IN THE HON'BLE HIGH COURT OF DELHI

TEAM CODE-

IN THE MATTER OF

THE STATE (DELHI ADMINISTRATION) …APPELLANT

V.

DR. K. K. SINHA & ORS …RESPONDENTS

WRITTEN SUBMISSION ON BEHALF OF THE APPELLANT

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LIST OF ABBREVIATIONS

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

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1.	Indian Penal Code, 1860
2.	Code of Criminal Procedure, 1973
3.	The Medical Council Act, 1956
4.	Delhi Medical Council Act, 1997

STATEMENT OF JURISDICTION

THE APPELLANT HAS APPROACHED THIS HON'BLE HIGH COURT OF DELHI UNDER SECTION 378[1] OF THE CODE OF CRIMINAL PROCEDURE 1973.

[1] 378. Appeal in case of acquittal.
(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.
(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.
(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.
(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.
(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.
(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under subsection (1) or under sub-section (2).

STATEMENT OF FACTS

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

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

STATEMENT OF ISSUES

1. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304.

A. RESPONDENT HAD THE KNOWLEDGE OF THE CONSEQUENCES OF THE ACT

B. THE ACT OF RESPONDENT WAS LIKELY TO CAUSE DEATH

C. THE DEATH OF THE DECEASED WAS CAUSED BY THE ACT OF RESPONDENTS

D. THE RESPONDENTS FAILED TO MAINTAIN STANDARD OF MONITORING PATIENT UNDERGOING ANAESTHESIA

SUMMARY OF ARGUMENTS

I. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304.

Section 304 provides punishment for culpable homicide not amounting to murder, wherein whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death.

A. RESPONDENT HAD THE KNOWLEDGE OF THE CONSEQUENCES OF THE ACT

The term 'knowledge' under section 299, IPC postulates the existence of positive mental attitude and this mental condition is the special *mens rea* necessary for the offence, which contemplates the likelihood of the death of the person.

B. THE ACT OF RESPONDENT WAS LIKELY TO CAUSE DEATH

The word 'likely' as mentioned in Clause (c) of Section 299, conveys the sense of 'probable' as distinguished from a mere possibility. This knowledge of his act can be attributed to him and he can be made liable u/s 304, Part II as the level of performance of the equipment were not in optimal level of which he was aware, even then they proceeded with the operation.

C. THE DEATH OF THE DECEASED WAS CAUSED BY THE ACT OF RESPONDENTS

The investigation on the patient before the commencement of the operation, propounded that the operation procedure followed by Sandok Hospital was extremely deficient for which reasons the second operation became inevitable. Thus, Sandok Hospital be held liable for culpable homicide as they have the knowledge that the act is likely to cause death of the patient for the reasons of using defective equipments.

D. THE RESPONDENTS FAILED TO MAINTAIN STANDARD OF MONITORING PATIENT UNDERGOING ANAESTHESIA

The Association of Anaesthetists of Great Britain and Ireland recommended the standards for monitoring during the anaesthesia procedure wherein provide guidance on the minimum standards for physiological monitoring of any patient undergoing anaesthesia under the care of an anaesthetist. There lies responsibility of the anaesthetist to check all the equipment before using followed by any specific checking procedures.

ARGUMENTS ADVANCED

I. DOCTOR K.K. SINHA AND OTHER TEAM MEMBERS ARE LIABLE FOR CRIMINAL NEGLIGENCE OF MURDER U/S 304.

1. For the perusal of the court the relevant part of the important provisions are reproduced here,
   Section- 299 provides explanation for the offence of Culpable homicide, wherein stated- "*Whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*"
2. Section 304 of Indian Penal Code, 1860 provides punishment for culpable homicide not amounting to murder, wherein stated- "*whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death.*"

A. RESPONDENT HAD THE KNOWLEDGE OF THE CONSEQUENCES OF THE ACT

3. The term 'knowledge' under section 299, IPC postulates the existence of positive mental attitude and this mental condition is the special *mens rea* necessary for the offence, which contemplates the likelihood of the death of the person.[2] The essence of knowledge lies in the awareness on part of the person concerned with the act, indicating his state of mind. [3]
4. It is pertinent to note that the patient, in the instant matter died because of the reckless act of management of Sandok Hospital, as the anaesthetist found beforehand that the machines used for the monitoring of oxygen supply and the retention level of anaesthesia were not working properly, yet they proceeded with the operation. This knowledge on part of the doctors that the equipments used while operation was defective constitutes part of culpable homicide fulfilling the ingredients within. Thereby, criminal liability could be imposed u/s 304, Part II on Dr. Sinha and the management of the said hospital as they possess the knowledge of the consequence of such act, the proximate cause of which was the operation conducted in the first instance with the defective equipments.

[2] Jayaraj v. State of Tamil Nadu, AIR 1976 SC 1519.
[3] Joti Prasad v. State of Haryana, AIR 1993 SC 1167.

5. The Apex Court in the recent case of *Alister Anthony Pareira v. State of Maharashtra*[4], while explaining the said section held that pertaining to the levying of punishment u/s 304 Part II, the prosecution need to prove the death of person caused by the act of the accused having knowledge that such act was likely to cause death. Further, in another case of *State Tr. P.S. Lodhi Colony New Delhi v. Sanjeev Nanda*[5], Supreme Court reiterated the above reasoning as to the knowledge of the act likely to cause death of the person in question. In the instant case, Dr. Sinha and management has evident knowledge of the circumstances that may cause the death of the patient in reasonable proximity as they conducted the operation with the equipments which were defective.
6. The Court went on to draw the distinction between knowledge and intention in the case of *Basdev v. The State of Pepsu*[6], stating that in many cases the intention and knowledge merge into each other and mean the same thing more or less, whereby intention can be presumed from knowledge. Though demarcation between the two is thin but not difficult to perceive that they connote different things. In case of *Riyazuddin v. State of NCT of Delhi*[7], the Delhi High Court relying on the above distinction, convicted the doctor u/s 304, Part II. The court held that though Riyazuddin may have no intention to commit the death of the deceased but the knowledge that the act was likely to cause death was clearly attributable, thereby convicted for offence punishable under Section 304 IPC.
7. A medical practitioner should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert.[8] A doctor becomes liable where his conduct fell below that of the standards of a reasonably competent practitioner in his field.[9] Here the practice of moving ahead with the operation with a machine which is not working properly is a practice below accepted practice.
8. A doctor who is not qualified to give advice in a certain field gives advice in such a field becomes liable.[10] In the instant case the Respondent even after not having

[4] (2012) 2 SCC 648.
[5] (2012) 8 SCC 450.
[6] AIR 1956 SC 488.
[7] 219 (2015) DLT 149.
[8] Eckersley v. Binnie, (1988) 18 CLR 1.
[9] Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors. [1996] 2 SCR 881.
[10] Poonam Verma v. Ashwin Patel and Ors. AIR1996SC2111; Dr. Shiv Kumar Gautam v. Alima, Revision Petition No. 586 of 1999; Md. Suleman Ansari (D.M.S.) v. Shankar Bhandari (2005) 12 SCC 430.

knowledge of anaesthetics ignored the advice of anaesthetics and went ahead with the operation. In the case of *Sarwat Ali Khan v. Prof. R. Gogi and Ors*[11], in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.

9. In the case of *Surendra Chauhan v. State of M.P*[12], doctor was held liable when the patient died due to non-application of anaesthesia. Following the dictum discussed above, it can be said that for an act to be punishable under Sec- 304, Part II, the person has to have the knowledge of the consequences of the act that it is likely to cause the death. It is evident in the present case that, Dr. Sinha acted in manner wherein the awareness of his act as to the knowledge of the act likely to causing death of the patient forms an imminent part for such conviction.

B. THE ACT OF RESPONDENT WAS LIKELY TO CAUSE DEATH

10. The word 'likely' as mentioned in Clause (c) of Section 299, conveys the sense of 'probable' as distinguished from a mere possibility.[13] The probable cause was the level of performance of the equipment not in optimal condition resulting in complications in furtherance death of the patient as the equipments used for monitoring the oxygen supply and retention level of anaesthesia formulates an integral part of the operation procedure whose failure increases the risk of such resultant condition.
11. The monitors are electronic devices which measure the heart rate, blood pressure, blood oxygen level and the amount of anaesthetic gases, oxygen and carbon dioxide in breath. These measurements inform anaesthetists of any change in the general condition of the patient and accordingly the changes are made.[14] Anaesthetic gases cannot be administered without oxygen and it is needed to be monitored accurately. Oxygen is one of the most important gases for anaesthetic procedures.[15] The

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[11] (2009) 2 CompLJ 454 (NCDRC).
[12] 2000 CriLJ 1789.
[13] *Supra* Note-5 .
[14] Dr. Anthony Chisakuta, Dr. Peter Crean, Section14: Equipment.Failure, http://www.rcoa.ac.uk/system/files/PI-RISK14-EQUIPMENT-2013.pdf, last seen on 28/02/2016.
[15] Sabyasachi Das, Subhrajyoti Chattopadhyay and Payel Bose, The Anaesthesia Gas Supply System, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3821266/, last seen on 28/02/2016.

American Society of Anaesthetists published a document[16] which encompasses duty upon the anaesthetic and his nursing/ technical staff to keep the anaesthesia equipment in order and make necessary checks to ensure the reliable working of the entire set up.

12. Further, a well-known orthopaedic surgeon can be said to have the knowledge of the importance of the equipments and consequences of its not working properly. This knowledge of his act can be attributed to him and he can be made liable u/s 304, Part II as the level of performance of the equipments were not in optimal level of which he was aware, even then they proceeded with the operation procedure stating the situation to be urgent. The defence of this urgency could not be taken as the condition of the patient before the operation was normal as stated he regained consciousness with normal pulse rate[17]. This elucidates the proposition that option of referring the patient to another hospital with working equipments was available but instead they proceeded with the operation increasing risk of danger to the life of the patient for which this act amounted to culpable homicide.
13. In the case of *T. Padmanabhan v. Hindustan Maternity Home*[18], the State Commission held the doctors including the anaesthetic liable on account of the hospital undertaking major surgery without having the basic facilities to perform such a surgery, the operation being elective and not urgent and not giving proper medical attention after the complications developed for delaying in deciding to transfer the patient to bigger hospital with necessary facilities. In consideration of the similar facts, reliance could be placed while adjudging the liability on the doctors and anaesthetist of the Sandok Hospital as mentioned that the surgery was conducted without the basic facilities even when the operation was not urgent, but only elective. Thus, admeasuring the degree of the subsequent conduct and the consequence therewith, criminal liability to be imposed on basis of their knowledgeable act likely to cause the death of the patient.

C. THE DEATH OF THE DECEASED WAS CAUSED BY THE ACT OF RESPONDENTS

14. The condition of the patient before conducting the operation was normal, but soon after they proceeded with the defective equipments, complications arose as to the patient did not regain the consciousness for next 24 hours, for which reasons he was

[16] Recommendation for Pre-Anaesthesia Checkout Procedure, (2008).
[17] Para- 3, Moot Proposition.
[18] Dr. Jagdish Singh, Medical Negligence and Compensation, Bharat Law Publication, Edn. 4rd Pg. 468 2014.

then referred to Rajiv Gandhi hospital. The investigation on the patient before the commencement of the operation, propounded that the operation procedure followed by Sandok Hospital was extremely deficient for which reasons the second operation became inevitable with lesser chance of success rate.

15. In the case of *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr.*[19], wherein the facts were similar of the instant case, the patient came after two days of breaking of femur. He died because he developed respiration complication because of improper anaesthesia. Also, in the instant case the deceased developed complication and did not regained consciousness and he died eventually. Thus, it can be said that the death was caused by the act of Respondent. In the case of *Jacob Mathew v. State of Punjab*[20] Hon'ble court while discussing above mentioned case observed that the doctor was not liable criminally only because it was not an issue before the court.
16. Further, Section 304 Part- II IPC requires knowledge on the part of a person that the only probable consequence of his act would be 'culpable homicide'. The court in the case of *Tukaram Dyaneshwar Patil v. State of Maharashtra*[21] relying on the facts and circumstances of the case which have been proved by the prosecution in bringing home the guilt of the accused under Section 304 Part-II IPC undoubtedly show a despicable aggravated offence warranting punishment proportionate to the crime. The court in the strict interpretation, observed that the sentence of eleven months awarded by the High Court for the said conviction was too meagre and not adequate, as would result in travesty of justice. Even no amount of compensation could relieve the family of victim from the constant agony, thereby held that imposition of five years of rigorous imprisonment on each respondent for the conviction under Section 304 Part-II IPC would meet the ends of justice.
17. Thereby relying on the said judgment and the contentions therewith, it is argued that Dr. Sinha and the management of the Sandok Hospital be held liable for culpable homicide as they have the knowledge that the act is likely to cause death of the patient for the reasons of using defective equipments resultantly complicating the condition of the patient, further making inevitable the second operation and consequently death. For the reasons stated herein it is contended that criminal imposition of liability u/s

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[19] AIR 1969 SC 128.
[20] 2005 CriLJ 3710.
[21] SLP (CRL.) No. 1506/2012.

304 would meet the ends of justice as no compensation could relieve the constant agony of the family members.

D. THE RESPONDENTS FAILED TO MAINTAIN STANDARD OF MONITORING PATIENT UNDERGOING ANAESTHESIA

18. The Association of Anaesthetists of Great Britain and Ireland[22] recommended the standards for monitoring during the anaesthesia procedure wherein provide guidance on the minimum standards for physiological monitoring of any patient undergoing anaesthesia under the care of an anaesthetist. It provides that the anaesthetist must be present for the patient throughout the conduct of the process ensuring the minimum monitoring devices attached before induction of anaesthesia. It embodies obligation to ensure that all the anaesthetic equipment, including relevant monitoring equipment has been checked before use. The guidelines on standards of clinical monitoring have been provided by various Anaesthesiologist societies.[23]
19. Further, it is the responsibility of the anaesthetist to check all the equipment before using followed by any specific checking procedures.[24] The recommendation also pondered upon the requisite use of an oxygen analyser to be essential during anaesthesia. Even emphasis has been laid to take care in order to configure the display setup, with attention to both the size and arrangement of onscreen data with the regular updating of the displayed values.
20. It is pertinent to note that the standard of care and monitoring needs to be maintained during the transfer of patients who are anaesthetised or sedated equivalent to that applied in the operating theatre, and personnel with the adequate knowledge and experience to accompany the patient.[25]
21. In the light of the above guidelines and recommendations it is evident that the hospital staff and management ought to maintain the standard of monitoring the psychological condition of the patient undergoing the anaesthetic procedure while the conduct of operation. Though in the instant matter, the hospital staff miserably failed to maintain the requisite standard as established by legislations of various societies acting in

[22] Recommendations for standards of monitoring during anaesthesia and recovery, 2015.
[23] The European Board of Anaesthesiology (2012), The American Society of Anaesthesiologists (2011) and the Australian and New Zealand College of Anaesthetists (2013).
[24] AAGBI guideline on Checking Anaesthetic Equipment 2012 [1].
[25] Association of Anaesthetists of Great Britain & Ireland. Inter hospital Transfer. AAGBI Safety Guideline. London, 2009. http://www.aagbi.org/sites/default/files/interhospital09.pdf.

manner which likely to cause death of the patient, thereby to be held criminally liable for such act.

PRAYER

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

1. The Respondents are liable u/s 304.

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

Sd/- ________________________

Counsels for the Appellant.