

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. No.D-2591 of 2016

DATE **ORDER WITH SIGNATURE OF JUDGE**

Date of Hearing : 02.03.2017

Date of Order : 24.03.2017

Mr. Pir Bux Bhurgari, Advocate for petitioner.

Mr. Shamim Iqbal Soomro, Advocate for complainant.

Syed Meeral Shah Bukhari, Deputy Prosecutor General

Mr. Allah Bachayo Soomro, Additional Advocate General.

ORDER

RASHEED AHMED SOOMRO, J:- Through this constitutional petition, the petitioner has called in question order dated 16.06.2016 passed by learned Civil Judge & Judicial Magistrate-II, Sehwan, whereby he has taken cognizance of the offence against the petitioner Dr. Zubeda Altaf.

2. Precisely the facts of the prosecution case are that the complainant's sister Mst.Shabeeran was pregnant and at the time of her delivery she was brought to Rural Health Centre Bhan, where Dr.Zubaida Altaf was present, who asked the complainant to bring the pregnant lady at her private hospital. As per instructions of Dr.Zubaida, the complainant shifted her pregnant sister to private clinic, where during the delivery she gave birth to a male child. It is further alleged by the complainant that an amount of Rs.15,000/- for medicines/delivery charges were received from him by Dr.Zubaida by saying that all the medicines were provided by her and it is further alleged that Doctor was greedy person and injected the complainant's sister expired injection, which resulted in reaction met with entire body ensued pain and swelling and while looking to such situation Dr.Zubaida ousted the complainant from her clinic with patient and directed him to go other clinic. Thereafter, Mst. Shabeeran was shifted to different hospitals lastly, she was brought to Civil Hospital, Karachi, wherefrom she got relief and was permitted to go home. Muhammad Sulleman approached

S.H.O P.S Bhan for registration of F.I.R. but he refused to record his statement, thereafter, complainant lodged F.I.R. against accused Dr. Zubeda vide crime No.26 of 2016 under Section 337-L(i) PPC on the directions of Additional Sessions Judge Jamshoro.

3. Learned Counsel for petitioner has contended that the allegations leveled against the petitioner are false, manipulated and concocted; that the impugned order dated 16.06.2016 passed by the Civil Judge/Judicial Magistrate is unlawful, which is based on the surmises; that on review of relevant record of the Health Center Bhan, the Committee has unanimously reached to the conclusion that patient Mst.Shabeeran had not visited the Health Center Bhan on 05.01.2016 for delivery. It is further contended that disease occurred due to insect bite. It is submitted that F.I.R. has been lodged with the delay of 05 months. It is contended that petitioner Dr. Zubeda is a senior doctor, the complainant has managed the alleged incident; that the complainant has used illegal, unlawful source by force/illegal means and got false certificates from the Hospitals; therefore, the impugned order dated 16.06.2016 is liable to be set-aside. Lastly, it is contended that proceedings before trial Court may be quashed.

4. For the sake of convenience impugned order is reproduced as under:-

“The report under section 173, Cr.P.C submitted by Investigating Officer ASI Nasrullah Solangi, in above crime against accused nominated in column 4 of report, as accused Doctor Zubaida Altaf W/O Altaf Surhiyo is released by I.O.

The precise facts of the prosecution case are that complainant's sister namely Mst. Shabeeran was married with Mumtaz Jamali and she became pregnant. It is case of prosecution that on 05.01.2016, Mst. Shabeeran felt pain of delivery and complainant brought her at Rural Health Centre Bhan where Doctor Zubaida was present who directed complainant to bring the lady at her private clinic and on such directions of doctor, complainant brought Mst. Shabeeran in

private clinic of Doctor Zubaida, where during delivery male child was born to her. It is further alleged by complainant that an amount of Rs.15,000- for medicines was taken by doctor who told to complainant that medicines and injections are lying with her, and the doctor due to greed of payment injected the expire injection which resulted in reaction, as a result, entire body ensued pain and swelling, looking to the such serious situation doctor Zubaida ousted us from her clinic and directed to go other clinic. Seeing, the serious condition of Mst. Shabeeran on 07.01.2016, she was shifted to Civil Hospital Dadu, Hyderabad, and thereafter they went to Liaquat National Hospital Karachi, LAMA Hospital, SPMC Hospital. Lateron, they brought lady at National Medical Centre Karachi where she was kept in ICU, wherefrom, Mst. Shabeeran was brought at Indus Hospital, and lastly, Civil Hospital, Karachi where condition of Mst. Shabeeran became better and she was permitted to go to her home, thus, complainant got certificate from Civil Hospital Karachi and after getting orders from the Court complainant has lodged the F.I.R. It is pertinent to re-produce the relevant opinion of Final Medicolegal Certificate issued on 11.04.2016 as under:-

Opinion

On the basis of examination, time-time history and Rx period, I am of the opinion that her injuries fall in "other hurts: Sub-Section I", probably caused by intraglutead 1/4 injection as alleged.

In addition to above, the version of complainant is fully supported by the statement under Section 161 Cr.P.C., on material points, so also the version of complainant is supported by the observations and opinion in the above Medicolegal Certificate. As regards to version of doctor is concerned, same cannot be determined at this stage and opinion of police regarding innocence of accused is inadmissible and is not binding on the Court. It is settled law that the magistrate can take cognizance of an offence even in case of negative report submitted by police that accusation is baseless and no case is made out against the delinquents as held by the Honourable Supreme Court in the judgment reported in PLD 2002 SC 63, nevertheless, in this case pictures of injured have been submitted by the complainant along with application and injured Mst: Shabeeran was also produced before the court who was severely injured on the face of it and she further claimed that flash of her legs has been lost due to gross negligence and carelessness of doctor, resultantly, by disagreeing with the report, I, exercising powers under section 190(1)(b), Cr.P.C, do hereby take cognizance of offences against accused Doctor Zubaida Surhio. I.O is directed to submit list of witnesses within seven days."

5. Conversely, the learned Counsel for complainant/respondent No.1 has argued that the Civil Judge/Judicial Magistrate Sehwan has passed legal order dated 16.06.2016 and took the cognizance of offence against the petitioner. It is contended that Mst.Shabeeran was injected expiry date injection and flash of her legs has been damaged; that the challan has been submitted and the case has proceeded before the Trial Court, hence the order passed by the Trial Court requires no interference. Lastly, contended that petitioner may approach trial Court in the first instance under Section 249-A Cr.P.C.

6. Likewise, the learned A.A.G as well as D.P.G have argued that the challan has already been submitted before the competent Court of Law and the learned Trial Court has taken cognizance. Petitioner/accused may approach trial Court for premature acquittal under Section 249-A Cr.P.C.

7. Heard the learned Counsel for the parties and perused the record carefully. It is an admitted position that the learned Judicial Magistrate has already taken cognizance of offence and case is pending trial. It is informed that trial Court has fixed case for trial. Deeper appreciation regarding guilt or otherwise of the petitioner can only be determined before the Trial Court at trial. Petitioner has approached this Court directly without exhausting remedy available to her before trial Court under Section 249-A Cr.P.C. In the case of *Director General, Anti-Corruption Establishment, Lahore & Others V/s. Muhammad Akram Khan & Others (PLD 2013 S.C 401)*, wherein following has been observed:-

“The law is quite settled by now that after taking of cognizance of a case by a Trial Court, FIR registered in the case cannot be quashed and the fate of the case and of the accused persons challaned therein is to be determined by the Trial Court itself. It goes without saying that if after taking of cognizance of a case by the Trial Court an accused person deems himself to be innocent and falsely implicated and he wishes to avoid the rigorous of a trial then the law has provided him a remedy under Section 249-A and 265-K Cr.P.C to seek his premature acquittal if the charge against him is groundless or there is no probability of his conviction.”

8. In view of above stated facts in the order dated 16.06.2016 passed by the learned Judicial Magistrate, no illegality has been pointed out and it is based upon sound reasons and requires no interference. The instant Constitutional Petition is dismissed. However, the petitioner would be at liberty to approach Trial Court for premature acquittal by adopting legal remedy as referred to in the above cited case, if so advised.

JUDGE

JUDGE

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8. The observations made hereinabove are tentative in nature, which shall not deprive the case of either party at any stage.