the other hand, what is stated is that trained anesthetists are qualified to administer anesthesia for electro laparoscopic surgeries. There is no dispute that the accused No.1 is a trained anesthetist. PW6, the Kollam District Medical Officer and member of the Expert Panel, has admitted that an MBBS graduate who has undergone four months of training in anesthesiology is competent to administer anesthesia. She has further admitted that the accused No.1 had high experience. DW4, the convener of the Apex Body, has also admitted that the accused No.1 was qualified to administer anesthesia. I have already found that the documents produced by the defence would show that accused No.1 had undergone resident senior house urgency in anesthesiology at Medical College, Trivandrum, for one year. For these reasons, the finding of the court below that the accused No.1 was not qualified and competent to administer anesthesia cannot be sustained.

21. The court below heavily relied on the evidence of PW9, the Assistant Professor of Forensic Medicine, Medical College Hospital, Trivandrum, who conducted the autopsy, and the findings in Ext.P6 post-mortem report to hold that what was administered by accused No.1 was spinal anesthesia and not the general anesthesia. The defence plea

is that accused No.1 administered general anesthesia and not spinal anesthesia as alleged by the prosecution and there is nothing on record to prove that the administration of anesthesia, whether spinal or general, was the proximate cause of the death of the patient.

22. In Ext.P6 post-mortem certificate, the first injury noted was an injection mark reaching the spinal canal. Its dura was punctured. Based on this, PW9 opined that it might have occurred when spinal anesthesia was administered. On the other hand, in the case sheet of the Deen Hospital (Ext. P12 series), it was recorded that what was administered was general anesthesia. It has come out in evidence that to ascertain whether spinal anesthesia was administered, the best and sure test is to collect and analyse Cerebro Spinal Fluid (CSF). DW3, an expert in forensic science, and PW 14, a consultant anesthesiologist at Poyanil Hospital, gave evidence that the CSF test is the confirmatory test to find out the administration of spinal anesthesia. CSF is a clear fluid that surrounds and protects the brain and spinal cord. CSF analysis is a group of tests that measures chemicals in the cerebrospinal fluid. PW9 admitted that CSF was not collected for chemical examination. According to her, it was blood-stained, so it was not attempted. On the other hand, DW3 categorically deposed that CSF will be available in several areas, and even if it is blood-stained, it can be sent for chemical analysis. He gave such an opinion referring to the authoritative textbook on Forensic Science. PW14 also deposed that CSF would be available at 2 to 3 places, ventricle, lumbar etc., even after two days of death. Apart from the testimony of PW9, there is absolutely nothing on record to suggest that what was administered by accused No.1 was spinal anesthesia and not general anesthesia. Even PW9 only deposed that accused No. 1 might have administered spinal anesthesia. She was not sure whether spinal anesthesia was administered. Without adopting the sure test for spinal anesthesia, the mere injunction mark is insufficient to conclude that spinal anesthesia was administered.

23. PW9 admitted that laparoscopic sterilization could be done either under spinal anesthesia or general anesthesia. In Ext.P16, it is stated that local anesthesia is the preferred choice for a tubectomy operation. Thus, laparoscopic sterilization can be done under general anesthesia or spinal anesthesia. So long as it is found that the procedure/treatment adopted was accepted by medical science, the medical practitioner cannot be held negligent merely because he chose to follow that treatment/procedure and the result was a failure. A medical practitioner cannot be held criminally liable simply because things went wrong through an error of judgment in choosing one reasonable course of procedure/treatment in preference of another. A medical practitioner can only be held liable for criminal negligence if he fails to adopt a usual and normal course of treatment and the course adopted by him is one no professional man of ordinary skill would have taken had he been acting with ordinary care (See Halsbury's Laws of England, Fourth Edition, Vol.30, para 35 as quoted in para 22 of Jacob Mathew). Thus, accused No.1 cannot be found at fault in administering spinal anesthesia even if the prosecution's version that spinal anesthesia was administered is believed to be true.

24. To impose criminal liability under section 304A of IPC, it is necessary that the death should have been the direct result of a rash or negligent act of the accused. That act must be the proximate and efficient cause without the intervention of another's negligence. The liability under this section is created on the assumption of foreseeability of consequences that could result from a wrongful act. Thus, for fastening the liability of criminal negligence on the accused, the administration of anesthesia, be it general or spinal, must be the direct or proximate cause of death.

25. The cause of death stated in Ext.P6 is the combined effect of Brain Hypoxia and Adult Respiratory Distress Syndrome (ARDS). PW9 deposed that ARDS is a condition in the lung impairing the oxygenation of tissues due to several causes like injury, aspiration of the stomach contents, defused lung infection, etc. She further stated that Hypoxia is a multi-organ dysfunction. The pathology report suggests changes in the lung, brain, adrenal and liver. Referring to an authoritative book on Pathology by Allan Stevens and James Steven Lowe, PW9 answered that spinal anesthesia could not cause ARDS. On the other hand, it has come out in the evidence of PW9, PW14 and DW3 that the cause of Hypoxia and ARDS can be attributed at the time of extubating after surgery or due to pressure pulmonary oedema. In Ext. D10 report/Medical Audit Performa prepared by DW2 under the instruction from the DMO, the cause of death was shown as pulmonary oedema. It was found in the said report that after extubation, the patient developed pulmonary oedema. All these circumstances completely rule out the theory projected by the prosecution that the administration of spinal anesthesia caused ARDS/Hypoxia, which in turn resulted in the death of the patient.

26. None of the Expert Panel Reports (Exts.P4, P15 or D9) specifically attributes negligence to the surgeon, anesthetist or nurses who were part of the surgical team. In Ext.P15, it is only stated that the pre-operative workup, including pre-anesthesia workup, was not done properly at the Deen Hospital. In Ext.D9, the conclusion was that there were some lapses in the preoperative and post-operative management. In Ext. P4, there is absolutely no reference to negligence on the part of the doctors or nurses. PW9, whose evidence is heavily relied on by the court below, also did not specifically say that the patient died because of the administration of anesthesia or there was any negligence on the part of the surgeon who did the procedure, the anesthetist who administered anesthesia and the nurses who assisted them. Even though the Expert Panel found that there was no preoperative evaluation, there is absolutely no evidence on record, or even the prosecution does not have a case that it was on account of the said lack of proper pre-operative evaluation that the complication developed to the patient and the death has occurred. Admittedly, the Deen Hospital did not have a ventilator facility. The patient was shifted to Poyanil Hospital only after 3½ hours. The prosecution alleged that this was a crucial time and the patient could have been referred to a higher centre having better facilities much before. But, the evidence on record would show that immediately after the complication developed, the doctors at Deen Hospital did their best to save the patient. It has come out in evidence that two anesthetists and a cardiologist from other hospitals came to Deen Hospital and examined the patient. PW14 deposed that when he visited Deen Hospital at 6.30 p.m., he found that shifting the patient to a higher centre was dangerous. In the absence of any material on record to suggest that the alleged lapses in the pre-operative or postoperative management of the patient at the Deen Hospital were the direct or proximate cause of death, findings in Exts.P15 and D9 assume no significance.

27. A contention was also taken that accused No.3 did not undergo any training in laparoscopic sterilization, and the Deen Hospital had no accreditation to conduct the laparoscopic sterilization. It is true that, as per Ext.P17, laparoscopic sterilization can only be done by a doctor who is trained in laparoscopy. DW5 has categorically deposed that accused No.3 had undergone training in laparoscopic surgery. The court below found that accused Nos.1, 2 and 4 to 6 did not undergo any training for laparoscopy. Ext.P17 only mandates that a doctor who performs the surgery should be trained in laparoscopy. Ext.D11 contained the list of the accredited institutions performing sterilization surgeries in the private sector at Kollam District. Deen Hospital finds a place in the said list. Of course, it is of the year 2007. According to DW5, the directory was published for the first

time in Kollam district in 2007. Ext.D12 would show that to a question given by the proprietor of the Deen hospital, the Public Information Officer of DMO Kollam, under the Right to Information Act answered that the date of commencement of the directory was not available. PW6 also admitted that mandatory accreditation for sterilization was not available at the DMO of Kollam till 2007. She has also admitted that prior to 2006, no such manual was published.

28. No doubt, this is an unfortunate case. But simply because a patient has not favourably responded to a treatment or a surgery has failed, the doctor cannot be held negligent per se for the offence under section 304A of IPC unless the prosecution establishes beyond reasonable doubt the culpable and gross negligent act on his part. That act must be the proximate or direct cause of death of the patient. Such a shred of evidence is lacking in this case. None of the witnesses and documents discussed in the above paragraphs points the gross or culpable negligence on the part of any of the accused.

29. Section 201 IPC deals with causing the disappearance of evidence of an offence or giving false information to screen the offender. The evidence of PW9 only shows that surgery notes, as well as nurses' notes, were not proper. Ext.D9 report of the Apex Body only says that the pre-operative and post-operative evaluation charts of Deen Hospital were incomplete. No specific impropriety or omission has been pointed out. Mere failure to maintain surgery notes, nurses' notes or case sheets properly cannot be construed as intentional, causing the disappearance of evidence. Thus, the materials on record are insufficient to prove the allegation of the offence under section 201 of IPC.

30. For the reasons stated above, I conclude that the prosecution has failed to prove the offences alleged against the accused beyond a reasonable doubt. There is no convincing evidence to connect the accused with the alleged incident. At any rate, the accused are entitled to get the benefit of doubt. Hence, the conviction and sentence under sections 304A and 201 r/w section 34 of IPC cannot be sustained.

31. The victim, while supporting the conviction and sentence of the accused under sections 304A and 201 r/w 34 of IPC, challenged the acquittal under section 304 of IPC by preferring a separate appeal. The learned Amicus Curiae Sri. V. Vinay submitted that the act of the accused would fall within the contours of section 304 of IPC, and the court below ought to have convicted them under the said provision.

32. Section 304 of IPC has two parts. Both parts deal with culpable homicide, not amounting to murder. The first part of section 304 of IPC deals with culpable homicide not amounting to murder when the act is done with the intention to cause death or bodily injury as is likely to cause death. The second part deals with culpable homicide not amounting to murder when the act is done without any intention to cause death or bodily injury as is likely to cause death but with the knowledge that his act is likely to cause death. A person responsible for a reckless or rash negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with the culpability of homicide not amounting to murder punishable under section 304 Part II of IPC. It is settled that the knowledge contemplated under sections 299 and 304 of IPC is of a higher degree. Knowledge of the mere possibility that the act may cause death is not the knowledge envisaged. Viewed from the nature of the evidence adduced, it can safely be concluded that the accused did not have the degree of knowledge to the extent that their act may likely cause the death of the patient. That apart, I have already found that the prosecution

failed to prove gross or culpable negligence on the part of the accused. In these circumstances, section 304 of IPC is also not attracted.

33. Ext.P18, the judgment of the Kerala State Consumer Disputes Redressal Commission in CC No.2/2008, would show that the complaint filed by the victim against the accused before the State Consumer Disputes Redressal Commission claiming compensation was allowed and a sum of ₹7,00,000/- was awarded as compensation. It is submitted by the learned counsel for the accused that, as against the said judgment, appeal is now pending before the National Commission. It is submitted by the learned Senior Counsel Sri.S.Sreekumar that the awarded compensation of ₹7,00,000/- was already deposited before the National Commission. The counsel further submitted that the appellants have no objection in the victim withdrawing the said amount, and the appellants do not want to proceed with the appeal. The said submission is recorded. That apart, the acquittal of the accused under section 304A of IPC will not have any bearing on the appeal pending before the National Commission since there exists a clear distinction between negligence incurring civil liability and criminal liability.

34. Considering the above findings, the conviction and sentence passed by the court below vide the impugned judgment are set aside. The accused are found not guilty of the offences charged against them, and accordingly, they are acquitted. Crl. Appeal Nos.1 /2014, 22/2014, 23/2014, and 25/2014 are allowed. Crl. Appeal (V) No.589/2015 is dismissed.

I place on record the appreciation for the painstaking effort taken and able assistance rendered by the learned Amicus Curiae, Sri.V.Vinay.