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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.29246 of 2017
(Naseem Akhtar v. Ex-Officio Justice of Peace etc.)
and
Writ Petition No.29468 of 2017
(Dr.Mudassar Rasool v. Ex-officio Justice of Peace etc.)

J U D G M E N T

Date of hearing.	**29.06.2018**
Petitioner by:	**Syed Nadeem Abrar, Advocate.**
State by	**Mrs. Shazia Ashraf, Assistant Advocate General, Punjab.**
Respondent by	**Mr. Muhammad Ahmad Pansota, Advocate.**

Ch. Abdul Aziz, J:- This single judgment shall dispose of Writ Petitions No.29246 & 29468 of 2017 as both are arising out of order dated 18.05.2017 passed by Ex-officio Justice of Peace/Additional Sessions Judge, Gujranwala, whereby he directed SHO, Police Station Civil Lines, Gujranwala (respondent No.2) to record the statement of Muhammad Zaheer (respondent No.3) and then to proceed further in terms of para No.27 of order dated 22.08.2016 passed by Punjab Healthcare Commission.

2. Precisely stated the background, in which the instant writ petitions are filed, is to the effect that Muhammad Zaheer (respondent No.3) initially approached Station House Officer, Police Station Civil Lines, Gujranawala with an application for registration of FIR against petitioners, with the allegation of having contributed to the death of his brother Muhammad Azeem through medical negligence. Since this application failed to set law into motion in terms of Section 154, Cr.P.C., hence, Muhammad Zaheer

(respondent No.3) opted to invoke the jurisdiction of learned Ex-officio Justice of Peace, Gujranwala through a petition under Section 22-A, Cr.P.C. which came up for hearing before learned Ex-officio Justice of Peace on 19.08.2013 and was disposed of in the following terms:-

> "It seems that application of the petitioner is pre-mature. I am not inclined to pass the direction for lodging FIR in this case at this stage. Petitioner is required to approach Pakistan Medical and Dental Council who is competent to look into the professional conduct of doctors."

Thereafter, Muhammad Zaheer moved an application for the redress of his grievance before the Chief Minister, Punjab, which was forwarded to Punjab Healthcare Commission. While taking cognizance of the issue under Section 4 of the Punjab Health Care Commission Act, 2010 (hereinafter referred to as the "**Act XVI of 2010**"), Punjab Healthcare Commission gave its verdict on 22.08.2016 and held responsible, the petitioners guilty of medical negligence. Subsequent thereto, Muhammad Zaheer (respondent No.3) again approached learned Ex-officio Justice of Peace, Gujranwala through a petition under Section 22-A, Cr.P.C. on 15.10.2017, which was finally decided through order dated 18.05.2017 (hereinafter referred to as "**Impugned Order**") with the following observation:-

> "Keeping in view para No.27 of order dated 22.08.16 passed by Chief Operating Officer Punjab Healthcare Commission wherein said commission has found negligence of various medical personnel of Civil Hospital, Gujranwala. This petition is disposed of in terms with direction to respondent S.H.O to record statement of petitioner and keeping in view para No.27 of order dated 22.08.16 passed by Punjab Healthcare Commission to proceed further in accordance with law. A copy of this order be sent to respondent S.H.O for information and compliance, whereas, record of this petition be consigned to record room."

Feeling aggrieved from the Impugned Order, the petitioners have approached this Court through their respective writ petitions.

3. It is contended on behalf of petitioners that from the accusations in question, no cognizable offence warranting the registration of FIR is made out; that the learned Ex-officio Justice of Peace passed Impugned Order in a mechanical manner without adverting to the facts of the case and law on the subject; that the wrong, if any, committed by the petitioners is amenable to the jurisdiction of Punjab Healthcare Commission blessed upon it by virtue of Act XVI of 2010; that since the petitioners have already undergone the wrath of facing the proceedings before the Commission, hence, cannot be prosecuted before a criminal court as it amounts to double jeopardy which is barred by Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "**Constitution**"); that even otherwise, Muhammad Azeem (deceased) was never subjected to autopsy, hence the cause of his death is unascertainable and in such circumstances, registration of FIR will be an effort in futility. With these submissions, it was urged on behalf of the petitioners that the issuance of impugned direction was uncalled for.

4. Conversely, learned counsel for Muhammad Zaheer (respondent No.3) along with learned Assistant Advocate General, Punjab has strongly controverted the arguments advanced on behalf of petitioners and submitted that the Impugned Order suffers from no legal infirmity, hence, needs not to be disturbed; that the decision of Punjab Healthcare Commission can, in no manner, be considered as a hurdle for the initiation of criminal proceedings as the law through which it was created, from its very genesis is civil in nature; that Article 13 of the Constitution comes in operation if an accused has already faced the ordeal of criminal proceedings; that it emerged from the investigation conducted by Punjab Healthcare Commission that the negligence of petitioners resulted into the death of Muhammad Azeem, thus is giving rise to a criminal offence; that by

now it is settled that on receipt of information about the commission of cognizable offence, the officer in-charge of Police Station is bound to proceed in terms of Section 154, Cr.P.C. and that since Impugned Order is passed in accordance with law, hence, needs not to be interfered with by this Court.

5. Arguments heard. Record perused.

6. A wade through the accusation reveals that Muhammad Zaheer (respondent No.3) has burdened the petitioners with the allegation of having contributed towards the death of his brother Muhammad Azeem through medical negligence. According to the detail of allegations, Muhammad Azeem (deceased) was brought to Civil Hospital Gujranwala on 04.06.2013 at about 4:00 p.m. with the complaint of acute abdominal pain. Though after administering him some medicines, Muhammad Azeem (deceased) was kept under observation for about three hours in hospital, however, he felt no relief from the pain and the doctors failed to diagnose its causes. Resultantly, Muhammad Azeem was admitted in hospital for further treatment. To be precise, according to Muhammad Zaheer (respondent No.3), the doctors and medical staff of Civil Hospital, Gujranwala paid no heed to the miseries of his brother (Muhammad Azeem) and treated him apathetically. The stance of Muhammad Zaheer (respondent No.3) can be summarized to the effect that his brother fell prey to the medical negligence of the petitioners and met his death on 06.06.2013 at about 8:45 a.m.

7. It further emerges from the review of record that after the dismissal of his first petition under Section 22-A, Cr.P.C. by learned Ex-officio Justice of Peace, Muhammad Zaheer (respondent No.3) moved an application before Chief Minister Punjab for redress of his grievance. The application was forwarded to Punjab Healthcare Commission (hereinafter referred to as the "**Commission**"), constituted under the Act XVI of 2010. The Commission took

cognizance of the matter under Section 4 of the Act XVI of 2010 and conducted a detailed investigation, during which both sides were provided due opportunities to put forth their respective versions. The Commission through its decision dated 22.08.2016 held the petitioners responsible of medical negligence. For the just decision of the instant petitions, it would be in fitness of things to reproduce the opinion of Commission embodied in paras No.26 & 27 of decision dated 22.08.2016, which is as under:-

> "26. Keeping in view all evidence, clinical record, testimonies, investigations, expert's opinion and critical assessment of all documents, the Commission is of the opinion that:
>
> (a) There is administrative failure on part of MS DHQ Teaching Hospital Gujranwala. MS tried to hide the facts of the First Inquiry Report conducted by Dr. Captain (Retd) Arif-ur-Rehman submitted to him by Dr. Captain (Retd) Arif-ur-Rehman on 19.06.2013, while second Inquiry Committee was revised by MS on 18.06.2013. There is also administrative failure on part of Dr.Nadeem Aslam, HOD Ward No.7 as no evening or night rounds were conducted in Ward No.7 even Dr. Nadeem Aslam and his AP Dr. Liaqat Ali Zia didn't examine patient Muhammad Azeem during his admission in Ward No.7 from 04.06.2013 to 06.06.2013. Charge Nurse Mst. Sauya Kausar did not inform in writing to Dr. Mubashir, first on call doctor when the patient developed pain on night 05.06.2013. She also did not inform about LAMA of patient from Ward No.7 to anybody. There is tempering of record of patient Muhammad Azeem as acknowledged by charge nurse Mst. Naseem Akhtar. Patient was not diagnosed properly at the initial stage. Investigation reports were overlooked and patient was not re-evaluated by the senior doctors. Dr. Maria left ward No.7 at 3.30 pm on 05.06.2013. There is lack of diagnostic facilities during night at DHQ Teaching Hospital Gujranwala. Post-mortem of the deceased should have been performed to arrive at the exact cause of death of patient Muhammad Azeem.
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> 27. After thorough deliberations and taking into consideration the record and the above noted findings/observations, the Board decides as follows:-
>
> (a) A fine of Rs.100,000/- is imposed on HCE for:
>
> (i) Not having diagnostic facilities at night even for emergency cases.
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> (ii) Tempering of patient's vital signs record on 06.06.2013 by Charge Nurse Naseem Akhtar.
>
> (b) Disciplinary action be taken against MS, DHQ Teaching Hospital, Gujranwala for:

(i) Not having any SOPs for the HCE.
(ii) No MOs on duty in Ward No.7 and 8.

(c) Warning be issued to Dr. Nadeem Aslam, HOD Ward No.7 and Dr. Liaqat Ali Zia, Assistant Professor Ward No.7 for not preparing SOPs for the ward and for not examining the patient during his stay in the ward.

(d) Disciplinary action be taken against Dr. Zafar Latif MO, Dr. M. Ikram, SMO and Dr. Mudassir Rasool, SR Ward No.7 for:
(i) Not informing their seniors about the critical condition of the patient.
(ii) Not ensuring the requisite investigations of the patient.
(iii) Their failure to carry out initial management of patient in ER and the ward.

(e) The HCE be directed to hold an inquiry against Staff Nurses Sauya Kausar and Naseem Akhtar and inform PHC about the action taken as a result of the inquiry.

(f) The HCE be directed to implement the MSDS immediately.

(g) The Government is advised to provide the following at the newly established medical colleges:-
(i) HR
(ii) Physical infrastructure improvement.

The above is the true & attested copy of the decision of the Board."

It will not be out of place to mention here that the Commission is established under Section 3 of the Act XVI of 2010 and its functions and powers are defined in Section 4. It is further evident from Section 4 (7) that the Commission can investigate into allegations of maladministration, malpractice or failure on the part of healthcare service provider or its employee. On the conclusion of such investigation, if the healthcare service provider is found guilty of medical negligence, he can be imposed with fine upto Rs.500,000/- under section 28 of the Act XVI of 2010. Since Muhammad Zaheer (respondent No.3) has saddled the petitioners with the accusation of acting negligently while imparting medical treatment to his deceased-brother, hence the moot question in this regard is how the term medical negligence is defined in the Act XVI of 2010. The term "medical negligence" is referred to in Section 19 of the Act XVI of 2010. According to foregoing provision, a

healthcare service provider can be held guilty of medical negligence in the following two forms:-

(a) the healthcare establishment does not have the requisite human resource and equipments which it professes to have possessed; or
(b) he or any of his employee did not, in the given case, exercise with reasonable competence the skill which he or his employee did possess.

From the findings of the Commission referred above and in accordance with the provision of Section 19, it reasonably evinces that the medical staff of Civil Hospital, Gujranwala acted negligently while attending a patient who was suffering from abdominal pain as none of them, apparently, exercised reasonable competence or utilized the skill he possessed. It is, prima facie, obvious from the afore-referred findings of the Commission that the doctors made no serious effort to have resort to diagnostic approach and instead restricted themselves to temporary measures of providing relief to the patient by administering pain-killer injections only. I do not feel appropriate to embark any further upon merits of case lest it may prejudice the case of either party at some later stage. As a necessary corollary to the finding of the Commission, question arises as to whether the canvassed conduct of medical staff gives rise to any criminal offence or is amenable to the civil jurisdiction of law only. Though the learned counsel for the complainant obsessively argued that the petitioners have committed qatl-i-amd of his brother and are liable under Section 302 PPC, however, this Court is not in agreement with him. In order to bring a case within the purview of Section 302 PPC, the aggrieved person has to demonstrate beyond any shred of ambiguity that the accused was having intention and knowledge to cause the death of deceased which in the instant case is missing. In the considered view of this Court, the projected negligence of the petitioners, apparently, comes within the purview

of 'Qatl-bis-Sabab' as defined in Section 321, PPC. For advantage sake, the foregoing provision is being reproduced which is as under:-

> "**321. Qatl-bis-Sabab**. 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."

It divulges from the plain view of Section 321, PPC that in order to attract its mischief, the attribution of mens rea to wrong doer is not condition precedent and instead the actus reus of such person is made culpable. It further surfaces from the above referred penal provision that it attracts to an "unlawful act" which leads to the death of person. As a necessary consequence, it exudes that what in law the term "unlawful act" means. Admittedly, the expression is not defined in Pakistan Penal Code or in any other legislation pertaining to criminal law. In such circumstances, while following the basic principle of interpretation, this Court is constrained to consult the dictionary meaning of "unlawful act". While doing so, this Court is guided by the observation of the Hon'ble Supreme Court of Pakistan expressed in the case reported as *Chairman Pakistan Railway Government of Pakistan v. Shah Jehan Shah* **(PLD 2016 Supreme Court 534)** wherein the Hon'ble Apex Court held as under:-

> "When a word has not been defined in the statute, its ordinary dictionary meaning was to be looked at."

While following the rule of interpretation laid down by the Hon'ble Supreme Court of Pakistan in the above case, the dictionary meaning of "**unlawful act**" is looked into by this Court. In **Black's Law Dictionary, Ninth Edition,** word "unlawful act" is defined as under;

> **"**Conduct that is not authorized by law; a violation of a civil or criminal law."

Keeping in view the meaning of "unlawful act" defined in Black's Law Dictionary as any civil or criminal wrong, it manifests

that the allegations of Muhammad Zaheer (respondent No.3) are, prima facie, attracting the provision of Section 322, PPC, which according to the second Schedule of Criminal Procedure Code is cognizable in nature. It needs no mention that on receipt of such information, the Officer In-charge of Police Station is obliged to proceed in terms of Section 154, Cr.P.C. The truth or otherwise of the accusation can best be thrashed during the process of investigation, which follows the registration of a criminal case. It is felt expedient to observe here that each case of death during medical treatment does not warrant the registration of a criminal case. No doubt, on occasions patients are brought to medical care centres with looming danger of losing life and death of such person does not make vulnerable a doctor to criminal prosecution, yet even in such cases negligence in extending medical care is intolerable. In all fairness, even in such cases, medical care provider is required to have resort to investigatory and diagnostic approach for ascertaining the nature of ailment. For initiating criminal proceedings, in cases of medical negligence, the complaining person is required to show that the death was due to gross negligence or recklessness of the doctor. Reference in this respect can be made to a case from Indian jurisdiction reported as *Dr. Suresh Gupta v. Government of NCT Delhi and another* **(AIR 2004 SC 4091)** wherein it was held that:-

> "21. Thus, when a patient appears to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable."

It will not be out of context to reproduce an excerpt from the judgment of Hon'ble Supreme Court of United Kingdom reported as

Montgomery v. Lanarkshire Health Board **(2015 SCMR 663)**, which is as under:-

> "In Sideway's case this question was approached by the members of the House in different ways, but with a measure of overlap. At one end of the spectrum was Lod Diplock, who considered that any alleged breach of a doctor's duty of care towards his patient, whether it related to diagnosis, treatment or advice, should be determined by applying the Bolam test:
> "The merit of the Bolam test is that the criterion of the duty of care owed by a doctor to his patient is whether he has acted in accordance with a practice accepted as proper by a body of responsible and skilled medical opinion….. To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that the warning may have, is as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient, and expert medical evidence on this matter should be treated in just the same way. The Bolam test should be applied."

8. Though it was contended with vehemence on behalf of Dr.Mudassar Rasool (petitioner in W.P.No.29468 of 2017) that he is enjoying great repute in medical strata and making him susceptible to criminal investigation is likely to mar his career. Such arguments can best be responded through the observation of Wilmot, CJ expressed in case of *Wilkes v. Wood* **(1769) 19 St.Tr.1406** which is as under:-

> "The law makes no difference between great and petty officers; thank God, they are all amenable to justice."

9. It is obvious from record that earlier, the petitioners faced proceedings before the Commission under the Act XVI of 2010 and on the strength of which, it was projected that registration of a criminal case will amount to double jeopardy. This Court is swayed to hold that such argument is not the correct exposition of double jeopardy as enshrined in Article 13 of the Constitution as well as in Section 403, Cr.P.C. It needs no mention that the rule of double jeopardy has its roots in maxim "*Nemo bis debet puniri pro uno delicto*" which stands for "no one should be subjected to peril twice for the same offence". The plea, either of autrefois acquit or of

autrefois convict arises only if a person is acquitted or convicted after prosecution. It will not be out of place to mention here that Article 13 (a) of the Constitution prohibits the dual prosecution or punishment for the same offence. It will not be out of context to reproduce Article 13 (a) which is as under:-

> "13. No person—
> (a) shall be prosecuted or punished for the same offence more than once;"

An in-depth view of Section 403, Cr.P.C. wherein it is contemplated that person once convicted or acquitted cannot be tried again for the same offence, reveals that the rule embodied therein is in consonance with Article 13 of the Constitution. To grasp the proposition, it is essentially required to see what prosecution means. The Hon'ble Supreme Court of Pakistan in the case of *Muhammad Ashraf and others v. The State* **(1995 SCMR 626)** while expounding upon the expression "prosecution" held as under:-

> "By prosecution is meant a trial followed by judgment of acquittal or punishment. It includes the entire proceedings starting with taking cognizance of an offence by the Court, followed by examination of evidence, addressing of arguments and ending with the pronouncement of judgment."

10. So far as, the proceedings before the Commission under the Act XVI of 2010 are concerned, by no stretch of interpretation, these can be held as criminal in nature. While holding so, this Court has peeped through the preamble of the Act XVI of 2010, from which it alludes that it was enacted for improving the quality of healthcare services and to prohibit quackery in all its forms. The Act XVI of 2010 from its very genesis can, in no manner, be termed as Criminal Legislation. While restricting myself to the extent of medical negligence cases, it is observed that the Act XVI of 2010 at the most is aimed at providing some mechanism for ascertaining the negligence of healthcare service provider. The Act XVI of 2010 is a provincial legislation which to some extent is substitute of Pakistan

Registration of Medical and Dental Practitioners Regulations, 2008 in so far as it relates to medical negligence. In the same stretch, it is deemed appropriate to hold that a case law referred on behalf of petitioners reported as *Shifa International, Hospitals Ltd. through Chairman and C.E.O. v. Pakistan Medical and Dental Council (PMDC) and 3 others* **(2011 CLC 463)** is distinguishable from the facts of this case. In the afore-mentioned case, a complaint of medical negligence was referred to PMDC for probing the conduct of doctor as is evident from the following extract:-

> "It is also established principle of law that special enactments always prevail over the general laws and in the present case, special laws to deal with the negligence of the practitioners is there and, therefore, without exhausting that remedy, no criminal proceedings can be initiated. Once it is held by the PMDC that practitioner was guilty of negligence and professional misconduct, criminal law as well as civil law can be set into motion against them."

For the just decision of the controversy in hand, it appears imperative to have a glance over another case reported as *Dr.Taqdees Naqash v. Senior Superintendent of Police and others* **(2015 P Cr. L J 1628)** hailing from the jurisdiction of Hon'ble Islamabad High Court, wherein quashing of FIR against doctors for medical negligence was refused due to the fact that PMDC, after appropriate probe had held that death of the patient occurred due to medical negligence.

11. As regards the objection of non-holding of autopsy, suffice it to say that it is not essentially required to be conducted for initiating criminal proceedings, if otherwise, cause of death is determinable. If any reference in this regard is needed, it can be made to the cases reported as *Abdur Rehman v. State* **(PLJ 1999 SC 86)** and *Sikandar v. State & another* **(PLJ 2007 SC 4)**.

12. In the afore-mentioned circumstances, the impugned order is perused and found not be suffering from any illegality, which may warrant interference of this Court. Before parting with this judgment,

it is considered beneficial to embark upon another issue which pertains the arrest of an accused during investigation. Keeping in view the scheme of things provided in criminal law, which needs not be dilated upon in-depth, it is observed that during investigation arrest of an accused is not incumbent upon the police officer. If otherwise, investigation can be concluded, the police officer is not required to deprive a person of his liberty. In arriving at such conclusion, this Court is enlightened from the wisdom expressed by the Hon'ble Supreme Court of Pakistan in case reported as *Sarwar and others v. The State and others* **(2014 SCMR 1762)**. In this backdrop, it is expected that the task to investigate instant case will be assigned to some senior police officer who will accomplish it without causing any undue harassment to the persons complained against. It is further expected that arrest of the accused if any will be made only if it is deemed expedient for the completion of investigation. Likewise, the provisions of Section 157 (2) and 169, Cr.P.C. read with Rule of 24.4 of Police Rules, 1934 will be kept in mind.

13. The petitions are dismissed in the above terms.

(CH. ABDUL AZIZ)
JUDGE

APPROVED FOR REPORTING

(CH. ABDUL AZIZ)
JUDGE

Najum*