BOODOO A.Y. v THE STATE

2016 SCJ 525

Record No. 8543

THE SUPREME COURT OF MAURITIUS

In the matter of:-

Abdool Yusuf Boodoo

Appellant

v

The State

Respondent

JUDGMENT

This is an appeal from a judgment of the learned Magistrate of the Intermediate Court convicting and sentencing the appellant to 9 months' imprisonment for having, on 1 May 2005, by medical negligence involuntarily caused the death of Bibi Tasleema Bava Saib whilst performing a medical intervention on her person, in breach of section 239(1) of the Criminal Code.

The background facts on which the learned Magistrate relied to find proved the charge are as follows. On 1 May 2005 at about 18.20 hrs, Mrs Bibi Tasleema Bava Saib who was pregnant and admitted to the labour ward of Victoria Hospital went into labour. Under the instructions of the appellant, a 54-year-old Specialist Obstetrics and Gynaecology on call on that day, Mrs Bava Saib was prepared to undergo a Caesarean section. At about 20.00 hrs, she was taken to the operating theatre and put under general anaesthesia by Dr Nagalingum, the Anaesthetist, assisted by Dr Jayeprakash Subaghra, a Senior Medical Officer. The appellant started the operation assisted by Dr Deenoo, an *"under trainee"* whose role was confined to holding the skin during the intervention.

At about 20.40 hrs, shortly after the delivery of the baby, Dr Nagalingum and Dr Subaghra noticed a fall in the patient's blood pressure and a rise in her pulse rate, which they attributed to a profuse bleeding. In spite of intravenous fluids to increase the blood pressure and blood transfusions, the patient's condition kept on worsening.

At about 21.10 hrs, Dr Rampadaruth, a Gynaecologist, who had earlier prepared the patient for surgery and found her general condition stable, was called in by the appellant to assist him. She found the patient bleeding abnormally from the uterus and the appellant trying to locate the source of the bleeding and using clamps to stop the bleeding. Ten minutes later, the appellant called Dr Rugbursing, a Consultant Gynaecologist, who by phone instructed the appellant to start a hysterectomy whilst he made his way to the hospital.

At about 21.30 hrs came Dr Rugbursing who found the patient in severe shock due to a massive haemorrhage. He had difficulty in locating the precise source of the massive bleeding but saw the patient bleeding profusely from the upper abdomen consistent with injuries to major blood vessels. Her abdominal cavity was packed with blood soaked dressing materials which he removed and found multiple injuries and sutures to major blood vessels including the abdominal aorta. The peritoneum was completely denuded exposing posterior vessels and blood was abnormally oozing from multiple sides attributable to the probable use of clamps. He added that the massive haemorrhage had caused the patient to lose all her coagulation factors resulting in extravasation of blood into the uterus which was in turn rendered atonic. The patient's worsening condition compelled him to seek further help in the person of Dr Rughoonundon.

At about 22.00 hrs, Dr Rughoonundon, a surgeon, walked into the operating theatre and found the patient bleeding severely from everywhere making it difficult for him to identify the source of the bleeding. He performed a peritoneum incision, that is, extending the original incision of the posterior wall of the abdomen by about 2 inches above the umbilicus and found two lacerations in the abdominal aorta which he attempted in vain to suture. At about 23.15 hrs, Mrs Bava Saib was pronounced dead.

On 2 May 2005, Dr Satish Boolell carried out an autopsy on the dead body of Mrs Bava Saib and attributed her cause of death to shock following sectioned pelvic vessels and aorta.

The appellant did not give evidence. But what is apparent from his unsworn statement is that he indirectly held Dr Rugbursing and Dr Rughoonundon responsible for the death of Mrs Bava Saib. His explanations of the circumstances of the death of Mrs Bava Saib are as follows. After having delivered Mrs Bava Saib of her baby and after having sutured the uterine wound, he found about 100 ml of dark blood in the left side of her pelvic

cavity indicating a probable bleeding vessel. He also found the uterus atonic. With the help of Dr Deenoo, he performed a uterine massage to enhance contraction of the uterus. He also noticed that the pelvic blood vessels were exposed and added that they could have been torn away from the uterine wall during the uterine massage. He located and clamped the bleeders to stop the bleeding. He then called for Dr Rampadaruth in replacement of Dr Deenoo.

In presence of Dr Rampadaruth, he ligated the bleeding vessels, that is, the left iliac artery and vein. After the ligation and a transfusion of blood, the patient's condition was stabilised. He then decided on a hysterectomy due to the atonic condition of the uterus and to stop the uterine bleeding. He asked Dr Nagalingum to inform Dr Rugbursing of the situation and that his help was needed. Under the instructions of Dr Rugbursing, he started the hysterectomy until the arrival of the latter at about 21.30 hrs when he handed over the patient to him.

The appellant went on to add that after the hysterectomy was completed, dark blood was seen in the abdominal cavity indicative of a new source of bleeding. Dr Rugbursing extended the original incision up to the level of the umbilicus and he saw dark blood from a tear in the distal end of the inferior vena cava. Dr Rugbursing used constant pressure with his fingers and swabs to control the bleeding and uttered the following *"Guette ça baiser là Boodoo, qui nous pou faire là? Bizin rode surgeon."*

Dr Rughoonundon came at about 22.00 hrs and took over and extended the incision further up to the epigastric area for a better view of the operating field. He (the appellant) stepped aside. At about 22.15 hrs, torrential bleeding occurred from a tear injury of the abdominal aorta which, according to the appellant, was caused by the multiple manipulations of the abdominal organs by the improper use of malleable metallic retractors by Dr Rugbursing resulting in the patient sustaining a first bradycardia and cardiogenic shock. Dr Rughoonundon chided Dr Rugbursing in the following terms, *"Qui tone alle faire ta Rugbursing. Ene beze ça nous pas pou capave sapp ça madame là aster."* In spite of massive transfusion of blood and the vain attempts of Dr Rughoonundon and Dr Rugbursing to suture the aorta, the patient continued to bleed severely.

The appellant blamed Dr Rughoonundon for not having taken the initiative of calling for a vascular surgeon for the repairs of the abdominal aorta and disagreed with the finding of Dr S. Boolell on the patient's cause of death. According to the appellant, the patient's

death was not due to the injuries sustained to the pelvic vessels but to the *"sectioned aorta leading to continuous heavy haemorrhage till shock"*.

The learned Magistrate considered the testimonies of the doctors who were called by the prosecution and the appellant's out-of-court unsworn statement. He found on the evidence of Dr Deenoo, Dr Nagalingum and Dr Subaghra that the abdominal bleeding had started straight after the delivery of the baby and that the continuous bleeding had caused the appellant to ask for the help of Senior Medical Officers.

The learned Magistrate believed Dr Rampadaruth that when she entered the operating theatre, which she did prior to the coming of Dr Rugbursing and Dr Rughoonundon, the patient, whom she had earlier found was fit to undergo a Caesarean section, was bleeding abnormally from her uterus.

The learned Magistrate accepted the evidence of Dr Rugbursing and Dr Rughoonundon that on reaching the operating theatre, nearly one and a half hours after the appellant had started operating, the patient was already in severe shock; that she was bleeding massively from her upper abdomen; that the massive bleeding was consistent with an injury to her abdominal aorta, a major blood vessel; and that a peritoneum incision by Dr Rughoonundon had revealed two lacerations to her abdominal aorta. The learned Magistrate also accepted the testimony of Dr Rugbursing that the massive bleeding had in turn led to a loss of all the coagulation factors of the patient and that the incision done by the appellant during the Caesarean section, even if done by the appellant below the patient's umbilicus, could still reach the abdominal aorta.

The learned Magistrate went on to find that when Dr Rugbursing and Dr Rughoonundon took charge of the patient from the appellant, the patient was already in the worst of condition and all their efforts to save her life were in vain. He also found that all the injuries sustained by her were as a result of the sole acts and doings of the appellant prior to the intervention of the two aforementioned doctors. He also took the view that the appellant was solely responsible for his *"wrong assessment of the cause of the bleeding"* and that his failure to identify the cause of the bleeding had led to further loss of blood and to loss of the patient's coagulation factors. He then concluded that the magnitude of those injuries sustained by the deceased in the hands of the accused had led to the death of Mrs Bava Saib thus *"clearly indicat*[ing] *that the faute of the accused is not a minor one but in fact is faute grossière."*

The learned Magistrate then referred to a passage in **Bolam v Friern Hospital Management Committee [1957] 1 WLR 582** and concluded on the overall evidence that the appellant, a fully qualified medical practitioner having the necessary knowledge and expertise to carry out a Caesarean section, had from the start of the operation accumulated a series of errors which had culminated in the patient's death. He pointed out that the appellant's negligence was made more serious by the fact that the operation itself was a rather non-complicated one and there were no medical issues with the patient's general condition. He was satisfied from the evidence adduced by the prosecution that the charge of involuntary homicide by negligence had been established against the appellant.

The appellant now appeals against his conviction and sentence on no less than 21 grounds. At the hearing of the appeal, learned Senior Counsel for the appellant informed us that he would rather address the grounds of appeal by grouping them into 6 issues which would encompass all the grounds of appeal instead of arguing them separately. The six issues are: (i) Disseminated Intravascular Coagulation; (ii) Aorta; (iii) Atonic uterus; (iv) Negligence; (v) Causation; and (vi) Appellant not giving evidence. For ease of convenience, we shall adopt the same approach.

Disseminated Intravascular Coagulation

Under this issue, we were referred to that part of the evidence of Dr Subaghra regarding the presence of haemolysis in the patient's blood following a blood clotting profile done prior to her receiving blood transfusions. We were also referred to that part of the Histopathology Report (Document A) which reads: *"There appears to be fibrin thrombi in some of the blood vessels consistent with DIC"* which prompted the argument of learned Senior Counsel that *"this was prior to the operation, not after."* Learned Senior Counsel also submitted that *"it is a condition which existed prior and this might be the cause leading to the problems or complications suffered by the patient when she was on the table"*, and therefore *"the learned Magistrate… analysis of this precondition is wrong in the circumstances."* Relying on the evidence of Dr Subaghra and Document A, learned Senior Counsel further argued that the learned Magistrate misdirected himself when he concluded as follows: *"I am alive to the fact regarding the results regarding the haemolysis showing the non-clotting of the blood prevented by the disseminated intra vascular coagulation (DIC). However, this is considered as secondary since the initial damage leading to the death of the patient was already done by the accused.*"

We have, in considering the argument of learned Senior Counsel, reviewed not only the evidence of Dr Subaghra on this issue but also the evidence of Dr Boolell and Dr Rugbursing who were respectively cross-examined and examined on the matter. According to Dr Subaghra, a blood clotting profile done prior to the blood transfusion had revealed the presence of haemolysis in the patient's blood. He added that the medical file of the patient showed *"two results regarding Haemolysis which shows the non-clotting of the blood – Disseminated intra vascular coagulation (DIC) preventing the blood from clotting."*

Dr Satish Boolell was cross-examined on the contents of the Histopathology Report (Document A), more particularly, that part which reads: *"**Lung**: There appears to be fibrin thrombi in some of the blood vessels consistent with DIC."* Dr Boolell explained that during post mortem of the body, he took a sample of veins and arteries of the deceased, as he could not send the whole body to the Forensic Science Laboratory, for a histopathology (microscopic) examination. The Histopathology Report confirmed the absence of any abnormality, i.e there was no deficiency in the structure and consistency of the blood vessels. He was then asked to explain the term **Disseminated Intravascular Coagulopathy (DIC)** which he stated, *"is a condition whereby multiple gloss and patchy haemorrhages are found all over the body anywhere, even where there is no traumatic insult in conditions of septicaemia infection, heavy septicaemia, all collect in conditions of massive bleed when the clotting factors are gone with the initial bleed and blood does not clot and patchy bleeding occurs in even local and distant organs."* On being further questioned, he explained that, *"blood would not clot properly following the massive bleed. It is indicative of a massive bleed somewhere."*

To the question whether DIC was a contributory factor to the death of the patient, he answered in the negative and added, *"it was almost an expected finding. If found it is not unexpected following a massive bleed, it does not cause the bleed, it rather results from the bleed."* When it was pointed out to him that the blood vessels examined by the pathologist were those of the lung, he agreed but stated, *"clotting factors are distributed in the whole circulation when they are depleted following a massive bleed, target areas start bleeding as well."*

We now turn to the evidence of Dr Rugbursing on this issue and his explanation was that *"…due to massive bleeding the patient had loss (sic) all the coagulation factors (substances responsible for blood coagulation)…"* He also pointed out that *"…the initial profused bleeding came from injury from major vessels leading to lost (sic) of coagulation factors leading to extra vasation of blood into the uterus..."* In cross-examination, he

reiterated his opinion that *"…following severe bleeding there are DIC (blood not coagulating)…"*

It is to be noted that the defence did not adduce counter medical evidence in rebuttal of the evidence of Dr Boolell and Dr Rugbursing on the issue of DIC. Be that as it may, what is clear from the evidence of those two doctors is that DIC, loss of coagulation factors, was a consequence of a massive bleeding caused by major injuries to major blood vessels and that the patient's death was due to shock following sectioned pelvic vessels and aorta. DIC was, therefore, not the cause or a contributory cause of her death. Nowhere in the evidence of Dr Boolell or that of Dr Rugbursing do we find any opinion emitted by them that haemolysis had aggravated the condition of the patient or was her cause of death.

As we have already said, DIC was not the cause but a consequence of the massive bleeding, hence the finding of the learned Magistrate that the haemolysis showing the non-clotting of the blood prevented by the disseminated intra vascular coagulation (DIC) was secondary. He therefore rightly concluded that the initial damages were from the blood vessels and the loss of blood.

The arguments of learned Senior Counsel that the learned Magistrate should have concluded that haemolysis or DIC had aggravated or complicated the patient's condition during the operation and had contributed to her death are accordingly devoid of merits and fail.

We now turn to the second issue, the **"Aorta"**.

Under that heading, whilst conceding that the patient had her abdominal aorta sectioned, it was, however, submitted that in view of the chronology of events and the intervention of other doctors, there was no concrete evidence establishing how and by whom the abdominal aorta was sectioned, that is, whether it was the appellant who did it while he was operating the patient or whether this occurred during the intervention of either Dr Rugbursing or Dr Rughoonundon or both when they took over the patient from the appellant.

It was also submitted that there was no cogent evidence establishing that the cause of the bleeding which Dr Deenoo and Dr Rampadaruth saw right after the operation, but before the intervention of Dr Rugbursing and Dr Rughoonundon, was from a transversally sectioned abdominal aorta. In support of his argument, learned Senior Counsel for the

appellant relied on (i) the evidence of Dr Boolell to the effect that a sectioned aorta will lead to instantaneous death; (ii) the evidence of Dr Subaghra and Dr Nagalingum that they could not say from where the patient was bleeding; (iii) the evidence of Dr Nagalingum that during the time the appellant was in charge of the patient, latter did not suffer any cardiac arrest or cardiogenic shock; (iv) the time at which Dr Rugbursing and Dr Rughoonundon took over the patient from the appellant; (v) the evidence of Dr Rugbursing that he could not say whether the abdominal aorta was sectioned and sutured by the appellant during the time that latter was operating; (vi) the evidence of Dr Rughoonundon that the abdominal cavity was packed with dark blood and that dark blood usually comes from veins whereas the aorta carries bright red blood; (vii) the time at which the patient was declared dead; and (viii) the appellant's unsworn version that *"…At around 22.15 hrs he saw acute bleeding of bright red blood from the tear injury of the abdominal aorta which occurred following the multiple manipulations of the abdominal organs by Dr Rugbursing with his left hand whilst holding a malleable metallic retractor placed in the abdominal cavity with his right hand…"*

Learned Senior Counsel for the appellant rightly conceded that it was beyond dispute that the patient had her abdominal aorta cut as confirmed in the Medico Legal Report of Dr Boolell who carried out the post-mortem. Now, it cannot also be seriously argued that the evidence before the learned Magistrate did not establish that the cause of the massive bleeding was not the abdominal aorta. The overall effect of the evidence of Dr Rampadaruth, Dr Rugbursing, Dr Rughoonundon and Dr Boolell, which the learned Magistrate accepted and acted upon, was that there could have been only one cause to the massive bleeding and that was a sectioned, i.e. a cut made by a sharp knife as explained by Dr Boolell, abdominal aorta - which Dr Boolell also explained is a major artery which if damaged may result in extreme haemorrhage resulting in haemorrhagic shock and death. In any event, in his report, Dr Boolell attributed the cause of death due to shock following sectioned pelvic vessels and aorta.

Now, as correctly pointed out by learned Senior Counsel for the appellant, the sequence of events and the different roles played by all those who were involved with the patient during the time she was in the operating theatre assume all their importance in determining under whose hands the patient's abdominal aorta was sectioned.

If we break the sequence of events, starting from the time the patient was wheeled in the operating theatre until she died, into different parts with those doctors who were present in the operating theatre at diverse points in time, we would have in the first part of the operation Dr Nagalingum, the Specialist Anaesthetist, seconded by Dr Subaghra, and then

Dr Deenoo, the under trainee, whose role was confined to holding the patient's skin while the appellant operated, and the appellant himself who was the only doctor to perform the Caesarean section. As we have seen from the evidence of those three doctors soon after the delivery of the baby, there was a drop in the patient's blood pressure and an increase in her pulse rate indicative of a profuse bleeding. Indeed, Dr Deenoo saw a pool of blood in the area where the appellant was operating and whilst the appellant was suturing the uterus, the patient started bleeding anew.

In the second part, we would have Dr Nagalingum, Dr Subaghra, Dr Deenoo, the appellant and then Dr Rampadaruth who was called in to give assistance to the appellant and who saw the patient bleeding abnormally from her uterus and the appellant trying to clamp the bleeding part.

In the third part, there would be Dr Nagalingum, Dr Subaghra, Dr Deenoo, Dr Rampadaruth, the appellant who was still in charge of the patient and an additional doctor in the person of Dr Rugbursing whose help the appellant had asked for and who on joining the team saw the patient in severe shock which he attributed to a massive haemorrhage. At that point in time, the patient, as the evidence revealed, was already bleeding profusely from the upper abdomen and her major blood vessels, including the abdominal aorta, bore multiple injuries and sutures.

In the fourth and final part, we would have all the above mentioned doctors including the appellant and Dr Rughoonundon. When latter came, he saw the patient having severe bleeding and, on carrying out a peritoneum incision on the posterior wall of the patient's abdomen, saw two lacerations in the abdominal aorta.

One common thread running through the sequence of events and the evidence of all the doctors is that from the time the appellant had delivered the patient of her baby and well before Dr Rugbursing and Dr Rughoonundon joined the team, the patient had been bleeding severely and, as the evidence pointed out, that was due to the abdominal aorta which Dr Boolell had explained in his testimony was cut almost totally and transversely into two pieces.

The learned Magistrate was perfectly right in his analysis of the evidence placed before him that Dr Nagalingum, Dr Subaghra, Dr Deenoo, Dr Rampadaruth and Dr Rugbursing did not carry out any incision on the patient. The irresistible conclusion was therefore that only two doctors could have done so, the appellant and Dr Rughoonundon.

In view of the evidence of Dr Rughoonundon, which the learned Magistrate accepted, that when he joined the team of doctors, the patient was already bleeding severely and he saw two lacerations in her abdominal aorta which his attempt at repairs proved unsuccessful as the patient's heart gave way and she died, the learned Magistrate cannot be faulted for his finding that *"the injuries sustained by the deceased leading to her death occurred whilst the accused was carrying out the Caesarian Section on her."* The learned Magistrate was equally right in his conclusion that *"there was no other doctor, besides, the accused directly involved in that surgical operation."* His further finding that *"Dr Rughoonundon joined the medical team after the damage had already been done to the patient by the accused"* is also justified on the evidence on record.

The learned Magistrate cannot also be faulted for accepting the evidence of Dr Rugbursing that when he took over from the appellant, he noted several sutures on major blood vessels including the abdominal aorta. The learned Magistrate's findings that the sectioning of the abdominal aorta and the injuries to other major blood vessels and the sutures noted by Dr Rugbursing when he joined the team could only have been done by the hands of the appellant are accordingly unimpeachable.

The arguments of learned Senior Counsel that the abdominal aorta could only have been sectioned after the appellant had handed over the patient to Dr Rugbursing and/or Dr Rughoonundon must, accordingly, fail. Must equally fail his arguments that in view of the evidence of Dr Rughoonundon to the effect that the patient's abdominal cavity was filled with dark blood whereas blood from the aorta is bright red, it follows that the source of the severe bleeding could not have been the aorta. We say so in view of the unrebutted evidence in support of the learned Magistrate's findings that not only had the abdominal aorta been sectioned but that also other blood vessels bore multiple injuries; that the inferior vena cava which Dr Boolell explained is also a major vein was found to bear a 3 cm long tear on that part which is located near the sectioned abdominal aorta; that blood was oozing from multiple sides; and there was profuse bleeding from the tissues in the uterus. Furthermore, as rightly submitted by Counsel for the respondent, in view of the types of injuries sustained by the patient as described in his evidence by Dr Boolell, including injuries to the pelvic vessels, the colour of the blood was of no or little importance. Of significant note is that at no time were all the allegations levelled against them by the appellant in his out-of-court statement put to Dr Rugbursing and Dr Rughoonundon during their cross-examination.

We now turn to the third issue labelled the **atonic uterus**.

Relying on a sentence in the judgment of the learned Magistrate which reads: "*Dr Rugbursing advised hysterectomy be carried out upon being informed over the phone that the uterus was atonic when in fact it was not."*, learned Senior Counsel submitted that the learned Magistrate erred in his finding that the uterus was not atonic whereas it was established from the evidence of Dr Rampadaruth and Dr Rugbursing that this was so, hence the reason for a hysterectomy. It was also submitted that this misinterpretation of the evidence by the learned Magistrate was fatal to the appellant's conviction.

As rightly conceded by learned Counsel for the respondent, this phrase in the judgment of the learned Magistrate is indeed puzzling, the more so when earlier at pages 7 and 11 of his judgment he rightly analysed the evidence of Dr Rugbursing in the following terms: *"…As a result of the massive bleeding following injuries to major vessels the patient had lost all her coagulation factors (substances responsible for blood coagulation) which in turn led to profuse bleeding from the tissues in the uterus leading the uterus to become 'atonic' (lacking muscle tone). That was the second problem which necessitated the removal of the uterus..."*

Be that as it may, we cannot but agree with the submissions of learned Counsel for the respondent that this sentence in the judgment did not adversely affect the rest of the Magistrate's findings for the reason that he subsequently found, and rightly so, that it was the sectioned abdominal aorta that was the cause of the patient's death whereas the atonic uterus was a secondary problem caused by the profuse bleeding from the tissues in the uterus. We therefore see no merit in the argument of learned Senior Counsel.

The fourth issue is the element of **negligence**.

The submissions made under this issue were that no evidence was forthcoming from any of the doctors called by the prosecution to establish that there was negligence in the manner the appellant had carried out the Caesarean, that he had failed in his professional duties and that such lack of professionalism on his part constituted malpractice and led to the patient's death. Learned Senior Counsel also relied on an answer of Dr Rugbursing where he said: *"I am not accusing the Accused of any negligence"* in support of the submissions that in view of this answer of Dr Rugbursing, the learned Magistrate, a layman in the medical field, could not come to the conclusion that the appellant was guilty of medical negligence.

Reliance was also placed on a report dated 30 May 2005 mentioned by the appellant in his out-of-court statement which he said he had produced to the police in support of his argument that had there been anything adverse in that report, the appellant would not have produced it to the police. Learned Senior Counsel also referred to the appellant's appearance before the Medical Council composed of a panel of doctors and pointed out that had the Medical Council adversely reported on the appellant, surely, the prosecution would have called a member of the Council to give evidence against the appellant. It was submitted that this failure of the learned Magistrate to address his mind to those two details has added to his faulty reasoning, thereby rendering unsafe the appellant's conviction.

Learned Senior Counsel further referred us to the decision in **Hunter v Hanley [1955] ScotCS CSIH_2 (04 February 1955), Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582** and **Auckloo v The State of Mauritius & Ors** [2004 SCJ 312] where is cited the Bolam test.

With regard to the submissions made in respect of the answer of Dr Rugbursing, whether the appellant was or was not guilty of medical negligence was a factual and legal matter for the sovereign appreciation and determination of the learned Magistrate in the light of the evidence adduced before him. We are not prepared to hold that the learned Magistrate was wrong not to have construed this single answer of Dr Rugbursing as proof of the appellant's innocence. We say so because the answer of Dr Rugbursing, which was given in cross-examination, should not be taken out of context, especially when viewed in the light of the tenor of his evidence to the effect that when he reached the operating theatre, he found the patient in severe shock due to a massive haemorrhage and multiple injuries and sutures to major blood vessels including the abdominal aorta. And the learned Magistrate relied, *inter alia*, on this evidence, as he was entitled to do, to find the charge proved against the appellant.

As for the report produced to the police by the appellant and the issue of the appellant's appearance before the Medical Council, we wish to observe that firstly, the report mentioned by the appellant in his unsworn statement is a report which, according to the explanation of the appellant himself, he was asked by the Chief Medical Officer of the Ministry of Health to write on the events of 1 May 2005. The submission of learned Senior Counsel that had there been anything adverse in this report, the appellant would not have communicated it to the police is misconceived inasmuch as the author of the report being the appellant himself, it would not be surprising if its contents were favourable to the appellant. Secondly, the outcome of the appellant's appearance before the Medical Council was not

made known to the trial Court. It would, therefore, serve no purpose to embark into a speculative exercise to come up with any kind of conclusion as to that outcome. So much for the arguments on the answer of Dr Rugbursing, the report mentioned by the appellant in his out-of-court statement and his appearance before the Medical Council.

We shall now address the issue of medical negligence. The Bolam case, referred to by the learned Magistrate in his judgment and learned Senior Counsel, was a claim for damages brought against the defendant's hospital for the alleged negligence of its doctors on the manner in which a treatment known as the E.C.T. treatment had been administered to the plaintiff at the hospital. In his summing-up to the jury on the meaning of *"negligence"*, the judge stated the following:

> *"In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But 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..."*

The Judge also cited the following extract from the Scottish case of **Hunter v Hanley**:

> *"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the 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."*

These cases, however, were of a civil nature. It is noteworthy that section 239(1) of the Criminal Code, under which the appellant has been charged, is the equivalent of the former article 319 of the French Penal Code which reads as follows:

«Quiconque, par maladresse, imprudence, inattention, négligence ou inobservation des règlements aura commis involontairement un homicide, ou en aura involontairement été la cause, sera puni d'emprisonnement et d'une amende…»

Section 239 of our Criminal Code is in fact reproduced in our statute book both in its above French version and English version. It is also to be noted that la loi du 10 Juillet 2000 in France replaced the former article 319 by article 221-6 which reads as follows:

«Le fait de causer par maladresse, imprudence, inattention, négligence et manquement à une obligation de prudence ou de sécurité imposée par la loi ou le règlement, la mort d'autrui constitue un homicide involontaire…»

We are, therefore, of the view that it is relevant and useful to refer to French law and doctrine for the purpose of the present case. In this context, the learned Magistrate referred to the constitutive elements of the present offence of involuntary homicide. With regard to these constitutive elements, we read the following in **Garçon, Code Pénal Annoté, Tome II, Livre III, Art. 319 à 320 bis**:

«Note 8: Les éléments constitutifs des délits prévus par les art. 319 et 320 sont: 1º un fait matériel d'homicide, ou de coups et blessures; 2º une faute de l'auteur de ce fait matériel; 3º une relation de cause à effet entre la faute commise et l'homicide…

Note 12: La faute est l'élément caractéristique des délits des art. 319…

Note 17: Les cinq catégories de fautes visées par l'art. 319 se confondent, d'ailleurs, le plus souvent, les unes avec les autres. En particulier, la maladresse, la négligence, l'inattention, l'inobservation même des règlements constituent dans la plupart des cas une imprudence…»

With regard more specifically to involuntary homicide by medical negligence, at one time, it had been contended that doctors should be immune from criminal responsibility in the exercise of their profession. But it is now settled that doctors may be found guilty of a criminal offence for medical negligence. This is borne out by the following notes in **Garçon (supra)**:

«233. Mais cette thèse de l'irresponsabilité absolue du médecin n'a pas triomphé et, en pratique, elle ne se discute même plus. Elle a été formellement condamnée par la Cour de cassation dans son célèbre arrêt du 18 juin 1835, rendu au civil sur les conclusions de Dupin, arrêt qui a fondé une jurisprudence dont les principes sont nettement dégagés. Il faut tenir pour certain que les tribunaux n'ont pas à apprécier les théories, les opinions et les systèmes scientifiques; ils ne peuvent contrôler ou critiquer le

traitement ordonné ou l'opération manquée. Mais les médecins sont au moins responsables de leurs fautes lourdes : ils répondent civilement et pénalement de leur imprudence certaine, de leur négligence grave, de leur impéritie inexcusable…

234. Cette doctrine doit être approuvée. La loi, en autorisant le docteur diplômé à exercer l'art de guérir, n'a point entendu l'exonérer de fautes aussi lourdes…»

At the end of the day, it is for the Court to determine the guilt of a medical practitioner for medical negligence. In this respect, French doctrine and case law advocate a need for a *"faute lourde ou grossière"* for a doctor to be found criminally liable. It is here apposite to refer to the following extracts in **Garçon (supra)**:

«Note 238: Les espèces suivantes, que nous citons à titre d'exemples, montrent mieux encore que les médecins n'ont, en effet, été déclarés pénalement responsables que lorsqu'ils s'étaient rendus coupables de fautes grossières. Ainsi les art. 319 et 320 ont été appliqués : à un médecin qui avait ordonné à un malade un médicament dans la composition duquel entraient quatre grammes de cyanure de potassium. Le malade était mort empoisonné dès la première cuillerée…

Note 239 : … A un médecin qui, ayant piqué l'artère brachiale, en opérant une saignée, avait occasionné la gangrène suivie de l'amputation du bras de la malade. Outre sa maladresse opératoire, il avait commis la double faute de ne point employer les moyens que l'art lui prescrivait pour en conjurer les effets, et de céler l'accident à d'autres médecins qui avaient vu la malade…»

In **Encyclopédie Dalloz, Répertoire de Droit Pénal et de Procédure Pénale, 2ème Ed., Tome III, Homicide**, we read the following at note 143:

«Il arrive que l'homicide soit dû à une faute professionnelle grave… Mais les fautes les plus souvent invoquées à l'encontre des médecins et chirurgiens consistent en une négligence…»

It is also appropriate to refer to the following extracts in **Jurisclasseur, Code Pénal, Vol. 2, Art. 221-6 à 221-7, Fasc. 20, Atteintes Involontaires à la Vie, Responsabilité pénale des membres des professions médicales et paramédicales**:

«199.- …Quant à la réalité de la faute, certains praticiens paraissent plus exposés que d'autres : les chirurgiens…, les anesthésistes…, les obstétriciens et néonatologues…, les médecins de garde et urgentistes…, les institutions elles-mêmes…

200.- …La relation de cause à effet a été admise par la Cour de cassation:

- naturellement dans le cas de geste chirurgical radicalement inadéquat… cassation de l'arrêt de la cour d'appel qui n'a pas recherché si le prévenu, chirurgien, auquel il incombait de contrôler l'acte pratiqué par l'interne, n'avait pas commis une faute entretenant un lien direct de causalité avec la mort de la patiente (décès dû à une hémorragie secondaire à une plaie chirurgicale de l'aorte abdominale et consécutive à une coelioscopie) ;…

*203.- **Fautes : chirurgien.**- Est coupable d'homicide involontaire comme n'ayant pas accompli les diligences normales qui lui incombaient compte tenu de sa mission et de sa compétence ainsi que de son pouvoir et des moyens dont il disposait, le chirurgien qui a causé directement le décès d'un patient, lequel a succombé à un choc péri-opératoire ayant pour origine une compression de l'abdomen qui a fait obstacle à l'irrigation normale du muscle cardiaque, puis du cerveau, due au mauvais positionnement de l'opéré sur la table d'opération…*

…

…

Pour déclarer le prévenu coupable des faits reprochés, l'arrêt retient qu'il résulte des pièces médicales du dossier que le décès du patient est en relation directe, certaine et exclusive avec les lésions d'effraction liées à l'action d'un instrument chirurgical pendant l'intervention, la pénétration de cet instrument dans le crâne résultant d'une erreur de trajet répétée à plusieurs reprises ; en l'état de ces énonciations, dépourvues de caractère dubitatif, et qui caractérisent l'absence de diligences normales du chirurgien, compte tenu de la nature de ses fonctions et de ses compétences, la cour d'appel a justifié sa décision…

Doivent être approuvés les juges qui retiennent, pour qualifier l'homicide involontaire, que le chirurgien n'a pas appliqué le «standard minimal des soins appropriés»…

*204.- **Fautes : obstétricien et pédiatre en néonatalogie.**- Sur l'hypothèse de la mort du fœtus…*

A été à bon droit déclaré coupable, au regard des articles 121-3 et 226-1 du Code pénal, d'homicide involontaire sur la personne d'un enfant nouveau-né, un médecin accoucheur qui, par l'utilisation maladroite de forceps en méconnaissance des règles de l'art, a été à l'origine directe de lésions cérébrales irréversibles ayant entraîné la mort de l'enfant…

N'a pas accompli les diligences normales qui lui incombaient, compte tenu de sa mission et des moyens dont il disposait, et s'est en conséquence rendu coupable d'homicide involontaire, le médecin, chef du service de gynécologie-obstétrique d'un hôpital, qui, en dépit des signes cliniques, que présentait une accouchée, d'une grave lésion qui pouvait être curable avec un traitement chirurgical approprié à la condition qu'il fût pratiqué à temps, a contribué, en omettant de le prescrire, au décès de la patiente…»

In the present case, after having accepted (i) the testimonies of all the doctors who were present at diverse points in time from the time the patient was wheeled in the operating theatre until she died, (ii) the evidence of Dr Boolell as to the patient's cause of death, (iii) that the sectioned abdominal aorta was the main cause of the massive bleeding, and in the light of his finding that *"…Taking the whole of the evidence adduced by the different prosecution's witnesses the only conclusion is that the injuries sustained by the deceased leading to her death occurred whilst the accused was carrying out the Caesarian Section on her."* as *"There was no other doctor, besides, the accused directly involved in that surgical operation ..."*, the question that the learned Magistrate had to determine was whether, on the evidence placed before him, the appellant, whose task was to perform a Caesarean operation to deliver the patient of her baby, had discharged his professional duties with the minimum appropriate standard of care expected of a reasonably competent and skilled doctor, taking into account his functions, his competence and the means at his disposal.

The learned Magistrate stated the following: *"The accused is a fully qualified medical practitioner and he has the necessary knowledge and expertise to carry out a Caesarian Section for the delivery of a baby. In this case a catalogue of errors starting with the bleeding and ending with the death of patient Bava Saib makes the alleged negligence even more serious, especially when one bears in mind that this occurred in a hospital environment and there was no emergency or medical complications in the delivery itself or the medical status of the deceased..."*

The evidence before the learned Magistrate revealed that it was to be a normal Caesarean operation. There was no evidence that it was either a complicated operation or that the patient presented signs of complications during the operation. Had this been the case, surely the appellant would not have missed the opportunity of saying so in his out-of-court statement. A certain level of proficiency and professionalism was therefore expected from the appellant who is a Specialist Obstetrics and Gynaecology. Did the appellant in the present case exhibit such level of proficiency and professionalism or was he grossly negligent?

On the evidence of Dr Rugbursing, Dr Rughoonundon and Dr Boolell, it is apparent that the appellant departed from the proper standard of care that he was expected to display in the discharge of his duties. His conduct in performing the Caesarean operation could not have been of the accepted standard. Over and above the sectioning of the abdominal aorta, there was also evidence of multiple injuries to other blood vessels. It is hard to reconcile how a simple Caesarean operation could have led to such type of injuries as described by

Dr Boolell, Dr Rugbursing and Dr Rughoonundon and which have ultimately resulted in the death of the patient. It was clear on the evidence that was before the learned Magistrate that the appellant had deviated from the accepted medical standard of care that was expected of him under the circumstances and that he was guilty of gross medical negligence.

The learned Magistrate cannot be blamed for his decision that the appellant had failed to exercise the degree of care and skill expected of him in the discharge of his professional duties and for his finding that *"the magnitude of the injuries sustained by the deceased in the hands of the accused which led to her death clearly indicate that the faute of the accused is not a minor one but in fact is faute grossière."*

We, accordingly, do not share the views of learned Senior Counsel that the evidence adduced before the learned Magistrate and on which he relied fell short of establishing the appellant's negligence in the discharge of his professional duties of Specialist Obstetrics and Gynaecology. On the contrary, we are of the view that the learned Magistrate was fully entitled to find that the appellant had committed a *"faute grossière"*.

We now turn to the fifth issue which is the **causation**.

Under this issue, two sentences in the judgment of the learned Magistrate were relied on by learned Senior Counsel in support of his submission that these were erroneous findings by the learned Magistrate. The two impugned sentences are: *"In this case a catalogue of errors starting with the bleeding and ending with the death of patient…"* and *"the magnitude of the injuries sustained by the deceased in the hands of the accused which led to her death clearly indicate that the faute of the accused is not a minor one but in fact is faute grossière."*

Learned Senior Counsel also contended that the evidence showed that apart from the appellant, Dr Rugbursing and Dr Rughoonundon had also intervened in the operation, therefore, the learned Magistrate erroneously pinpointed the appellant as being responsible for the death of the patient. This misinterpretation of the evidence by the learned Magistrate, so submitted learned Senior Counsel, has, therefore, led him into making a wrong finding against the appellant.

It was further contended by learned Senior Counsel that as the evidence led by the prosecution fell short of establishing a strong *prima facie* case against the appellant, the learned Magistrate's concluding remarks at the penultimate paragraph of his judgment on the appellant's choice of exercising his right to silence at his risk and peril were unwarranted and therefore an added reason why the conviction must be quashed.

As we have earlier said, at the time when Dr Rugbursing and Dr Rughoonundon appeared on the scene, the patient was already in the worst of condition and bleeding so severely that they had great difficulty in locating the source of the bleeding. Dr Rugbursing's testimony, which the learned Magistrate accepted and which was to the effect that when he took stock of the patient's condition, he immediately called for Dr Rughoonundon, a surgeon and adviser in surgery to the Ministry of Health, was quite significant and showed that at the time he was called, the patient's condition was already critical and the situation indeed very serious. As we have also said earlier, the unrebutted testimonies of these two doctors established that when they took over the patient from the appellant, there were multiple sutures to the major blood vessels including the abdominal aorta indicative of injuries done to them and an attempt at repairs. There was also unrebutted evidence from Dr Rugbursing that he had not done any incision on the patient. The only doctor who had done an incision, apart from the appellant, was Dr Rughoonundon, and that too he explained was performed to locate the source of the severe bleeding.

Bearing in mind the patient's condition when these two doctors were called for assistance, the learned Magistrate cannot be faulted for his finding that these two doctors did their best to save the patient's life. The learned Magistrate can hardly be blamed for his conclusions, after his exhaustive analysis of their testimonies, that when they took over from the appellant, the patient had already sustained injuries of a significant magnitude under the appellant's hands, and that the initial damages to the blood vessels were compounded by the appellant's wrong assessment of the cause of the bleeding for which the appellant alone was responsible.

Last but not least, Dr Boolell, after carrying out an autopsy, attributed the cause of death of the patient to *"shock following sectioned pelvic vessels and aorta"*. The cause of death is no doubt consistent with the serious injuries suffered by the patient while undergoing a Caesarean section and found by the learned Magistrate to have been caused by the appellant.

In these circumstances, the learned Magistrate's finding that the death of the patient was due to the appellant's negligence is beyond reproach.

As regards the remarks made by the learned Magistrate in the concluding part of his judgment on the appellant's silence, we have perused with care the whole of his judgment in the light of the evidence that was placed before him as well as the appellant's out-of-court statement. We have not found anything from which we can safely infer that in deciding the guilt of the appellant, the learned Magistrate has failed to apply the required standard expected in a criminal case. We are also unable to say that the learned Magistrate has drawn wrong inferences on the appellant's silence and has made adverse remarks thereon.

We therefore see no merit in any of the arguments of learned Senior Counsel for the appellant.

We are left with the last issue which is that of the sentence of nine months' imprisonment which was said to be manifestly harsh and excessive and wrong in principle. The argument in support thereof was that a sentence of imprisonment on a doctor who was performing his job in a hospital and had done his level best to save the life of a patient is utterly and manifestly harsh, excessive and wrong in principle.

In sentencing the appellant, the learned Magistrate considered his clean record but observed that by his failure *"to bring a fair, reasonable and competent degree of skill",* the appellant has caused the death of a fairly young mother of 33. He also observed that what made matters worse for the appellant is the fact that being a qualified Specialist Obstetrics and Gynaecology with adequate experience working in a public hospital, he ought, but has failed, to command a *"very reasonable and professional standard of care in every surgical intervention undertaken by him."* The learned Magistrate further observed that it is not only a life which has been taken away by the negligent actions of the appellant but that also a child has been for ever deprived of maternal love, care and attention. The learned Magistrate then considered the penalty provided for the offence of involuntary homicide by negligence under sections 239(1) and 12 of the Criminal Code, which is imprisonment not exceeding 5 years and a fine not exceeding Rs 50,000 and found that having regard to the whole circumstances of the case and the manner in which Mrs Bava Saib lost her life, only a custodial sentence would be an appropriate punishment.

We fully concur with the rationale behind the custodial sentence which we do not find to be wrong in principle. As rightly pointed out by the learned Magistrate, the appellant, a fully qualified Specialist Obstetrics and Gynaecology, has committed a *"faute grossière"* in the discharge of his professional duties. The nature of the injuries caused to the patient during the operation speaks volumes on the lack of skill and competence displayed by the appellant. It is unimaginable that a simple Caesarean operation without any complications or difficulties could have given rise to such serious injuries thus leading to the death of a patient. It is indeed a tragedy for not only the life of a patient has been taken away, but also a whole family has been affected.

Furthermore, we note that at the sitting of 7 October 2013, the date on which the prosecutor was to file an updated PF 15 for sentencing purpose after the Magistrate had pronounced the appellant's guilt on 30 September 2013, the appellant was legally assisted but no attempt was made to adduce any evidence in mitigation. Not a single word of apologies was tendered to the victim's family. Not even an expression of remorse was shown to the Court. So that apart from the appellant's clean record which, as rightly observed by the learned Magistrate, was not to be reckoned as a passport for leniency, there were no mitigating factors in the appellant's favour.

We take the view that having regard to the whole circumstances of the case, a custodial sentence is richly deserved. Learned Counsel for the respondent referred us to the case of **R v Bala Kovvali [2014] 1 Cr. App. R. (S.) 33**, in which the Court of Appeal maintained a sentence of two and a half years' imprisonment passed on the appellant who had pleaded guilty to manslaughter by gross medical negligence.

Learned Counsel, however, very fairly, invited us to take into account the delay which has lapsed since the commission of the offence, which is a relevant factor in the imposition of the appropriate sentence. We agree. As a matter of fact, the relevant principles are set out in **Jhurry v The Independent Commission Against Corruption & Anor** [2015 SCJ 258].

Applying these principles, we are of the view that although the appellant richly deserves a custodial sentence, he is entitled to a discount taking into consideration the delay of 10 years which has elapsed since the commission of the offence. We find that a sentence of 6 (six) months' imprisonment would meet the ends of justice and would not be disproportionate.

We, accordingly, allow the appeal on sentence to the extent that we substitute for the sentence of 9 months' imprisonment imposed by the learned Magistrate a term of 6 months' imprisonment.

For all the above reasons, all the other grounds of appeal fail. We, accordingly, dismiss the appeal against conviction. The appellant shall pay half the costs of this appeal.

N. Devat
Judge

D. Chan Kan Cheong
Judge

23 December 2016

Judgment delivered by Hon. N. Devat, Judge

For Appellant : Mr H.B. Rojubally, Attorney-at-Law
Mr M. Sauzier, SC

For Respondent : State Attorney
Mr D. Mootoo, Assistant Director of Public Prosecutions