

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

C.P. No.D-854 of 2017.

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection.
2. For katcha peshi.

15.08.2017.

Mr. Mian Mumtaz Rabbani, Advocate for the petitioner.

Mr. Sher Muhammad Laghari, State Counsel.

Mehboob Ali, 8-UC Clerk, Edhi Welfare Centre, Tando Adam present in Court.

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SALAHUDDIN PANHWAR, J: Through instant constitutional petition, petitioner seeks exhumation of dead body, recovered by police of Oderolal Police Station, which after completing formalities was sent to Edhi Centre for burial; same was buried in graveyard situated at Tando Adam District Sanghar.

1. In *nut-shell*, the back-ground giving rise to instant petition, is that uncle and son of one Abdul Aziz Shar identified the body to be **'the deceased'**. *Per* record, on 10-06-2014 at about time 2130 hours the uncle of petitioner namely Abdul Hakeem s/o Abdul Majeed lodged F.I.R. bearing crime No.21/2014 u/s 302, 201, 109, 148, 149 PPC at PS Jhangoro District Sukkur, wherein aforesaid un-identified dead body was shown as **victim** of aforesaid crime but later the uncle of petitioner claim to be not satisfied about *identification* of **'the deceased'** because photographs of dead body were not satisfactory for *identification* as water animal has taken away the flash of said dead body hence *identification* of the **'the deceased'** through DNA was essential which was not possible without *exhumation* of dead body as DNA sample was not preserved by the concerned doctor while

conducting post-mortem. The record further shows that their application was declined by the Magistrate on the ground that he has no jurisdiction because graveyard, where body was buried, is not falling within his jurisdiction; then petitioner filed application before the trial Court i.e. Vth Additional Sessions Judge, Sukkur, same was also declined on the ground of jurisdiction with observation that “*he has no jurisdiction to direct any Court of Tando Adam District Sanghar with regard to exhume the dead body*”; thereafter, petitioner approached Judicial Magistrate, Tando Adam, who also declined the application of the petitioner for DNA test of the deceased on the ground that offence has not been committed within his jurisdiction, therefore, application, being *coram non-judice*, was declined.

2. We have heard the respective sides and have also gone through the available record.

3. Before going into *details* of case in hand, we would *first* insist that a *murder* charge essentially requires the *prosecution* to first establish ‘unnatural’ death of a ‘particular’ person even in a case of an ‘unseen incident’. There can be no *denial* to the legal position that an ‘unseen incident’ shall always require ‘circumstantial evidences’ which shall always include a *motive*. A *motive* can never stand without proper reference / identity of the *deceased*. This *even* shall stand evident from a referral to allegations, leveled in the FIR, which are:

“... On 26/5/2014 they come to know that one unknown dead body had been recovered by Tando Adam police from Naseerabad Canal Thereafter he went at Tando Adam PS where he (saw) photographs of his brother and met with doctor who informed him that on 23/5/2014 he conducted his postmortem and dead body was 5/6 days old was decomposed and was mark of violence on it including throttling mark and old injury mark.. that

accused mentioned in the F.I.R. have caused murder of his brother over plot dispute.

We would add that the *identity* of an ‘**unknown dead body**’ is always material either for *prosecution* (in case of *unnatural death*) or *least* for satisfying the *family* (if it was a natural death or *suicide*). Thus, the *identity* of the body appears to be *necessary* for ‘**two purposes**’ i.e for *trial* of an offence as well for satisfying the *family* of such dead-body (person).

For first *purpose*, it would be relevant to make a direct referral to Section 174 of the Code, being relevant, is made hereunder:-

“174. Police to inquire to report in suicide, etc.:

(1) The officer incharge of a police station or some other police officer specially empowered by the Provincial Government in that behalf, on receiving information that a person-

(a) has committed suicide, or

(b) **has been killed by another**, or by an animal, or by machinery, or by an accident, or

(c) has died under circumstances raising a reasonable suspicion that **some other person has committed an offence**, shall immediately give intimation thereof to the nearest Magistrate empowered to hold (inquests and unless otherwise directed by any rule prescribed by the Provincial Government, shall proceed to the place where the body, of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body **and stating in what manner, or by what weapons- or instrument (if any), such marks appear to have been inflicted.**

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the [concerned] Magistrate.

(3) When there is **any doubt** regarding the cause of death or when for any other reason the

police-officer considers it expedient so to do, shall, subject to such rules as the Provincial Government may prescribe in this behalf, forward the body, **with a view to its being examined**, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Provincial Government, if the state of the weather and the distance admits of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) [Omitted by A.O., 1949, Sch.]

(5) [The Magistrates of the First Class are empowered to hold inquests.]

A bare perusal of the above should *leave* nothing ambiguous that the *Legislatures* have properly appreciated that recovery of an unknown *dead-body* and *even* non-appearance of an *informant* would not exempt the In-charge police station from his legal obligation rather duty to make an *inquiry* into cause of death. Here, it is needful to add that if in result of *inquiry*, so conducted under Section 174 or 176 of the Code, it appears that a *cognizable* offence has been committed then the In-charge Police Station would be under an obligation to resort to provision of Section 154 of the Code i.e lodgment of an FIR because the purpose of an *inquiry* under both said provisions is nothing but to ensure that no offence has been committed in connection with the death of a person. Reference to the case of *American Life Insurance Company (Pakistan) Ltd. v. Master Agha Jan Ahmed & Ors* 2011 CLD 350 (Karachi) may be made wherein it is observed as:

“3, Section 174 of the Code of Criminal Procedure (“the code”)requires that if a suicide is reported to the police, the officer incharge of the police station concerned (or any other duly authorized police officer) must, in the manner as laid down in the section, investigate the matter and make a report on the apparent cause of death. This report is to be submitted to the concerned Magistrate. Section 176 of the Code empowers the concerned Magistrate to make an inquiry into the matter, either instead of , or in addition to, the investigation to be carried out by the police under section 174. The Magistrate holding the

inquiry is empowered to record evidence, and while conducting the inquiry, has all the powers as would be available to him when holding an inquiry into an offence.

“15. In this context, we would also note that the purpose of an investigation under section 174 or inquiry under section 176 of the Code is only to ensure that no offence has been committed in connection with the death of a person, it is not to establish that a suicide has occurred.....

Now, for *first* purpose of *necessity* of identification of an **‘unknown dead body’**, we would safely conclude that once it comes to surface in result of such an *inquiry* that an offence has been committed then provision of Section 154 of the Code shall come into operation *automatically* which insists that **‘an offence should never go un-attended’**.

Now, will take the second *purpose* of necessity of identification of an **‘unknown dead body’**, for which would make a direct referral to Rule 22.79 of Police Rules, 1934, being relevant, is made hereunder:-

22.79. Order regarding notices: (1) When it is considered necessary to record of **communicate to other police stations information** regarding **unidentified corpses, missing persons,** unclaimed, lost or stolen cattle or other property, **notices in the forms** given below shall be prepared by the carbon copying process and dispatched to the **Central intelligence Agency at headquarters and to such police stations** as the officer in charge of the police station thinks fit, care being taken that only property **easy of identification** is included:-

- a) Unidentified corpses. Form 22.79 (1)(a).
- b) Missing persons. Form 22.79 (1)(b).
- c) Unclaimed property, including cattle. Form 22.79(1)(c).
- d) Property lost or stolen including cattle. Form 22-79 (1)(d).

(2) if the matter is urgent the necessary copies shall be made and dispatched direct from the police station, otherwise notices shall be submitted to the Central Intelligence Agency at headquarters where the required number of copies shall be made by means of duplicating process act dispatched without delay to such police stations or posts as the submitting officer may recommend, and also in

exceptional cases where such a course is likely to prove effective, to the office of the Assistant Inspector-General, Crime and Criminal Tribes, for **publication in the Criminal Intelligence Gazette.** In addition, in all important cases the information should be communicated to the **chaukidars visiting the station with a view police to its circulation throughout the jurisdiction of the police station.**

(3) Office copies of the notices referred to shall be kept and these, as well as the notices received from other **police stations,** shall, respectively, **be given an annual serial number under each class separately** and filed for seven years in two bundles, one containing notices of the **home police station and the other those received from other police stations.**

(4) **Notices shall be compared with a view to tracing missing persons, owners of unclaimed property, establishing identity of unidentified corpses, etc., and results noted in the column remarks.**

(5) In the case of similar notices received from **other districts or provinces,** Superintendents shall exercise their discretion as to the police stations to which they should be circulated and the necessary number of copies shall be made in their own offices if duplicate copies are not received from the forwarding district.

A bare reading of the above *rule* make it quite clear that ‘**police station**’ has to maintain a *proper* record of ‘**unknown dead-body, missing person, unclaimed proper, etc**’ which also requires to be given due *publicity* by way of ‘**notices** (in prescribed forms) to ‘**head-quarter**’ or *other police stations, even* of other province with no other view but to establish **identity** thereof because it shall only be the **identity** of such detailed things which shall turn the status of ‘**unknown; missing; unclaimed etc**’ into ‘**known; found; titled etc**’ thereby the person likely to suffer / prejudice in any way, could be satisfied. The *ordinary* meaning of ‘**notice**’, per *Merrriam-Webster*, is:

“*information that tells you or warns you about something that is going to happen*” &

“*attention that people give to someone or something*”

Thus, if a *fact*, intended to be brought into notice of *public*, remains to a **register** only then it shall never serve the object and purpose whereof therefore, the Police must avail the available *modern* devices hence the *photo-graphs* of **‘unknown dead body’** as well **‘missing person’ register** should not only be maintained in the manner as prescribed but **‘must’** also be displayed at police station as well on a **‘web-site’** specifically designed for such purpose i.e **‘identity of unknown dead body and locating a missing person’**.

Having said so, we shall revert to the merits of the instant case. In the instant matter it is *prima facie* evident that the complainant party has been denying or *least* disputing the **‘identity of dead-body’** and did approach to trial Court, the concerned Magistrate (from whose territorial jurisdiction the police recovered dead body) as well the Magistrate where dead body was buried but all the Courts, *surprisingly*, declined prayer of the petitioner on the ground of territorial jurisdiction /*coramnon-judice* although the **public prosecutor** has *rightly* declared it as one of the **‘defects’** while observing as:

“The IO during course of investigation has left following glaring defect.

DEFECT

1. That the IO has failed to prepare list of legal heirs of deceased.
2. That IO has failed **to get or be got conducted DNA test for authenticity of relationship.**
3. That IO has failed to collect **photographs** which are said to be of complainant’s brother.
4. That IO has failed to collect CNIC of victim/deceased.
5. That IO has failed to record the statement of witnesses who has recovered the dead body of deceased.
6. That IO has failed to visit at Tando Adam for investigation purpose.

According to concerned police official that DNA test would take much time as complainant has

identified the photographs of dead body to be his brother but it is not enough relay upon.

The above defects are essential to be or **got rectified**. Therefore the IO is required to rectify the same by seeking further time from the court of learned Magistrate and after compliance of above direction then place the same before undersigned for further orders.”

However, the manner in which all the *lower* courts have acted is quite strange and not worth-appreciating. It is also strange that the *unknown* body was found; complainant party rushed to the concerned police station and attempted for verification of the deceased, but police failed to refer the matter for DNA test though when specifically it was informed to them by the petitioner / complainant party that one murder case is pending at Sukkur then police was under obligation to get it confirmed that unknown dead body was of the **‘deceased’** by initiating process even at *its* own but record shows *otherwise*. Simultaneously, it is apparently shocking that three Courts declined same prayer for exhumation of body and for further verification merely on the ground that matter is *courm non-judice* and they have no territorial jurisdiction although the provision of Section 176(2) of the Code *itself* vests jurisdiction by saying as:

(2) Power to disinter corpses: 'Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

The *phrase* ‘discover the cause of death’ is not to be given much weight particularly when question of *identity* of dead-body is *involved* because *identity* is equally important as the cause of death may be. Reference may be made to the case of Muhammad Saleem v. State 2014 P Cr. LJ 219 wherein disinterring of *corpse* was allowed solely for DNA (identity) purpose while holding that:

“14. The contention that exhumation at this stage will serve no useful purpose pales into significance for the sole

reason that there is no time limit for the disinterment of the body. Modi in his Medical jurisprudence and Toxicology in Chapter IV opines:--

“In India and in England, no time-limit is fixed for the disinterment of a body. In France, this period is limited to ten years and it is thirty years in Germany.”

16. In the circumstances I allow this application and in view of above, learned Judicial Magistrate-IV (Central) Karachi and in case he was not available, his successor **will disinter the dead body of Mst. Rizwana for D.N.A examination** after joining both the parties soon after the receipt of this order and complete the whole process within a fortnight.”

The Courts of Civil Judge Matiari, in whose jurisdiction dead body was recovered, as well Civil Judge Tando Adam, in whose jurisdiction body was buried, were competent to exercise such *jurisdiction* but *prima facie* they failed by making the request of petitioner a **‘ping-pong ball’**. In short, not only the police failed to perform their duties but also *lower* Courts have also failed to exercise their powers and *jurisdiction* vested in them by law which is not worth appreciating.

Thus, we would conclude that where very *identity* of the **‘dead-body/deceased’** is denied or *least* begged for *confirmation* then in such eventuality the prosecution must always remove such *clouds* which couldn’t be but through **‘DNA’** process. Here, a *little* introduction of DNA, being necessary, is made hereunder which is:

“DNA is a material found in cells that determines characteristics such as eye, hair, and skin colour. Each person’s DNA is different, except for identical twins. DNA evidence can be collected from blood, saliva, sweat urine, tissues, and semen. “

Internationally, the DNA evidence has proven itself to be a powerful tool in determining the innocence of *prisoners* even after their *convictions*. We would add that the *identity* of an **‘unknown dead body’** is always material either for *prosecution* (in case of *unnatural death*) or *least* for satisfying the *family* (if it was a natural death or

suicide). This means that DNA can be used to *accurately* identify a **person** or **identity** thereof. The importance of *modern* devices so as to eliminate possibility of any *mistaken* trial needs to be insisted which (DNA) *normally* is being done in *rape-cases*. This has been the cause because of which the honourable Apex Court in the case of *Muhammad Asif v. State* 2017 SCMR 486 held as:

“19. We have noticed that the Punjab Police invariably indulge in such a practice which is highly improper because **unless the blood stained earth or cotton and blood stained clothes of the victim are not sent with the same for opinion of serologist** to the effect that it was human blood on the crime weapon and was of the same group which was available on the clothes of the victim and the blood stained earth / cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence. **Therefore, copy of this judgment be sent to the Prosecutor General, Punjab, and Chief Incharge of Investigation, Punjab Provincial Police to issue instructions to the investigating agencies in this regard.**”

Under these circumstances, we direct the Judicial Magistrate Tando Adam for exhumation of body under his supervision as well we direct the DHO Sanghar to constitute Medical Board and exhume the dead body as well make all arrangements for referral of DNA test with regard to cause of death as well identification of the body. This exercise shall be completed within one month.

While parting, we find it in all fairness to direct Inspector General of Police that:

i) in the *event* of discovery of an **‘unknown dead-body’** which *otherwise* for any reason, including decomposition, is difficult to be *safely* identified, the concerned police must always ensure preserving of *samples* for DNA which *however* should be preserved in a manner thereby dispelling the chances of fabrication of evidence through corrupt practices *preferably* in presence of Illaka Magistrate. View is guided by case of *Azeem Khan & another*

v. Mujahid Khan & ors 2016 SCMR 274 wherein it is observed as:

“28. In any case, it is an expert opinion and even if it is admitted into the evidence and relied upon, would in no manner be sufficient to connect the necks of the appellants with the commission of the crime when the bulk of other evidence has been held by us unbelievable thus, no reliance can be placed on it to award a capital sentence. Moreover, to ensure fair-play and transparency, the samples in the laboratories from the parents should have been taken in the presence of some independent authority like a Magistrate and also the recovered samples from the crime scene in the same way to dispel the chances of fabrication of evidence through corrupt practices and the transition of the samples to the laboratory should have also been made in a safe and secure manner. But all these safeguards were kept aside;

ii) to direct all police station(s) to *properly* maintain the record of missing persons as well of **‘unknown dead-bodies’** and photo-graphs of such persons be displayed on notice board of police stations;

iii) chalk-out a mechanism, including launching of *website* thereby assuring that detail/*description* (missing person, had at time of missing; dead-body found) of every single missing and unknown dead-body, is available for public to see so as to *ease* help people in searching their loved one which *otherwise* is purpose and object of Rule 22.79 of Police Rules, 1934.

This exercise be completed within a period of within six months with compliance report to this Court.

Copy of this order be circulated among all *Magistrates, SSP(s) for compliance*. Office shall communicate this order to all learned District courts trying criminal cases and trial Court for guidance as well I.G.P. Sindh for compliance and report.

JUDGE

JUDGE