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"TO RUN" OR "NOT TO RUN"- CONFUSION GALORE!

- Soumye Sharma[1]

Only the other day I was hanging out with my father (an officer in law enforcement) when our casual conversation regarding rechristening sections in new major criminal acts transcended far more profoundly than we could initially wonder.

Among the sections that we flipped through was Section 106 Bhartiya Nyaya Sanhita (BNS), which is set to supplant (the soon-to-be erstwhile) 304A IPC, one that prescribes punishment for causing death due to rash and negligent acts. For convenience, these sections have been reproduced below.

Section 304A IPC: 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, with a fine, or with both.[2]

Section 106 BNS: Causing death by negligence.

(1) 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 five years and shall also be liable to a fine. Suppose such an act is done by a registered medical practitioner while performing a medical procedure. In that case, he shall be punished with imprisonment of either description for a term extending to two years and liable to a fine.[3]

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[2] Section-304A, Indian Penal Code, 1860.
[3] Section-106, Bhartiya Nyaya Sangita, 2023.

Explanation. — For this sub-section, "registered medical practitioner" means a medical practitioner with any medical qualification recognised under the National Medical Commission Act 2019 and whose name has been entered in the National Medical Register or a State Medical Register under that Act.

(2) Whoever causes the death of any person by rash and negligent driving of a vehicle not amounting to culpable homicide and escapes without reporting it to a police officer or a Magistrate soon after the incident shall be punished with imprisonment of either description of a term which may extend to ten years, and shall also be liable to fine.

Juxtaposing old law with new enactment, anyone can easily discern the changes in new coding:

a) Increase in punishment for death caused by rash and negligent act (from now on called **simple offence**) from two to five years
b) A specific mention of the offence of death due to medical negligence, which retains the old punishment of two years.
c) Introduction of new offence (starting now called the **aggravated offence**), commonly referred to as **hit and run**, where after causing death, the offender escapes without reporting it to the police or a Magistrate soon after the incident, punishable with imprisonment extending up to ten years.

Seemingly innocuous to the law-abiding, the new provisions appear intuitive at first glance. But as we delved deep, myriad legal consequences began to unfold.

Divergence mentioned in (a) is easy to understand, and (b) is also not difficult to comprehend as the courts in India have long, though cautiously, been punishing rash and negligent acts of medical professionals under 304A IPC. The act mentioned at (c), as described under section 106(2) BNS, divides the criminal act into two parts, the first being a rash and negligent act leading to the death of the victim and the second being the intentional act of fleeing away from the crime scene without reporting it to police or Magistrate.

On the **issue of medical negligence,** the law has sufficiently precipitated following a series of judgments of the honourable Supreme Court, which, for the interest of all, would like to crystallise:-

1) Jurisprudence in Civil negligence needs to be distinguished from Criminal negligence. Though a claim can be preferred under both, Criminal negligence would require proof of elements of **mens rea**, which would flow only in cases of **gross** negligence (recklessness). 304A IPC doesn't mention "gross", but this has been a legal construct from the catena of judgements.
2) In the given facts and circumstances, the registered medical practitioner should have failed to do something that no medical professional in the ordinary sense and prudence would have failed. "Bolam test" is applicable in India for determining medical negligence, and it says that the proper test to be applied in such circumstances is that of an **ordinary** skilled man exercising that particular art and **not** the standard of the **highest expert** in that field.
3) The doctrine of **res ipsa locator** (meaning the thing speaks for itself) is a rule of evidence and operates only in civil law in determining the onus of proof. This doctrine **cannot be applied** to determine liability in criminal cases. The initial burden of proof has to be discharged by the complainant, and only after that will it be shifted to the medical practitioner.
4) Where there are several modes of treatments available, the treating medical practitioner **may choose any method** acceptable to the medical profession. Just because the professional has undertaken a procedure involving more risk, owing to the gravity of illness or to redeem the patient, the act will not constitute negligence.
5) Deficiency in service, mere error of judgement, tolerable inadvertence, and some degree of want of adequate care and caution must be dealt with **under civil law** of torts and not criminally.

So, while attributing criminality to an act, the **degree** of negligence has to be given primal importance. A medical professional would be deemed to be criminally negligent if **either** he did not possess the requisite skill set **or** did not exercise the possessed skill set with reasonable competence.

Some observations related to this offence are as follows:-

(i) Noteworthy of this offence in the new setup is that these being punishable with imprisonment of less than three years, the **permission** of an officer of the rank of at least a deputy superintendent of police will be required as per Section 35(7) of Bhartiya Nagrik Suraksha Sanhita (BNSS) **before arresting the accused.**

(ii) As regards the cases instituted other than on police report, i.e. based ona private complaint under section 200 CrPC (now 210 BNSS), a new procedural safeguard has been made available to public servants under section 210(3) BNSS whereby a magistrate is obligated to seek a report from a superior officer and also to hear the accused public servant before taking cognisance. Note that the honourable Supreme Court in *Jacob Mathew v. State of Punjab*[4]She had directed that the private complainant must produce the opinion of another competent doctor in cases of medical negligence. Also, the guidelines in this case need to be followed until there is a corresponding change in the legislation. So, protection as available to public servants under 210(3) BNSS could have been offered to those of the medical fraternity who fall outside the definition of a public servant.

(iii) New BNSS in section 173(3) has provisioned a preliminary enquiry that may be held if a prima facie cognisable case is not made out. Unfortunately, this provision can be invoked only in cases punishable for (3 years or more but less than seven years)**** and medical negligence is punishable with a maximum of 2 years imprisonment, which is clearly out of its ambit. A perusal of the list of cases mentioned appropriate for conducting PE in Lalita Kumari's judgement would reveal that this class of cases could have also been included based on the principle of ejusdem generis.

Just because the new enactment has specifically mentioned medical negligence, it doesn't mean there has been any legislative intent to address any hitherto unpunishable malpractice. On the contrary, the medical profession has been segregated from the bulk, and a concessional treatment has been given. Booking a medical practitioner for something which is, at most, only a tortious liability will not serve any public good. So, the discretion available to police and magistrate has to be exercised judiciously before arraigning them as accused.

[4] 2005 6 SCC 1.

Now let us switch to the **hit-and-run cases**, more specifically to the aggravated ones (106(2) BNS cases), the real meat of today's discussion.

Not many investigating officers would know the correct procedure to be adopted when an accused walks into a police station with a confession about having committed a crime. Such cases are rare, so the investigating staff is neither conversant nor has much empirical experience handling these cases. The problem becomes even more complex when the narration of the accused includes inculpatory and self-exculpatory statements. Those blissfully unaware of the inadmissibility of confession before a police officer under the Indian Evidence Act (IEA), both before and during the investigation, would probably register an FIR. Ignorance is bliss, at least sometimes, as in the above case of registering the confessional FIR. Lalita Kumari's case mandates such registration even if the information given by the **accused amounts to a confession.**

However, what lies ahead is the **evidentiary value such FIR will carry**. An *FIR ordinarily is not a substantive piece of evidence*. It differs from the statements made during the investigation under section 161 CrPC, which can only be used to contradict its maker. In contrast, statements contained in FIR can be used both for contradiction (under section 145 IEA) and corroboration (under section 157 IEA) of the informant when he appears as a witness. The defence can also use it to impeach the credit of the maker (under section 155(3) IEA), can be used by the informant to refresh his memory under section 159 IEA and can also be used to prove the informant's conduct under section 8 of IEA. FIR can be used to identify the accused, the witnesses, and the place and time of occurrence as per section 9 IEA and, in certain circumstances, can also be used as an alibi under section 11 of the Evidence Act. Though not a substantive piece of evidence, FIR assumes a **pivotal role** in establishing the timeline, indicating the conduct (even motive at times), and corroborating the place, time, and identity of various actors involved in the incident. Overall, it provides a great help in scrutinising the circumstances and plays a significant role in how the evidence is interpreted and appreciated. Non-confessional FIRs may even be used as an admission under section 21 of the Evidence Act.

Admissibility of FIR, like confession, is struck by section 25 of the Evidence Act. The law in this regard has crystallised since the judgement of the honourable Supreme Court in *Aghnoo*

Nagesiaversus State of Bihar, where it has been laid that such *a confessional FIR will not be admissible in evidence* except for portions which come within the purview of section 27 of Indian evidence act.[5] When the confessional statement also contains some parts that may be considered non-confessional, it may not be permissible in law to separate one part from another. If some statements reveal opportunity motive, preparation, intention or conduct of the accused, then these would also be deemed to be incriminating and would constitute a confession, thereby rendering them inadmissible under section 25 of the evidence act, unless there are some incriminating facts the proof of which is permitted to be adduced under section 27 of evidence act. A finer read of section 27 of the Evidence Act reveals that it only applies to confessional statements made during police custody. The pre-FIR stage cannot even constructively be construed as police custody. Therefore, even statements consequentially leading to the discovery of any relevant facts (as envisaged under section 27 of the Evidence Act) may not hold legal ground. Confession, however, has to be distinguished delicately from admission, which is not hit by section 25 of the Evidence Act and is, therefore, admissible.

An overarching problem will also be that when an accused himself lodges an FIR, then it cannot be used either for corroboration or for contradiction because the accused here cannot be a prosecution witness and so cannot be examined unless he offers to be a defence witness (under section 315 CrPC).

Section 24 of the Indian Evidence Act adds another dimension to this problem. It says that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to have been caused by inducement, threat or promise. Confession in hit-and-run cases to escape the clutches of subsection (2) of section 106 BNS may fall under an impending legal threat. So, such a confession may not satisfy the requirements of relevancy. The judicial interpretation of the new statute will only shed light on this matter.

The provisions of 106(2) BNS will also have to stand the judicial scrutiny of testimonial compulsion under article 20(3) of the Constitution, which provides that "no person, accused of any offence shall be compelled to be a witness against himself". Doesn't the new law compel such a testimony that is forbidden under the fundamental safeguards available to all citizens

[5] AIR 1966 SC 119.

against self-incrimination by giving an aggravated sentence? Protection under 161(2) CrPC is available to the accused during the investigation only, but article 20(3) of the constitution has a much wider latitude. The prosecutionwill surely invite challenges in this regard even if the jurisprudence behind subsection 2 of section 106 BNS is not adjudged res integra in future.

Taking a cue from Lalita Kumari's judgement, preliminary enquiry (thereinafter "PE") has now been provisioned under section 173(3) of the new BNSS in cases punishable for three years or more but less than seven years after prior permission from an officer of and above DSP rank. This provision can be invoked where ingredients of a cognisable case have not been made out, and the police officer wants to ascertain whether a prima facie case exists for proceeding. When an accused walks into a police station post-incident, he has already wriggled out of the clutches of subsection (2) and is now maximally liable only for five years imprisonment (and so falls within the ambit of PE). Suppose he renders an entirely exculpatory narration of the incident or discloses some elements that fall in the realm of confession. In that case, a suitable course will be to institute a PE and register crime afterwards.

A closer look at subsection (2) of 106 BNS will reveal that an accused can extenuate his liability by approaching even a magistrate instead of the police. But here, a procedural limitation comes into play. During the investigation, a magistrate can only record confession under section 164 CrPC (as per chapter XII). In the case envisaged above, since not even an FIR has been registered till this stage, the investigation cannot be deemed to have started. So, the only option available to the magistrate is to forward such a person to the concerned police authority to launch necessary criminal proceedings. The accused may also try to take refuge under provisions of section 190(1)(a) CrPC and may approach the magistrate. Still, here, his averments have to be non-confessional and in nature of a complaint where he attributes the fault to the other party to constitute a complaint capable of being taken cognisance of under the above sub-section. The magistrate, after that, will have two options: first, to send the complaint without taking cognisance to police for investigation under 156(3) CrPC or second, to take cognisance and proceed under sections 200 and 202 CrPC. Persons acting under crafty legal advice will likely take recourse to this provision of law to evade the bite of section 106(2) BNS.

I understand that the above legal position may not be easy to grasp, even for a person practising criminal law. Still, the narration was necessary to give those interested in the proper legal perspective, especially after the change in landscape after the enactment of the new criminal laws. Ever since the incredibly televised case of KM Nanavati vs the State of Maharashtra relating to confessional FIR, the legal position has more or less settled on this count. However,only a handful of investing officers would have had a flavour of such cases. Undoubtedly, with the transformed scenario, such cases will abound in each police station nationwide. So, a standard SOP that successfully navigates legal scrutiny is the need of the hour.

To summarise in simple terms, the predicament that the officer in charge of a police station will face in cases relating to 106(1) when the accused walks in essentially boils down to two things:*first*, whether to reduce the confessional statement made by the accused into an FIR or *second* to exercise the option of preliminary enquiry in befitting circumstances. In exercising the first option, the subsequent prosecution of the court case will necessarily involve a lot of challenges on the grounds of admissibility and appreciation of evidence in hitherto relatively more straightforward cases of accidental crimes. The situation will become even more convoluted when the accused, guided by his instincts and human nature of thwarting incrimination, gives a statement that is either fictitious or partially self-exculpatory. In the second option, the officer in charge will have to justify that prima facie ingredients of a cognisable offence have not been made out to explain the invocation of a PE.

Whatever the course adopted, now that the punishment under the new law has been increased, both under sub-section (1) and (2) of section 106 BNS, several procedural consequences will inevitably follow: -

1) Since the punishment for the aggravated offence covered under subsection (2) of 106 BNS extends up to 10 years, the scene of crime unit shall have to visit the crime scene as mandated under section 176(3) BNSS. This is bound to add additional professional burden to the already overloaded state FSLs. They will have to be sufficiently equipped in this regard.
2) Section 3 of the Probation of Offenders Act, 1958 had provisions for warning the accused instead of imprisonment or release on probation. This was applicable only in cases where

punishment was up to 2 years. With increased punishment, section 106 BNS is now clearly out of the ambit of such a relief.

3) As per the provisions of section 468 CrPC, criminal offences are punishable with more than three years imprisonment and outside the scope of the limitation period. 106 BNSis now such that the bar to cognisance based on the limitation period has been lifted.
4) Another interface of increased punishment exceeding seven years (as provided in sub section 2) will be applying sections 41 and 41A of CrPC, which deal with arrest. A misconception is widely prevalent amongst investigating officers is that in offences punishable with greater than seven years imprisonment, a police officer has to mandatorily arrest the accused (as per 41(1)(a) CrPC and the option of giving notice as per section 41A is not available herein. This popular understanding is legally flawed, as the provisions of 41 and 41A CrPC don't place any such limitation on the investigating officer's discretion regarding the arrest. ***Noteworthy is the fact that offence under 106(2) has now been made non-bailable***. Notwithstanding this non-billability and the punishment now stretches beyond seven years, police officers would still be within their powers not to arrest the accused if considered unnecessary. The only difference in cases with more than seven years imprisonment is that here, the police officer is not mandated to record reasons for arrest or not arrest as he has to do for offences under seven years imprisonment; this nowhere means that he has to compulsorily arrest the accused in cases with more than seven years imprisonment. <u>This correct legal position needs to percolate effectively to the cutting edge; otherwise, with the new laws coming into force, several people will be arrested and detained indiscriminately.</u>
5) Offence under 304A IPC in its present form is punishable up to a maximum of two years imprisonment and is an offence triable by the magistrate. Even the aggravated offence conceived under 106(2) BSA, which carries an imprisonment of up to 10 years, has been made triable by the magistrate, who can award only a maximum punishment of up to 3 years as per section 29 of CrPC. This anomaly in CrPC is not new and has existed for a considerable time in offences related to acid attacks, extortion of property, kidnapping, robbery and some other offences. If the magistrate felt that a punishment of more than three years should be awarded, he could take recourse to section 325 CrPC and refer the

matter to the chief judicial magistrate, who could grant up to 7 years of imprisonment. This provision has historically been exercised in a tiny percentage of cases. Some states like Madhya Pradesh have made local amendments to CrPC and altered the position concerning certain offences, making them triable by the sessions court. Still, ideally, this anomaly should have been addressed in the new laws. However, schedule I of the code of the new BNSS still retains the earlier position. The two contrasting concerns must be weighed and acted upon by the States contemplating enabling amendments, first to be able to render increased punishment in the trial court itself and second to avoid overloading session courts with accidental crimes.

6) With punishment exceeding two years, the offences now fall within the category of warrant trial cases. Presently, 304A IPC being a summon trial case, it was mandatory for the magistrate under 204 CrPC to issue a summons, and after that, the personal attendance of the accused could have been dispensed with under section 205 CRPC. But now, even a warrant can be issued, and personal attendance of the accused may be required. The charges will necessarily have to be framed. Because of the very nature of the warrant trial case, the trial will prolong for both cases taken cognisance of on police report and without a police report. This is likely to affect the pendency of undertrial cases significantly.

In sum and substance, the new provision on rash and negligent acts, as it relates to vehicular accidents, essentially implies that in every case of a severe crash, a report be made because who knows whether the injured will survive or not, and subsection (2) of 106 BNS subsequently gets attracted detrimentally. Playing a good samaritan is not just a civil duty now; it is also in one's best interest. Taking the injured to the hospital should be deemed to be a report made to the authorities as legal process would invariably be invoked after that. A deterrent may be placed in terms of an exclusion clause in a third-party insurance policy, which blows the indemnity cover if the insured is found guilty of hit and run case.

With more fatalities in accidents than the cumulative loss of life on account of all other crimes, stringent dealing of recklessness on roads was long imperative but equally important is it now for law enforcement to brace itself for the impending impact. Lawyers,

meanwhile, will delightfully exploit the informational and implementational hiatus for a good foreseeable time.

End Notes:

****** Section 173(3) of BNSS mentions offences punishable for three years or more but less than seven years. A careful perusal of schedule one of BNSS will reveal that no category of offences falls strictly under this bracket. Offences are either punishable with imprisonment that may extend to 7 years or with imprisonment of preciselyseven years or imprisonment of 7 years or more. No offence prescribes a maximum punishment of less than seven years. Some offences like trafficking (section 144(2) BNS), assault on a woman with intent to disrobe (section 76 BNS), and subsequent conviction on Voyeurism (section 77 BNS) prescribe a punishment for three years and more and extending up to 7 years, where, technically a punishment of seven years is also within the legal ambit. So, the adequate wording should have been offences punishable for three years and more, but which can extend to 7 years **and not less than seven years.**