

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**W.P. No. 3144-2023**

Dr. Saiqa Yousaf

*versus*

The State and others.

**Petitioner by:** Malik Ghulam Mustafa Kandwal and  
Malik Adeel Kandwal, Advocates.

**Respondents by:** Ms. Saadia Shahzadi, State Counsel.  
Mr. Shahzad Javed Panni, Advocate for  
respondent No.3.  
Mr. Ashiq Shah, Inspector.

**Date of Hearing:** 20.05.2024.

**MOHSIN AKHTAR KAYANI, J:** Through this writ petition the petitioner Dr. Saiqa Yousaf has prayed for quashing of FIR No.823/23, dated 16.09.2023, under section 322/34 PPC, registered in police station Kohsar, Islamabad.

2. Brief facts referred in the instant writ petition are that complainant / respondent No.3 / Zain Ali Raza, lodged an FIR against Dr. Saiqa Yousaf / appellant, Dr. Nudrat Ahsan, and Dr. Mehwish of Medicsi Hospital Islamabad for medical malpractice, professional misconduct, and criminal negligence. The complainant alleged that his wife Hoor Kamal Khan, was under their care during her high-risk pregnancy with monochorionic diamniotic twins, a condition requiring extra attention and care. Despite numerous visits to the hospital and severe symptoms such as abdominal pain and decreased fetal movements, the doctors repeatedly failed to provide appropriate and timely medical intervention. On September 3,

2023, despite experiencing severe pain, however, his wife was sent home after a cursory examination. The following day, her condition worsened, and she visited the hospital multiple times. Each time, she was inadequately treated, with vital signs and symptoms largely ignored. Critical procedures, such as emergency blood tests and obstetrical ultrasounds, were not performed. The complainant further alleged that his wife was left waiting in distress, and it wasn't until late in the evening that Dr. Saiqa finally performed an emergency C-section, but by then, it was too late, and their twins had died due to severe placental abruption.

3. Throughout this period, Dr. Saiqa, who claimed MRCOG (Member Royal College of Obstetricians and Gynecologists) qualifications (though only registered as an MBBS with the PMDC), failed to attend the wife of the complainant personally or assign another competent consultant. The lack of proper medical care not only resulted in the death of their twins but also put his wife's life at extreme risk, evidenced by her critically low hemoglobin levels and significant blood loss during the delayed surgery. Their actions represent a severe dereliction of duty, professional misconduct, and criminal negligence.

4. Learned counsel for the petitioner contends that there is no direct evidence available on record to constitute the requirements of offence U/S 322 PPC and even matter is of technical nature which could only be resolved by filing a complaint before Islamabad Healthcare Regulatory Authority U/S 33 of the Islamabad Healthcare Regulation Act, 2018 subject to condition that if the allegation of mal-administration, malpractice on the part of healthcare professional or healthcare establishment are referred,

however, if it is a case of professional negligence on the part of doctor, the appropriate forum of investigation is PM&DC U/S 44 of the Pakistan Medical and Dental Council Act, 2022 which has an overriding effect, therefore, instant criminal case should have been quashed, even otherwise, complainant has filed a private complaint with the allegation of offence U/S 319 PPC, which is *qatl-i-khata*, therefore, prosecution itself is confused as to which of the offence is made out, even otherwise without final opinion of competent medical authority, criminal case is not proceed-able.

5. Conversely, learned counsel for the complainant as well as learned State Counsel have opposed the maintainability of instant writ petition on the ground that investigation has been completed and petitioner has alternate remedy in terms of Section 249-A Cr.P.C. or 265-K Cr.P.C. as the case may be, therefore, instant quashing petition is not maintainable.

6. Argument heard, record perused.

7. Perusal of record reveals that complainant has initially lodged criminal case FIR No.823, dated 16.09.2023, U/S 322/34 PPC, PS Kohsar, Islamabad with the allegation that petitioner as well as two other doctors have not handled complainant's wife Hoor Kamal Khan under their care during high risk pregnancy with monochorionic diamniotic twins a condition which requires extra attention and care but despite numerous visits to hospital and severe symptoms such as abdominal pain and decreased fetal movements, the doctors have not taken care of patient and not treated her including Dr. Saiqa Yousaf (present petitioner), Dr. Nudrat Ahsan and Dr. Mehvish, resultantly, both the babies died. On the plain reading of FIR, it appears that patient i.e. wife of complainant was treated

by the respective doctors in the hospital but question arises as to whether the acts and actions taken by all three doctors are to be called and treated in terms of *qatl-bis-sabab* U/S 322 PPC, which requires that any death has been caused or any harm has been caused to any person due to unlawful act without intention is to be called *qatl-bis-sabab* in terms of Section 322 PPC, therefore, the requirement of unlawful act is to be concluded only after technical experts advise or report if taken in this case, therefore, I.O has been confronted with this aspect, whereby he has drawn the attention of this court towards a letter dated 02.11.2023 calling for an expert opinion in this case from PM&DC which reflects that PM&DC Act, 2022 only allows a complaint addressed to Disciplinary Committee in a prescribed manner referred by the Assistant Manager (Disciplinary) PM&DC to the SSP (Investigation), Islamabad.

8. Similarly, I.O has also referred another correspondence dated 04.10.2023 on the subject of constitution of Medical Board in this case addressed to the Islamabad Healthcare Regulatory Authority (IHRA), which replied by the Deputy Director (Complaint) IHRA, highlighting the process and procedure for filing of complaint U/S 33 of the Islamabad Healthcare Regulation Act, 2018 and finally there is no such medical report available on record to confirm that there was any criminal negligence duly verified by any Medical Board, PM&DC experts or by the IHRA, therefore, in this backdrop, I.O is not in position to confirm whether any charge U/S 322 PPC is made out and this aspect has also been reflected from his incomplete report U/S 173 Cr.P.C. submitted in the trial court.

9. On the other hand, complainant has filed a private complaint U/S 319 PPC against the present petitioner Dr. Saiqa Yousaf and two other doctors with the similar allegations and claims that all three doctors be prosecuted in terms of Section 319 PPC for *qatl-i-khata*, which is only applicable when any person without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata*. The complaint was entertained by Judicial Magistrate, who has issued notice to summon the accused persons to face trial. In such divergent allegation, especially with reference to allegation U/S 319 PPC vs. U/S 322 PPC, the primary charge could only be demonstrated subject to expert report of health professional which is missing link in this case.

10. In order to understand the proposition the question of medical negligence is to be seen in concept of definition provided in Section 2(xxiv) of IHRA, 2018:-

*"Medical negligence" means any negligence by an act or omission of a healthcare professional in performing his duty. In medical negligence cases it has to be established that-*

*(a) there was a duty which the healthcare professional owed to the patient;*

*(b) there was a breach of duty;*

*(c) the breach resulted in injury to the patient; and*

*(d) the injury resulted in causing damage or death;*

11. However, under the IHRA 2018, medical negligence has not been criminalized and declared an offence. Any person who is aggrieved under IHRA 2018 for the violation of any of its provisions by a healthcare establishment or healthcare professional, the aggrieved may lodge a

complaint to the Authority. Whereas, medical negligence is not an offence, the offences are defined under section 30 as:-

1. *Operating Without a License: Up to 5 years imprisonment, fine up to 1 million Rupees, or both.*
2. *Obstructing Inspection: Up to 6 months imprisonment, fine up to 50,000 Rupees, or both.*
3. *Quackery: Non-bailable, up to 7 years imprisonment, fine up to 2 million Rupees, or both.*

Under section 1 it has been clearly defined that IHRA is applicable to all the healthcare establishments in Islamabad. And medical negligence is not a crime under the said special law, therefore, a person who is accused of medical negligence under IHRA cannot be criminally prosecuted rather the matter will be placed before IHRA to determine whether medical negligence was actually there or not. Under criminal proceedings, police through investigation cannot determine whether the healthcare professional was medically negligent or not. Moreover, it is also difficult for the court to determine that the professional practice rules and reasonable care was taken into consideration or not. A team of professional experts and supervisors can better reach to this conclusion.

12. Under the IHRA 2018 any person, within 60 days from the accrual of cause of action, aggrieved by the any healthcare establishment, healthcare professional, healthcare services or medical negligence shall file a complaint before the Authority under section 33. It defines complaint as:-

**33. Complaints.-**

*(1) The Authority shall investigate the complaints relating to healthcare establishment, healthcare professional, healthcare services and medical negligence.*

*(2) The Authority shall define-*

- (a) kinds of complaints;
  - (b) categories or different kinds of medical negligence; and
  - (c) mal-administration, malpractice and failure in provision of healthcare services.
- (3) The recognized and known complications of a medical or surgical treatment are not considered as medical negligence.

The Authority will investigate the matter in hand under section 34 and pass an order accordingly whether the accused was medically negligent or not. Section 31 extends a right to appeal to the aggrieved party. If the order passed by the Board the appeal lies before the authority and if the original order passed by the Authority, appeal lies before the secretary of Ministry of National Health services, Regulations and Coordination within 30 days from the date of communication of order.

13. In view of the law laid down in the case of *Shifa International Hospitals Ltd. Through Chairman and C.E.O. v. Pakistan Medical and Dental Council (PMDC) and 3 others (2011 CLC 463)*, it was held that special enactment always prevails over the general law and in presence of the special law to deal with the negligence of the practitioners being available, without exhausting the remedy, no criminal proceedings could be initiated. Once it was held by the Pakistan Medical and Dental Council that practitioner was guilty of negligence and professional misconduct, criminal law as well as civil law could be set into motion against them by forwarding a complaint to the Council for proper legal action under the law without being prejudiced by any observation made by the police or the Court. Similar view has also been endorsed in *2022 P Cr. L J 1067 (Riaz Ahmed vs ADJ/EX-officio Justice of Peace Rojhan District Rajanpur and 3 others)*.

14. Another question that requires attention and needs to be admitted is in the presence of two special laws i.e. PM&DC Act and IHRA, which one would prevail. It is settled law that the Pakistan Medical and Dental Council is a statutory regulatory authority responsible for maintaining the official register of medical practitioners in Pakistan. Its primary role is to set and uphold uniform minimum standards for basic and advanced qualifications in medicine and dentistry across the country. PMDC Act also provides a mechanism to deal professional negligence situation against the medical practitioner, who would be dealt under disciplinary proceedings, even otherwise PMDC Authorities have expert, who after adopting their own procedure of inquiry, if comes to the opinion may cancel the license of the doctor, who is guilty of medical negligence. No such mechanism of canceling license to practice of a medical practitioner is given under IHRA. Under section 9 (k) of PM&DC Act 2022 the council has the power to hear and decide complaints against licences of professional negligence and misconduct in accordance with regulations prescribed by the Council. Moreover, section 44 describes that the Council in terms of Professional negligence of any medical or dental practitioner, their names can be removed from the register of medical practitioners. It reads as follows;

***44. Removal of names from the register. –***

*(1) The Council, in its discretion, may direct the registrar to remove altogether or for a specified period from the register the name of any registered medical practitioner or registered dentist who has been convicted by the disciplinary committee or by any other court of law of any such offence as implies in the opinion of the Council a defect of character defined in the code of ethics of practice or who, after an inquiry at which opportunity has been given to such person to be heard in person or through a pleader,*



*has been convicted by the disciplinary committee of the Council as guilty of professional negligence or incompetence in a patient-doctor scenario in clinical setting or who has shown himself to be unfit to continue in practice or on account of mental ill health or other grounds as prescribed in the code of ethics of practice regulations and the complaint and matter shall finish if the complainant withdraws his complaint.*

*(2) The Council may also direct that any name removed from the register under sub-section (1) shall be restored.*

*(3) For the purpose of an inquiry under sub-section (1), the disciplinary committee of the Council shall exercise all the powers of a civil court under the Code of Civil Procedure, 1908 (Act V of 1908) for summoning the witnesses, for compelling the production of documents and for issuing commissions with the help of law enforcing authorities.*

*4) **The claim of professional negligence shall initially be established before the disciplinary committee of the Council before any other proceedings.***

Subsection 4 of section 44 made it clear that disciplinary committee of PM&DC is the first forum to initiate the proceedings against a medical practitioner in case of professional negligence.

15. Before going further with this judgment to answer the question that which one of the two special laws will prevail, it is necessary to define what is professional negligence. A few definitions given below:-

1. *Professional negligence is also termed malpractice. It occurs when a professional breaches a duty to a client.*
2. *The definition of professional negligence is when a professional fails to perform their responsibilities to the required standard or breaches a duty of care. This poor conduct subsequently results in a financial loss, physical damage or injury of their client or customer.*
3. *The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the*

*scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs because damage is a necessary ingredient of this tort.*

16. When two laws are in conflict, the general principle of interpretation of a statute is that the special law shall have precedence over the general law and when two special laws are inconsistent of any provision/situation, then one which is later in time shall prevail over the earlier one. Reliance is placed upon 2002 PCr.LJ 216 (Muhammad Saleem v. The State and another). Similarly, while interpreting two special laws, the Courts have to see other factors including the object, purpose and policy of both the statutes as well as intention of the legislature in order to determine, which of the two special laws will prevail and applicable. Reliance is placed upon 2017 CLD 1198 (Syed Mushahid Shah and others v. Federal Investment Agency and others).

17. Thus, from the text of section 33 of IHRA the Authority is made in Islamabad to deal with the issues of medical negligence, mal-practice, maladministration and failure of health service providers. Whereas, PMDC is more like a regulatory and supervisory body that keeps the record of licenses of institutions and medical & dental practitioners across the country and maintain a minimum standard of basic and advanced qualification in medicine and dental studies. Moreover, health is a provincial subject and all provinces have their respective healthcare commissions to deal with such like situations, therefore, in Islamabad IHRA is the competent authority to deal with the matter in hand.

18. In both these eventualities, overriding effect is available in Islamabad Healthcare Regulation Act, 2018, though the offences which were provided in that special law, are entirely different and for that matter

Pakistan Penal Code is a general law with bodily injuries or hurt, therefore, while interpreting these two situations, in which special law versus general law is to be considered in juxtaposition, it appears that Pakistan Penal Code does not exclusively cater for the medical negligence, rather covers. In generalized hurt caused by negligence without referring to any medical concept or with reference to any patient, however, *actus reus* or *mensrea* are the key factors in the PPC, especially the entire criminal law, but in order to determine the offence, in this scenario, it requires the evidence and report of the expert, especially when proposed accused are professional doctors or Healthcare providers or incident took place in the Healthcare Institution. Unlike, Punjab Healthcare Commission Act, 2010, there is no explicit immunity clause provided in Islamabad Healthcare Regulation Act, 2018 that no suit, prosecution or other legal proceedings related to healthcare services shall lie against a healthcare service provider, except under PHCA, 2010. Since, IHRA Act has overriding effect thus before lodging an FIR and to determine offence, the concerned Police Station shall write a letter of request to IHRA for their expert report/opinion as laid down in Regulation No.54 in the Islamabad Healthcare Regulation, 2023 and submit the final/signed report to Police Station, whereafter the concerned S.H.O shall act accordingly. Additionally, by virtue of section 44 of PMDC Act, the police shall also send a copy of letter of request to PMDC as well but only when the matter is related to medical negligence of a healthcare professional.

19. In view of above discussion, I have also attended the proposition with reference to *PLD 2019 Lahore 429 (Dr. Riaz Qadeer Khan vs. Presiding Officer, District Consumer Court, Sargodha and others)*, where

it was held that *“Healthcare Commission is the only competent forum to investigate into the allegations of maladministration or malpractice by a health service provider and the Consumer Court has no jurisdiction to adjudicate upon such matters”*. Similarly, in 2020 CLC 2037 (Dr. Sheraz-ur-Rehman and others vs. Province of Sindh through Secretary and others), it was held 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 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”*. Similarly, in 2022 YLR 63 (Dr. Khair Muhammad Sahowal and 3 others vs. Province of Sindh through Secretary Home Department and 2 others), it was held that *“in the province of Sindh, a forum is available in the shape of Sindh Health Care Commission, which is a body constituted under the Sindh Health Care Commission Act, 2013 to determine whether the petitioners have committed medical negligence as defined in Sindh Health Care Commission Act, 2013, hence, matter was referred to Sindh Health Care Commission as per provision under section 4(6)(d) of the Act, for an inquiry/investigation with direction that whatever the result of such inquiry/investigation may be, the Commission shall transmit the same to the trial Court, where the trial is pending. Therefore, in the light of above referred detailed discussion, this Court is of*

the view that matter requires an expert opinion of Healthcare Commission or for that matter from PM&DC under their laws and if case of medical negligence is proved during the course of inquiry/investigation by IHRA or PM&DC, as the case may be, the report shall be filed before the trial court and there-after trial court shall decide the matter accordingly. Though on the other hand, police shall not proceed directly by lodging the FIR in such type of cases rather direct the parties to seek remedy provided under the IHR Act, 2018 or PM&DC as the case may be, which are appropriate remedies under the law.

20. There is no cavil to the proposition that offence of medical negligence in terms of Section 319 PPC or Section 322 PPC as the case may be is difficult to prove without evidence of technical expert opinion which is missing link in this case, even I.O has not put any serious effort to conclude such a matter except referring two letters to PM&DC and IHRA, which were answered by the respective officers by referring the remedies provided under their special laws, which explains the intent of the Legislature and no criminal case could be registered directly by any stretch of imagination.

21. In the present scenario, when private complaint has also been filed, it appears that complainant has taken the entire onus upon his own shoulder to discharge the burden of proving the case of medical negligence in terms of Section 319 PPC with the claim of *qatl-i-khata* where he has to prove the mistake of act or mistake of fact committed by the doctors while treating the wife of complainant but I am surprised to see that Judicial Magistrate Section 30, Islamabad vide order dated 08.05.2024 has issued the process for summoning of accused persons on the basis of tentative assessment of private complaint as well as by considering the statements

of witnesses without obtaining expert evidence of any doctor. In this backdrop, this court is of the view that from any angle no offence has been demonstrated by the complainant, nor by I.O as there is no underline technical expert report or evidence to prosecute the three professional doctors before the registration of FIR, such aspect persuaded this Court to exercise the powers U/S 561-A Cr.P.C., which could only be exercised in extra-ordinary or in exceptional circumstances like case in hand, hence, while relying upon the judgments of superior courts with reference to exercise of inherent powers in the Criminal Procedure Code, this Court has been guided with the principles set out in 2006 SCMR 276 (Col. Shah Sadiq vs. Muhammad Ashiq), 2011 SCMR 1937 (Rana Shahid Ahmad Khan vs. Tanveer Ahmed), 2000 SCMR 122 (Miraj Khan vs. Gul Ahmed), 2016 SCMR 447 (Director General FIA vs. Kamran Iqbal), 1995 MLD 615 (Pervez Ellahi vs. Federation of Pakistan), 1995 P.Cr.L.J 1224 (Mian Muhammad Abbas Sharif vs. Federation of Pakistan), 2009 SCMR 141 (Muhammad Aslam vs. DPO, Rawalpindi), 2014 P.Cr.L.J 487 (Zulfiqar Ali vs. SHO PS Model Town Gujranwala), 2017 P.Cr.L.J. 133 (Muhammad Nawaz vs. SHO, P.S. Sabzi Mandi, Islamabad), therefore, instant writ petition is allowed and FIR No.823, dated 16.09.2023, U/S 322/34 PPC, PS Kohsar, Islamabad stands quashed accordingly.

22. Before parting with this judgment it is important note here that the respondent No.3 / Zain Ali Raza has filed private complaint under section 319 / 34 PPC which is also pending with the court of learned Judicial Magistrate but the fact remained the same that there is no under lined technical expert report issued on the request of police through IHRA or by the PM&DC as the case may be in this case of alleged medical negligence, therefore, the case in complaint shall remain stayed till receiving of

any final report qua alleged medical negligence by the IHRA or by the PM&DC. In such scenario, the complainant as well as the I.O shall approach IHRA and PM&DC for early conclusion of expert report to conclude the allegation of medical negligence in case of any positive report.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

**Announced in open Court on \_\_\_\_\_**

**JUDGE**

Approved for Reporting

Zahid