

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL ANTICIPATORY BAIL APPLICATION NO. 513 OF 2018

1 Deepa Sanjeev Pawaskar.
2 Sanjeev Anant Pawaskar. .. Applicants.

V/s.

The State of Maharashtra. .. Respondent.

Mr. Shirish Gupte, Sr. Counsel a/w. Mr. A.P. Mundargi, Senior Counsel I/b.
Mr. Jayant J. Bardeskar, advocate for applicants.

Mr. Deepak Thakare a/w. Ms. Veera Shinde, APP for State.

Mr. Prashant Thombare a/w. Mr. Sandeep Agne, advocate for intervenor.

Mr. S.M. Varale, API, Ratnagiri City Police Station.

CORAM : SMT. SADHANA S. JADHAV,J.

RESERVED ON : JUNE 13, 2018.
PRONOUNCED ON : JULY 25, 2018.

P. C. :

1 Heard the learned Counsel for the applicants and the learned
APP for State.

2 This is an application under section 438 of the Code of
Criminal Procedure, 1908. The applicants herein are apprehending their
arrest in Crime No. 71 of 2018 registered with Ratnagiri City Police
Station for offence punishable under section 304 read with section 34 of
Indian Penal Code.

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3 The applicant No. 1 happens to be the wife of applicant No. 2. The applicants are medical practitioners. The qualification of the applicants is M.D. (Gynecology).

4 **Issue for consideration : Prescription without diagnosis and hence resulting into death of the patient amounts to criminal negligence on the part of the doctors.**

5 The whole thrust of the applicants in the present case is that the act of the applicants would fall under section 304A of the Indian Penal Code or under section 304 of the Indian Penal Code and therefore, this Court is considering the issue.

6 It is the case of the prosecution that on 7th March, 2018 Pranav Pramod Polekar was constrained to lodge a report at the police station. The first informant informed the police that Dnyanada was his wife. Dnyanada was hail and hearty. That in the month of June, 2017 preliminary diagnosis indicated symptoms of having conceived and therefore, they had visited the hospital of Dr. Pawaskar. Dr. Sanjiv Pawaskar (applicant No. 2) had examined Dnyanada and had confirmed that she was pregnant. Dnyanada was registered with Dr. Pawaskar.

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Dnyanada used to visit the hospital regularly for routine check-up. She had taken the medicine prescribed by Dr. Pawaskar. He was informed that due date is approximately 18/2/2018.

7 On 5/2/2018 she had started having labour pains and therefore, they had rushed to Dr. Pawaskar Hospital. The doctor and his wife were present. She was admitted in the hospital. Initially, the family members were informed that she would have normal delivery. On 6/2/2018 she was advised to undergo sonography test at Gurukrupa Sonography Center. Upon seeing the sonography report, the doctors were of the opinion that she should undergo cesarean operation. On 6/2/2018 she had undergone **cesarean** operation. Dr. Ketkar was the anaesthetist. Dnyanada had given birth to a female child. The baby was admitted in Gajanan Bal Rugnalay of Dr. Vijay Suryagandh. On 6/2/2018 Dnyanada appeared to be normal. The first informant had deposited Rs. 25,000/- towards medical fees. On 8/2/2018 baby was also discharged and on 9/2/2018 at 5 p.m. Dnyanada was discharged from Dr. Pawaskar Hospital. At the time of discharge, doctors were not available. The staff had also not informed the family members or the patient about the post-operative care.

8 On 10/2/2018 Dnyanada was vomiting throughout the day.

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Her relatives had called upon Dr. Deepa Pawaskar. She had asked them to call her from medical shop. The doctor had given instructions to the medical shop owner and accordingly, he had given them tablets which she had taken. On the same day, in the evening Dnyanada had fever and she continued vomiting and therefore, she was taken to the hospital of Dr. Deepa Pawaskar at 8.30 p.m.. In their presence, the staff nurse had called upon Dr. Deepa Pawaskar. She was advised to admit the patient. The staff had informed that the doctors are not available in the hospital. **The first informant had asked as to whether she should be taken to another hospital.** However, he was informed that it was not necessary and that the patient would be admitted for one day and on the next day, she would be discharged.

9 Dnyanada was being treated by two nurses, who were administering medicines on the telephonic instructions of Dr. Deepa Pawaskar. The condition of the patient was deteriorating and the relatives, out of anxiety were accordingly informing the staff nurse. The relatives were insisting upon shifting the patient to another hospital. However, the staff nurse upon instructions of the applicant No. 1 had informed the relatives that they need not panic and that they are in touch with Dr. Deepa Pawaskar and she has guided them telephonically. At about 10.15 p.m. Dr. Girish Karmarkar had been to the hospital. He

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had patiently heard about the complaints of the patient. Dr. Karmarkar had prescribed the tablet-Trazine H, which the first informant got from National Medical Shop as advised by Dr. Karmarkar.

10 On 11/2/2018 at about 3.45 a.m. his sister Mrunali, who was with the patient, had asked the first informant to rush to the hospital. They realised that tip of nose and lips of Dnyanada had turned black. Dr. Girish Karmarkar did not visit again nor enquired about the patient. The first informant had realised that the health of the patient had deteriorated to a large extent. He had to quarrel with the staff and thereafter, at 4 a.m. the staff had called upon Dr. Pawaskar. Upon his instructions, Dr. Ketkar had visited hospital at 4.30 a.m.. Dr. Ketkar had enquired as to why the head of the patient was lowered. Upon objectionable query made by Dr. Ketkar, the staff had informed that the head was lowered at the instructions of Dr. Karmarkar. By then Dnyanada was getting fits. Dr. Ketkar felt need of putting her on oxygen. Dr. Ketkar had diagnosed poor prognosis and therefore, needed to be shifted to Parkar Hospital. Dr. Ketkar was not able to tell the relatives of as to what had happened to her. He informed Dr. Pawaskar that he is shifting the patient to Parkar Hospital. There was no ambulance with Dr. Pawaskar. To save time, Dr. Ketkar had to take the patient in his own car. She was admitted in the ICU of Parkar Hospital. She was kept on

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ventilator and at 7 a.m. the doctor had informed that Dnyanada had expired. The first informant had specifically stated that it was due to negligence by the present applicants that he had lost his wife. On the basis of the said report, an offence was registered. Investigation was set in motion.

11 The dead body of Dnyanada was sent for autopsy. The post mortem notes indicated that the cause of death was due to pulmonary embolism. Thereafter, it was sent for histopathological test. The findings recorded in the histopathological test are as follows :

Brain :congestion.

Heart :No specific lesion

Lungs : Pulmonary thromboembolism and bone marrow embolism in medium sized blood vessels

Intraalveolar Hemorrhages and focal pulmonary edema.

Liver : Focal fatty change, portal triaditis.

Spleen, Kidney : Congestion

Uterus with bilateral adnexae : Postpartum changes.

LSCS suture site :Acute nonspecific inflammation.

12 The case papers of Dr. Pawaskar Hospital, Dr. Parkar's Hospital alongwith medical reports were referred to the District Civil Surgeon and his opinion was sought vide report dated 3/3/2018. His opinion was as follows :

(i) Since Dnyanada Polekar had undergone cesarean operation

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and was readmitted on the very next day, it was incumbent upon the hospital to have examined the patient by the gynecologist before admission.

(ii) The patient was admitted on the telephonic instructions of Dr. Deepa Pawaskar.

(iii) Dr. Deepa Pawaskar is responsible for the health condition of the patient.

(iv) Dr Deepa Pawaskar should have referred the patient to a specialist immediately. Her negligence is apparent on the face of the record.

(v) The health condition was not monitored properly from 10/2/2018 8.30 p.m. to 11/2/2018 5.40 a.m. and therefore, negligence is apparent.

13 The second report given by the District Civil Surgeon to the investigating officer dated 13th March, 2018 reads as follows :

The statement of the staff nurses was recorded by the Investigating Officer and was placed before the District Civil Surgeon alongwith medical reports, upon which, medical analysis was as follows :

(i) Smt. Shital Thick had examined the patient at the time of readmission. Her educational qualification is 12th standard and passed A.N.M.. Another staff nurse was Smt. Anuradha Sharad Rasal whose

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educational qualification is S.S.C. After the patient was admitted at 8.30 p.m., she was not examined by any medical officer. Dr. Girish Karmarkar had prescribed Trazin H. There was no preliminary assessment of the ailment and therefore, the treatment was not proper. The patient ought to have undergone pathological test such as X-ray and sonographic test. The condition of the patient ought to have been monitored every half an hour. The relatives of the patient were not informed immediately about the poor prognosis.

(ii) **The absence of Dr. Deepa Pawaskar was pre-planned and therefore, the patient ought not to have been admitted in her absence. Except checking pulse and blood pressure, no other tests were performed on the patient.**

(iii) The complications were not noticed immediately for want of proper medical officer.

(iv) Civil Surgeon has assigned reasons for pulmonary embolism and the symptoms which were found in patient Dnyanada, which are as follows :

- (1) Restlessness
- (2) Leg pain
- (3) Breathlessness
- (4) Pedal oedema
- (5) Cold extremities

- (6) Pulse 132/min (on monitor)
- (7) RR 32/min (on monitor)

(v) There is no record to show that there was any effort to refer the re-admitted patient to another doctor in the absence of Deepa Pawaskar and she continued to prescribe medicine telephonically. There was no resident medical officer or any other doctor to look after the patient in the absence of Mr. and Mrs. Pawaskar. In fact, the said trip was prescheduled.

14 In the course of investigation, the investigating officer had recorded the statements of staff of Dr. Pawaskar Hospital. Sarika Dakare has stated that she has passed her 12th standard. That the doctors had prepared the discharge card of the patient one day before, as they were to go out of station. Co-nurse Harshada Kanade had handed over the discharge papers, birth certificate to the patient at the time of discharge. On 9/2/2018 from 2 p.m. to 8 p.m., no doctor was available in the hospital. They had been asked by the doctors to discharge the patient on 9/2/2018 at 5 p.m. At that time, doctors were not available in the hospital. She has further stated that as per the telephonic instructions of Dr. Deepa Pawaskar, the patient was re-admitted. Saline was given. Saline could not be given on left hand as it was swollen.

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15 The statement of one Anuradha Rasal was recorded. She is also studied up to 10th standard. She was an untrained nurse. On 7/2/2018 when she attended her duty at 8 p.m., she was informed by the co-nurse Manali Vasave that the applicants are leaving for Pune for conference on 8/2/2018 and that they have kept discharge papers of Dynanada Polekar ready and in case there is new patient, they should call upon Dr. Girish Karmarkar. On 10/2/2018 Dynanada was re-admitted. On telephonic instructions of Dr. Deepa Pawaskar, case papers were prepared as per her instructions. The new born baby was not with the mother when she was re-admitted. She was admitted in room No. 3. She was given dextrose injection through saline. Another injection was R-din. Dompan tablet and Aciloc was given and as per the instructions of Dr. Karmarkar, Trazine H was given. The patient had complaint of nausea, head-ache, giddiness, tremendous, unbearable pain in her legs, loose motions. However, the said symptoms were not mentioned in the case papers. There was abdominal inflammation, swelling on her legs and lips had turned black. Her condition deteriorated between 4 and 4.30 a.m. The patient was panting for breath and complained of severe pain in her legs. At 4.30 a.m. Dr. Ketkar arrived and had shifted her at Parkar Hospital. She has specifically stated that there was no stretcher and therefore, she had to be taken upto the car in a plastic sheet. The relatives were made to hold plastic

sheet. Similar are the statements of the other staff nurses.

16 Learned Senior Counsel for the applicants in the course of argument has submitted that the applicants at the most be prosecuted under section 304A of the Indian Penal Code and not under section 304 of the Indian Penal Code. What is placed on record to substantiate his argument is the Literature in respect of Pulmonary Embolism. Introduction itself reads as follows:

“The pathophysiology of pulmonary embolism. Although pulmonary embolism can arise from anywhere in the body, most commonly it arises from the calf veins.”

The literature further shows :

“In patients who survive a pulmonary embolism, recurrent embolism and death can be prevented with prompt diagnosis and therapy. Unfortunately, the diagnosis is often missed because patients with pulmonary embolism present with nonspecific signs and symptoms.”

17 In the present case, it is more than clear that the patient had shown specific signs of embolism as she had fever, her calf was aching terribly. There was swelling on the abdominal, which was apparent. She had severe head-ache and fever. All these symptoms are noted by the District Civil Surgeon.

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18 The learned APP has submitted that the sonographic report of the patient dated 6/2/2018 itself showed that “Umbilical artery show reduced diastolic flow with increased S/D ratio s/o fetoplacental insufficiency.” In these circumstances, the patient had undergone cesarean. All the medical case papers of 10th and 11th show that the medicines were administered on the oral instructions of Dr. Mrs. Pawaskar.

19 Learned APP has further submitted that in the course of investigation, the applicants had tried to tamper with the evidence and the same cannot be disclosed till filing of the charge-sheet. The medical Board has also opined that it is a case of negligence, more particularly, because the visit to Pune on 9/2/2018 was pre-scheduled. The discharge card was prepared by the Doctors without examining the patient at the time of discharge. The statement of Dr. Karmarkar shows that one day Dr. Mr. and Mrs. Pawaskar had casually met him on road and requested him to attend patient, if necessary in their absence. That he was never requested by Dr. Pawaskar telephonically to examine the patient Dynanada. It was at the request of nurse that he had been to examine Dynanada on humanitarian ground and by virtue of professional courtesy. In his statement, he has given symptoms of pulmonary embolism, which can be diagnosed immediately and could have been

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treated.

20 It is pertinent to note that on 9/3/2018 when the investigation was in progress, the Indian Medical Association, Ratnagiri Branch wrote a letter of protest to the District Collector and the Superintendent of Police, threatening to go on strike for prosecuting Dr. Pawaskar couple for offence punishable under section 304 of the Indian Penal Code. They have also warned that they would not hesitate to go on strike in all cities and at the State level or even at the National level. They had threatened of keeping the hospital closed in Ratnagiri. The letters were sent to the Chief Minister of Maharashtra, District Civil Surgeon, District Information Officer and the Superintendent of Police. **It is unfortunate that all private hospitals in Ratnagiri actually remained closed for 2 days and the patients were forced to rush to Civil Hospital.**

21 The medical board has observed that there were clots in inferior Vena cava. Inferior vein returns blood to the heart from the lower part of the body. It is a vein which carries de-oxygenated blood from lower half of the body to the artium of the heart. The said vein runs beyond abdominal cavity.

22 The learned APP submits that in the eventuality, there was

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proper diagnosis at the time of readmission, Dynanada would have been saved. According to the learned APP, it is criminal negligence, more particularly, because the first informant had specifically asked as to whether he should admit his wife in some other hospital and as per the instructions of Dr. Deepa Pawaskar, the patient was readmitted being oblivious of the fact that the patient needed readmission within 24 hours of discharge. It is clear that the patient was not examined by the doctor at the time of discharge. This Court had perused the discharge certificate which is signed by the applicants. It was post dated discharge certificate as it was prepared on 7/2/2018 since the doctors had left for Pune on 8th in the morning, the date on the discharge card is 9/2/2018.

23 The learned Senior Counsel vehemently submits that this would be a case of 304(A) and not 304 of the Indian Penal Code. Section 304A reads thus :

304A. Causing death by negligence —Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

It is submitted that in no way, it can be said that this was a criminal

negligence.

24 To appreciate the submissions of the learned Senior Counsel one has to see the definition of “negligence” as per Black's Law Dictionary. The word “negligence” is defined in Black's Law Dictionary as follows :

“Failure to exercise the standard of care that a reasonably prudent person would have exercised in similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights. The term denotes culpable carelessness.”

The Criminal Negligence is defined as *“Gross negligence so extreme that it is punishable as a crime.”* Whereas Culpable Negligence is *an intentional conduct which the actor may not intend to be harmful but which ordinary and reasonably prudent man would recognise as involving a strong probability of injury to others.* This would be a case of culpable neglect which is defined as censurable or blameworthy neglect: neglect i.e. less than gross carelessness, but more than failure to use ordinary care.

25 Doctors failure to exercise the degree of care and skill that a

physician or surgeon of the medical specialty would use under similar circumstances would amount to malpractice. An error in diagnosis could be negligence and covered under section 304A of the Indian Penal Code. **But this is a case of prescription without diagnosis and therefore, culpable negligence.** The element of criminality is introduced not only by a guilty mind but by the practitioner having run a risk of doing something with recklessness and indifference to the consequences. It should be added that this negligence or rashness is gross in nature.

26 When a doctor fails in his duty, does it not tantamount to criminal negligence? The Courts cannot ignore the ethical nature of the medical law by liberally extending legal protection to the medical professionals. The ethical issues raised by failure to assist a person in need arises from positive duties. According to this Court, the breach of these duties could fall within the realm of a criminal law of negligence.

27 The learned Senior Counsel submits that it is a case of civil law and the doctors could be made to pay compensation. It is submitted that at the most it is a negligence under section 304A and not criminal negligence. Therefore, according to the learned Senior Counsel, the scope of the present case cannot be enhanced to make out a case of criminal negligence.

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28 At this stage, a line of distinction needs to be withdrawn. As is held above, in case there was an error in diagnosis, it would be a civil liability. But in the present case,

- (i) the patient was directed to be admitted in the absence of the doctors;
- (ii) the medicines were administered on telephonic instructions without even enquiring about the symptoms or nature of the pain suffered by the patient;
- (iii) there was no resident medical officer;
- (iv) no alternative arrangement was made;
- (v) In fact, Dr. Karmarkar was also called by the staff when the health of the patient started deteriorating. The applicants had not even bothered to ask Dr. Karmarkar about the treatment given by him or the condition of the patient.
- (vi) All these when the complainant wanted to admit his wife in another hospital.

29 The question is whether all this is a civil liability? Whether the compensation can buy a child her mother and beloved wife to a husband.

30 To add to all this, the applicants had indulged into pressure tactics through Indian Medical Association, Ratnagiri Branch by putting other vulnerable patients into peril. Initially, the report of the Civil Surgeon clearly indicated that the applicants were responsible for the cause of death. However, subsequently, all the doctors had mellowed down in support of the applicants. There is no element of deterrence to medical fraternity. Negligence becomes actionable on account of the injury resulting from the act or omission to commit the act amounting to negligence i.e. criminal negligence. The initially essential components are breached out and the resultant damage.

31 The medical professionals have been put on pedestal near mortals especially destitute patient and their families suffer because of lack of knowledge and over imposition of technologies in law.

32 The time has come for weeding out careless and negligent persons in the medical profession. Segregation of reckless and negligent doctor in the profession will go a great way in restoring the honour and prestige of large number of doctors and hospital who are devoted to the profession and scrupulously follow the ethics and principles of the noble profession. Recklessness and negligence are tricky road to travel. There is gross negligence from the point of standard of care.

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Prescription without diagnosis would amount to culpable negligence. This issue is decided in the affirmative.

33 According to the learned Senior Counsel, the offence would at the most be under section 304A of the Indian Penal Code. The learned Counsel has drawn attention of this Court to the observations of the Hon'ble Apex Court in the case of **Jacob Mathew v/s. State of Punjab and anr. reported in (2005) 6 SCC 1**, wherein it is held that -

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

“A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally.”

“A doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is prima facie acting with rashness or negligence.”

In the aforesaid Judgment, the Hon'ble Apex Court has also held as follows :

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“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.”

The Hon'ble Apex Court has discussed the observations of Sir Lawrence Jenkins in [Emperor v. Omkar Rampratap \(1902\) 4 Bom. LR 679](#) as follows :

“To impose criminal liability under [Section 304-A, Indian Penal Code](#), it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non.”

It is also observed by the Hon'ble Apex Court that :

“an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment.”

It is pertinent to note that present case is not a case of error of judgment but of pure neglect and taking the patient for granted.

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34 The next Judgment relied by the learned Senior Counsel is in the case of **P.B. Desasi v/s. State of Maharashtra reported in (2013) 15 SCC 481**, wherein the Hon'ble Apex Court has observed that -

“An omission is sometimes called a negative act, but this seems dangerous practice, for it too easily permits an omission to be substituted for an act without requiring the special requirement for omission liability such as legal duty and the physical capacity to perform the act.”

In that case, the Court was considering the purport of section 338 of the Indian Penal Code. The Hon'ble Apex Court had held that -

“The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent.”

35 In the present case, the gynecologist should have been aware that a person who was discharged after cesarean operation had to be admitted within 24 hours. There was no reason for not referring the patient to another doctor. This was the commercial aspect of looking at the profession and retaining the patient in the absence of the doctor and then claiming that it is an error of judgment and that she has died due to

pulmonary embolism for which the doctors cannot be held responsible. Firstly the doctors had not thoroughly examined the patient at the time of discharge or else some diagnosis could have been made at that stage itself.

36 The learned Senior Counsel has also placed reliance on the Judgment of the Apex Court in the case of **Mahadev Prasad Kaushik v/s. State of U.P. reported in (2009) ALL MR (Cri.) 1864 (SC)**. The facts of the case are at variance. In that case the complainant had alleged that the treatment was given by the appellant who administered three injections to Buddha Ram and within half an hour, Buddha Ram died. That could be a case of an error of judgment. In case of **Mahadev Prasad Kaushik(cited supra)**, it was an appeal filed against the conviction recorded by the High Court. There was material evidence before the Court. In the present case, the material shows that the applicants were influential so much that the doctors had gone on strike and closed the private hospital for a week.

37 The other cases relied upon by the learned Senior Counsel are in respect of the complaints decided by the Consumer Protection Forum.

38 In the case of **A.S.V.Narayanan Rao v/s. Ratnamala and anr.**

Reported in (2013) 10 SCC 741, the Hon'ble Apex Court has placed reliance upon the Judgment of the Apex Court in the case of **Jacob Mathew(cited supra)** and has held that 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. The word "gross" has not been used in Section 304-A of the Indian Penal Code, 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".

39 It is in the aforesaid observations that this Court is not inclined to exercise the discretion under section 438 of the Code of Criminal Procedure, 1973 in favour of the applicants.

40 These observations are restricted to the application under section 438 of the Code of Criminal Procedure, 1973 and the same shall not be taken into consideration in any other proceedings.

41 The application being sans merits stands rejected and disposed of accordingly.

42 However, operation of this order is stayed till 2/8/2018.

[SMT. SADHANA S. JADHAV, J.]

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