

**IN THE HIGH COURT OF SINDH CIRCUIT COURT,
MIRPURKHAS**

Cr. Misc. Application No.S-51 of 2023

Applicants:

1. Ms. Tabinda Ashraf D/o Muhammad Ashraf.
2. Fahad Ahmed S/o Abdul Ghaffar.
3. Gunesh S/o Arjan Kumar.
4. Yasir Iqbal Memon S/o Muhammad Iqbal Memon.
Through Mr. Muhammad Hashim Laghari, Advocate.

Respondents:

1. The State.
Through Mr. Shahzad Saleem, Additional Prosecutor
General.
2. Muhammad Asif alias Kashif S/o Muhammad Aslam.
Through Mr. Rao Faisal Ali, Advocate.

Date of hearing: 19.10.2023

Date of order: 27.10.2023

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ORDER

Shamsuddin Abbasi, J:- Applicants are accused in F.I.R No.22 of 2023 registered at P.S. Women Mirpurkhas for offences under Sections 319, 322 and 34 P.P.C. The incident was reported to police on 26.06.2023 by Muhammad Asif @ Kashif son of Muhammad Aslam, stating therein that his wife Mst. Musarat Saba being pregnant was under treatment of Dr. Nasreen Akhtar. On 21.06.2023 at about 4:00 am he took his wife to Dr. Nasreen's Clinic, where she was provided necessary treatment and Doctor Nasreen Akhtar also assured him that it is a case of normal delivery. It was about 11:30 am Dr. Nasreen Akhtar, looking to the critical condition of his wife, referred her to Dr. Tabinda Ashraf, who advised for caesarian section to which the complainant consented, but despite caesarian section, she gave birth to an expired baby due to negligence of Dr. Tabinda Ashraf, hence this FIR.

2. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under Sections 319, 322, 419, 509 and 34 P.P.C, whereby the applicants and co-accused Dr. Nasreen Akhtar were sent up to face trial.

3. The learned Civil Judge & Judicial Magistrate-III, Mirpurkhas vide order dated 15.07.2023 took cognizance against Dr. Nasreen Akhtar only and let off the applicants and also sent-up the case to the Court of Sessions for trial.

4. At trial, the State filed an application under Section 193, Cr.P.C. seeking to join applicants as accused in the trial. The learned trial Court (Additional Sessions Judge-I Mirpurkhas) while converting the application into criminal revision set-aside the order dated 15.07.2023 passed by learned Magistrate and remanded the case back to the learned Magistrate with direction to refer the matter to "Sindh Health Care Commission" ("SHCC") under Section 4(6)(a) of Sindh Health Care Commission Act, 2013, to ascertain medical negligence committed by accused and, thereafter, pass appropriate order in the light of findings of "SHCC".

5. Feeling aggrieved by the order of the learned trial Court, the applicants have filed this Criminal Misc. Application.

6. It is contended on behalf of the applicants that the applicants are innocent and have been rightly let off by the learned Magistrate. It is next

submitted that the learned Judge of the trial Court while converting the application under Section 193, Cr.P.C. into criminal revision has acted beyond his powers. It is also submitted that the complainant neither aggrieved of the order of the learned Magistrate nor he has challenged such order either before this Court or any other forum. Lastly, submitted that the order passed by the learned trial Court is bad in law and facts, without application of a judicial mind and is not sustainable in the eyes of law, hence liable to be set-aside.

7. In contra, the learned Additional Prosecutor General, assisted by the learned counsel for the respondent No.3/complainant, has supported the impugned order dated 02.10.2023 and submitted that the learned trial Court is competent to refer the matter to "SHCC", which is the only forum to investigate the matters relating to medical negligence.

8. Heard learned counsel for the applicants, learned counsel for the complainant and learned Additional P.G. as well as perused the material available on record with their able assistance.

9. The issue involved in this case is medical negligence committed by accused which caused death of new born baby. Record demonstrates that neither the complainant approached to "SHCC" before registration of the F.I.R nor the investigating officer made any attempt to first obtain expert opinion from there. Even otherwise, the learned Magistrate while exonerating the applicants did not refer the case for expert opinion. Worth to mention here that the case relates to "Qatl-bis-Sabab" falling

under Section 322, PPC, which is defined in Section 321 P.P.C and reads as under:-

"Whoever, without any intention to cause death of or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit qatl-bis-sabab".

10. Learned Magistrate has taken cognizance only against accused Nasreen Akhter, who initially treated Mst. Musarat Saba and referred her to Dr. Tabinda Ashraf due to critical condition, where her caesarian section took place and she gave birth to an expired baby. Learned Magistrate while releasing all the accused except Dr. Nasreen Akhtar has mentioned this fact in his order that uterus of patient was already ruptured and baby died in the womb before caesarian section and Dr. Nasreen Akhtar is not qualified doctor. Controversies involved in cases of medical negligence require expert opinion. No doubt the applicants belong to medical profession. The Government has provided a forum in the shape of "Sindh Health Care Commission" ("SHCC"), which is a body constituted under the Sindh Health Care Commission Act, 2013 (Sindh Act No.VII of 2014) to determine medical negligence, based on inquiry/ investigation even in a sub-judice case and reference can be made by court to get expert opinion. I have also gone through the findings passed by learned trial Court in this behalf are just and clear. For the sake of convenience, the same are reproduced below:-

"From the careful scanning of the case file as well as police papers, it transpires that in this case investigating officer only completed formal investigation and then placed challan u/s 173, Cr.P.C. before the learned Judicial Magistrate-III, Mirpurkhas and the learned Judicial Magistrate passed the impugned order dated

15.07.2023 whereby he took cognizance against only one accused Mst. Nasreen Akhtar and let off the present respondents/accused persons and sent the R & Ps to the Honourable Sessions Court, Mirpurkhas on the ground that the offence u/s 319, PPC is exclusively triable by the Court of Sessions, but this matter was never ever referred to Sindh Health Care Commission for inquiry/ investigation though the accused persons belong to medical profession, by the I.O. or by the learned Judicial Magistrate -III, Mirpurkhas.

In view of the above discussed case of Dr. Khair Muhammad Sahowal and 03 others (2022 YLR 63) and Dr. Shiraz ur Rehman and others (2020 CLC 2037) it was the duty of the I.O. to refer this matter to Sindh Health Care Commission for an opinion from senior doctors in verification of such allegations before proceeding further against the accused persons including doctors, after completion of formal investigation, but admittedly, it was not done.

Therefore, in view of the above discussion, considering the instant application as Criminal Revision, the impugned order dated 15.07.2023 passed by the learned Judicial Magistrate-III, Mirpurkhas on challan submitted by the I.O. u/s 173, Cr.P.C. is hereby set aside and I do hereby return the R & Ps of this Sessions Case No.468/2023 including challan u/s 173, Cr.P.C. to the learned Judicial Magistrate-III, Mirpurkhas with direction to refer the matter alongwith challan u/s 173 Cr.P.C. through I.O. to the Sindh Health Care Commission u/s 4(6)(a) OF Sindh Health Care Commission Act 2013, while considering the instant challan as complaint by the aggrieved person for an opinion from senior doctors in verification of such allegations before proceeding further against the accused person including doctors with direction to the Health Care Commission to transmit its report within 30 days to the learned Judicial Magistrate-III, Mirpurkhas from the date of receiving the said reference. And after receiving the report of the Sindh Health Care Commission, learned Judicial Magistrate-III, Mirpurkhas shall apply his judicial mind and pass fresh order on the final challan/report submitted by the I.O. u/s 173, Cr.P.C. on the basis of his formal investigation and the report of Sindh Health Care Commission. All the accused persons including the present respondents/accused persons are directed to appear before learned Judicial Magistrate-III, Mirpurkhas on 05.10.2023 without fail for further necessary action by the learned Judicial Magistrate-III, Mirpurkhas".

11. This court in number of cases referred the matters to "SHCC" to determine the issue of medical negligence on the part of accused. Medical

negligence committed by qualified professional needs opinion of senior and expert doctors of same discipline through proper enquiry/ investigation. The Divisional Bench of this court in a case of Dr. Sheeraz-ur-Rehman and others V/s Province of Sindh through Secretary and others reported in **2020 CLC 2037 [Sindh]** has given observation in an identical matter and held as under:-

“In the light of above discussion, we do not hesitate to hold that if any case of medical negligence as defined in the Act or in some other laws in force for the time being is reported to a police station and an FIR is registered, the Investigation Officer shall first after formal investigation needed to get acquaintance with facts of the case refer the matter to the Commission for enquiry, which shall treat such reference as a complaint under section 4(2)(6) of the Act and proceed accordingly. In the course of which it shall seek help of the senior doctors concerned for verification of allegation. It shall convey its report to the investigation officer within a period not later than 30 days of receiving of such reference. If the report in respect of allegation is in positive, the same shall be treated as a reference by the Commission under section 26(2) of the Act. Then I.O. shall proceed further in accordance with law and file a report under section 173, Cr.P.C. for a trial making report of the Commission its part”.

As to the contention that learned trial Court was not competent to convert the application under Section 193 Cr.P.C into criminal revision and refer the matter to “SHCC”. During arguments, learned counsel for applicants was put on query that apart from procedural technicalities which forum is competent to determine medical negligence, he replied that “SHCC” is a competent forum to investigate the case and to verify allegations in a case of medical negligence. It is well settled that the matters should be decided on merits rather on technicalities. Reliance may well be made to the case of Kathiwar Cooperative Housing Society

Ltd v MACCA Masjid Trust & others (2009 SCMR 574), wherein it has been held as under:-

“For the foregoing reasons, we do not find any substance in the impugned judgments of the learned High Court or the learned Appellate Court. In our opinion, the matter should be decided on merits and not dismissed on technicalities, which even otherwise could not be substantiated. So also it is trite law that rules of procedure have been made to foster the cause of justice and not to hamper it and unless any party is prejudiced by any violation of the same, they should not stand in the way of dispensation of justice”.

12. Reviewing the findings of the learned trial Court coupled with the view taken by the Hon’ble apex Court, I am of the view that the order, impugned herein, is based on proper application of judicial mind to the facts and circumstances of the case, hence calls for no interference by this Court and I do not find any illegality or serious infirmity committed by the learned Additional Session Judge-I Mirpurkhas while referring the matter to “SHCC”. In view thereof, this Criminal Misc. Application is bereft of merit stands dismissed.

JUDGE

Faisal