

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

**W.P No. 744-M/2023
With I.R**

Lady Doctor Getman Alla alias Aliya Wahab
Verus
The State and others

Present:

Mr. Hazrat Rahman, Advocate for petitioner.

Hafiz Ashfaq Ahmad, Assistant A.G. for State.

Khawaja Shahid Rasool, Advocate for respondent No. 2.

Date of hearing: 20.02.2024

Date of announcement: 28.02.2024

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution), the petitioner has prayed for quashing of FIR No. 83 dated 24.05.2023 u/s 322 PPC registered her at P.S Munda, District Dir Lower.

2. Brief facts of the case are that Respondent No.2 Saeed-ul-Haq (complainant) brought his pregnant wife Mst. Khadija Bibi on 29.10.2022 to Wahab Medical Complex situated at Munda where the present petitioner, being a lady doctor, advised her some medicines informing her that the delivery was not mature on the said date. The lady patient, per direction of the petitioner, was again brought to said hospital on 31.10.2022 where she was admitted. Intravenous

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cannulation (I.V cannula) line was inserted/passed, however, after passing of a few drops, her condition worsened. The patient accordingly informed sister of the complainant, attending her at the relevant time, regarding the adverse effect of the drip on her body whereafter she was shifted by paramedical staff from lower to upper floor of the hospital. After some time, the complainant was informed that the patient had died before the delivery with loss of her child as well. The complainant reported the matter to local police which was recorded vide DD No. 28 dated 15.11.2022. After conducting inquiry in the matter under Section 156(3), Cr.P.C during which exhumation of the dead body was conducted and FSL report was received, the referred to above FIR was registered against the petitioner on the opinion given by the learned District Public Prosecutor (DPP) wherein the petitioner was charged for the offence of *qatl-bis-sabab* punishable under Section 322 PPC on the ground that the lady had died due to negligence of the petitioner. Being aggrieved, she has filed instant petition for quashing of the FIR.

3. Learned counsel for the petitioner contended that the FIR, being based on illegal opinion of the DPP, was chalked out with mala fide for the purpose of the petitioner's implication in a false case. He further

contended that the opinion of the learned DPP is not backed by any juristic medical opinion nor the medical and FSL reports constitute any offence, hence, there was no legal authority for the action suggested by DPP and officer incharge of the police station by way of lodging of *ibid* FIR. That the petitioner is well-experienced and qualified professional in her field while the hospital i.e., Wahab Medical Complex at Munda, District Dir Lower, has earned a good name and reputation in the area since years wherein best health facilities are provided to public including Sehat Card. He next argued that in view of the allegations leveled by complainant with regard to medical negligence/malpractice, the matter exclusively falls within the jurisdiction of the Khyber Pakhtunkhwa Health Care Commission (the Commission) established under Section 3 of the Khyber Pakhtunkhwa Health Care Commission Act, 2015 which bars all other legal proceedings against healthcare providers. The learned counsel also submitted that it is a fundamental rule that where a right is created by a statute which also prescribes the manner in which that right may be enforced, the party complaining of any infringement of such right can only seek such remedy as provided by that statute, therefore, the proceedings conducted against the petitioner are against the Act which, being

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a special law, will prevail over the general law. He requested for accepting the instant petition for quashing of the FIR in question. He placed reliance on "F.I.A through Director General, FIA and others Vs. Syed Hamid Ali Shah and others" (**PLD 2023 S.C 265**), "Muslimabad Cooperative Housing Society Ltd. Through Secretary Vs. Mrs. Siddiq Faiz and others" (**PLD 2008 S.C 135**), "Justice Qazi Faez Isa and others Vs. President of Pakistan and others" (**PLD 2023 S.C 661**), "Syeda Ayesha Subhani Vs. The State and others" (**PLD 2023 S.C 648**), "Dr. Malik Muhammad Yaseen Vs. Justice of Peace/Additional Sessions Judge Kabirwala and others" (**2017 P Cr. L J Note 192**), "Shahid Khan and others Vs. The State through Station House Officer (SHO) and others" (**2017 YLR 2419 Peshawar**), "Lady Dr. Nafeesa Saleem and another Vs. Justice of Peace/Additional Sessions Judge, Multan and others" (**PLD 2022 Lahore 18**), "Dr. Riaz Qadeer Khan Vs. Presiding Officer, District Consumer Court, Sargodha and others" (**PLD 2019 Lahore 429**), "Mian Sultan Ali Nanghiana Vs. Mian Nur Hussain" (**PLD 1949 Lahore 301**), "Khair Muhammad Sahawal and others Vs. Province of Sindh through Secretary Home Department and others" (**2022 YLR 63 Sindh**), "Riaz Ahmad Vs. Additional Sessions Judge/Ex-Officio Justice of Peace Rojhan District Rajanpur and others"

(2022 P Cr. L J 1067) and "Shifa International Hospitals Ltd. Through Chairman and C.E.O Vs. Pakistant Medical and Dental council (PMDC) and others" (2011 CLC 463).

4. The above contentions of learned counsel for petitioner were opposed by learned counsel for complainant by contending that a precious life was lost due to negligence of the petitioner and the report of the complainant constitutes a cognizable offence, as such, the action taken against her was in accordance with law. He further contended that the trial Court has taken cognizance of the matter and alternate remedy by making application under Section 249-A or 265-K, Cr.P.C. is available to the accused petitioner, therefore, her resort to Constitutional jurisdiction for quashing of the FIR at this stage is not legally permissible. That the question with regard to alleged innocence of the petitioner would be decided by the trial Court after recording of evidence and at this stage quashing of the FIR would defeat the ends of justice. That it is settled law that if, prima facie, an offence had been committed, ordinary course of trial before the Court should not be allowed to be deflected by resorting to constitutional jurisdiction of High Court under Article 199 of the Constitution. That such powers are to be exercised by High Court in exceptional and rare cases and had to be

done with circumspection so as not to affect due process of law. The learned counsel added that it is also well-settled that the inherent jurisdiction of the High Court under Section 561-A, Cr.P.C. is neither alternative nor additional in its character and is to be rarely invoked only in the interest of justice so as to seek redressal of grievances for which no other procedure is available and that the provision should not be used to obstruct or divert the ordinary course of criminal procedure. He placed his reliance on "Haji Sardar Khalid Saleem Vs. Muhammad Ashraf and others" **(2006 SCMR 1192)**, "Col. Shah Sadiq Vs. Muhammad Ashiq and others" **(2006 SCMR 276)**, "Bashir Ahmad Vs. Zafar-ul-Islam" **(PLD 2004 S.C 298)**, "Brig. (Retd.) Imtiaz Ahmad Vs. government of Pakistan through Secretary, Interior Division, Islamabad and other" **(1994 SCMR 2142)**, "Marghoob Alam and another Vs. Shamas Din and another" **(1986 SCMR 303)**, "Abdul Rehman Vs. Muhammad Hayat Khan etc." **(1980 SCMR 311)**, "Shaikh Muhammad Yamin Vs. The State" **(1973 SCMR 622)**, "Shahnaz Begum Vs. The Hon'ble Judges of the High Court of Sindh and Baluchistan" **(PLD 1971 S.C 677)**, "Dr. Manzoor Hussain Malik Vs. The State and another" **(2021 P Cr. L J 844 Lahore)**, "Faisal Khan Vs. The State and another" **(2020 P Cr. L J 471 Peshawar)**, "Mehmood

Rangoonwala and others Vs. Furqan Ali Mustafa and others" (2019 P Cr. L J 1634 Sindh), "Qayum Nawaz and others Vs. District Police Officer, D.I. Khan and others" (2018 P Cr. L J 1345), "Muhammad Ayyaz and others Vs. Station House Officer, Police Station Tarakhal and others" (2018 YLR 78 H.C (AJ&K)), "Masood Anwar Vs. The State and another" (2017 P Cr. L J 1466), "Sheikh Arif Ur Rehman and another Vs. Station House Officer, Police Station Kh7uram, Tehsil and District Karak and others" (2017 MLD 2064 Peshawar), and "Ghulam Muhammad Vs. Muzammal Khan and others" (PLD 1976 S.C 317). The learned Assistant Advocate General representing the State supported the arguments of learned counsel for the complainant.

5. We have heard the arguments of learned counsel for the parties including the learned Assistant A.G. representing the State and perused the record available on the instant petition in light of the case law produced by both the sides in support of their respective contentions.

5. The FIR was registered against the petitioner on the basis of allegation that she, being a medical practitioner in Wahab Medical Complex, negligently and carelessly attended Mst. Khadija Bibi during her delivery process as result whereof she died and

consequently the baby she had conceived was also lost. The petitioner was indicted under Section 322 of the Pakistan Penal Code, however, the pivotal question for resolution before this Court is to determine the legal status of the FIR under the aforesaid offence when the provincial Government has promulgated the Khyber Pakhtunkhwa Healthcare Commission Act, 2015 (the Act) with the aim to promote and improve patient safety and health care service quality in public and private sectors and to provide a mechanism for banning quackery in all its forms with establishment of Health Care Commission for regulating the health care matters. Husband of the petitioner is running a private hospital known as Wahab Medical Complex at Munda, District Dir Lower which falls within the definition of "healthcare establishment" under clause (i) of Section 2 of the Act. Thus, the Act is applicable to the matter in hand in terms of Section 1(2) of the Act which reads:

1. Short title, application and commencement. -

- (1) This Act may be called the Khyber Pakhtunkhwa Health Care Commission Act, 2015.
- (2) It shall apply to all the health care establishments in public and private sectors.
- (3) -----

It is not disputed that the petitioner is performing her duties as a lady doctor in the said hospital under the license issued to her by Pakistan Medical Commission, copy of which has been annexed with the instant petition along with other medical

testimonials. Section 33 of the Act, being a special enactment, gives it an overriding effect which is replicated for ready perusal.

33. Overriding effect:-- Notwithstanding anything to the contrary contained in any other law, the provisions of this Act shall have an overriding effect and the provisions of any such law to the extent of inconsistency to this Act shall cease to have effect.

The above provision, especially in view of its non-obstante clause, endorses its enforceability over any provision in any other law for the time being in force which is contradictory or repugnant to it. It is a well celebrated rule that Special law always prevail over the general law. In the present case, the complainant has leveled the allegations of negligence against the petitioner and a special law was available to deal with the matter but he, without exhausting the remedy under the Act, resorted to criminal proceedings which cannot sustain in view of the bar contained in Section 19 of the Act according to which no suit, prosecution or other legal proceedings related to provision of private health care service shall lie against a health care establishment except under the Act. It is well-settled that when there was a conflict between a special law and a general law, the former would prevail over the latter. Wisdom is drawn from "Syed Mushahid Shah and others Vs. Federal Investment Agency and others" (2017 SCMR 1218). Thus, keeping in view the

aforesaid mode of the proceedings conducted on the report of complainant, the same were illegal being contrary to the provisions of the Act.

6. Complaints of the like nature are dealt with in accordance with Section 13 of the Act, which needs reproduction.

13. Complaints. (1) An aggrieved person may, within sixty days from the date of knowledge of the cause of action, file a complaint against a healthcare service provider or healthcare establishment by submitting an application in writing supported by an affidavit, national identity card number and address of the aggrieved person.

(2) The Commission shall not entertain an anonymous or pseudonymous complaint against a private health care service provider or healthcare establishment.

(3) The Commission shall investigate in a transparent manner, the complaints relating to quality of health services, health services or system and medical negligence.

(4) The Commission shall prescribe the procedure for the conduct of investigation to be carried out by the Commission under this Act.

The complainant in the present case, being an aggrieved person because of death of his wife due to alleged negligence of the petitioner in her hospital, has not made any complaint to Commission in the mode and manner as prescribed under Section 13(1) of the Act rather he reported the matter to local police on which an inquiry was conducted and thereafter the FIR in question was registered against her in total disregard of the Act which was in the field at the relevant time followed by Khyber Pakhtunkhwa Health Care Commission Conduct of Business Regulations, 2016

(the Regulations) notified on 5th April, 2016 wherein the entire procedure for filing of complaints has been given. The matter in hand, pertaining to death of a lady at delivery stage, falls in clause (a) of Section 5 of the Regulations categorizing the act of medical negligence, maladministration malpractice or any other act or omission resulting in compromised healthcare service on the basis of severity. Thus, complainant has not agitated the matter before the proper forum and the proceedings so conducted by police culminating into registration of the FIR were against the relevant law. A similar issue came before the Hon'ble Lahore High Court, Multan Bench in the case of **Dr. Malik Muhammad Yaseen [2017 P Cr. L J 192]** *supra* wherein the petitioner called in question the order of learned Justice of Peace on application of complainant under Section 22-A, Cr.P.C. directing the police for proceeding with the matter in accordance with law. The petition was accepted and order of the Justice of Peace was set aside in light of Sections 26 and 29 of the Punjab Health Care Commission Act, 2010 reiterating that no suit, prosecution or other legal proceedings related to provision of healthcare services shall lie against a health service provider except under the mentioned Act. Reliance is also placed on another judgment of the said Bench in **Riaz Ahmad's** case

supra **(2022 P Cr. L J 1067)**. No doubt, according to Clause (a) of Section 5(2) of the Regulations, criminal proceedings may be initiated under the Pakistan Penal Code or Code of Criminal Procedure in cases of severe negligence but the same exercise may be made by the Commission by referring the matter for criminal proceedings after entertaining the complaint filed under Section 13 of the Act. Since, the complainant has not sought his remedy in accordance with the law specially enacted for the purpose, therefore, the directions of the learned DPP for registration of the FIR were illegal in view of the law laid down in the case of **Sultan Ali Nanghiana** *supra* **(PLD 1949 Lahore 301)** that where a right is created by statute which also prescribes the manner in which that right may be enforced, the party complaining of any infringement of such right can only seek such remedy as is provided by that statute. Thus, registration of the FIR in question, being without lawful authority and the investigation so conducted being of no legal effect, are amenable to the jurisdiction of this Court under Article 199(I)(a)(ii) of the Constitution. Guidance is taken from the judgment in the case of **Syed Hamid Ali Shah** *supra* **(PLD 2023 SC 265)**.

7. Adverting to the contention of learned counsel for the complainant with regard to availability of alternate remedy to petitioner under Sections 249-A or

265-K, Cr.P.C. suffice it to say that availability of alternate remedy in each and every case would not bar jurisdiction of High Court to entertain constitutional petition. Reliance in this regard is placed on the case of **Mrs. Siddiq Faiz (PLD 2008 SC 135)** wherein it was held that:

On the aspect whether writ lies before the High Court when alternate and efficacious remedy is available, it would be appropriate to refer to the case of The Murree Brewery Co. Ltd. v. Pakistan through the Secretary to Government of Pakistan and others (PLO 1972 SC 279). It has been held therein that the High Court will not entertain a writ petition when other appropriate remedy is yet available is not a rule of law barring jurisdiction but a rule by which the Court regulates its jurisdiction. When a statutory functionary acts mala fide or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has power to grant relief to the aggrieved party.

8. Learned counsel for the complainant contended that complainant has challenged the interim order dated 14.06.2023 of this Court in the instant petition before the apex Court, therefore, the prayer of petitioner for quashing of the FIR cannot be entertained by this Court prior to decision of the Hon'ble Supreme Court on the law points formulated in the said petition for consideration and verdict of the apex Court. Filing of petition by complainant before the apex Court against the order of this Court cannot be denied, however, the learned counsel could not produce any order for staying the proceedings in the instant petition by this Court. Even the Court was apprised that the

petition before the apex Court has not been fixed for hearing till date. In the mentioned situation, the instant matter cannot be kept pending. The case law referred to by learned counsel for the complainant mainly pertains to jurisdiction of the High Court for quashment of criminal proceedings during the investigation in exercise of its inherent powers under Section 561-A, Cr.P.C. However, same is not the situation before this Court in the present case because the petitioner seeks her remedy purely under Article 199 of the Constitution and investigation in the matter has already been finalized, therefore, the case law produced by learned counsel for the complainant cannot be applied to the present case in view of its distinguishing facts and circumstances.

9. In light of the above discussion, instant petition is allowed and FIR No. 83 dated 24.05.2023 under Section 322 PPC registered against the petitioner at P.S Munda, District Dir Lower is hereby quashed. However, the complainant, if so advised, would be at liberty to seek his remedy from the proper forum in accordance with law.

Announced.
Dt: 28.02.2024



JUDGE



JUDGE

Office
29/2/2024