

ORDER SHEET  
THE HIGH COURT OF SINDH AT KARACHI

Cr. Misc. Appln No.446 of 2022.

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Date:                      Order with signature(s) of the Judge(s)  
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1. For Hearing of Main Case.
2. For Hearing of MA No.9632/2022.

12<sup>th</sup> September, 2022.

Applicant Muhammad Ahad is present in person.

M/s. Zia Ahmed Awan, S. M. Khalid Azhar, Samreen Naz, Karim Nawaz, Pervez Medhi, Syed Itrat Husain Rizvi and Samia Tariq advocates for respondents No. 1 & 2.

Mr. Muhammad Nawaz Tahiri advocate for respondent No.3.

Mr. Zahid Farooq Mazari, Asst. A.G. Sindh.

Ms. Amna Ansari, Addl. P.G.

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**SALAHUDDIN PANHWAR, J.-** Through instant Criminal Misc. Application, the applicant has impugned the order dated 16.08.2022 passed by the Additional Sessions Judge-II Karachi East, whereby; the order dated 18-06-2022, passed by the Civil Judge & Judicial Magistrate-XX Karachi East directing the Secretary Health to constitute a Medical Board and fix the date of exhumation of the dead body of deceased Dr. Aamir Liaquat Hussain was set aside.

2. Precisely the facts relevant for disposal of instant case are that the applicant filed an application U/s 174/176(2) Cr.P.C. before the concerned Magistrate for disinterment/exhumation of dead body of deceased Dr. Aamir Liaquat Hussain, which was allowed vide order dated 18-06-2022. The operative para of the order is reproduced as under: -

*“Since the Police Surgeon in his Medico-Legal Certificate dated 10-06-2022 has clearly opined that on the basis of external examination nothing can be opined regarding the cause of death, therefore, it is crystal clear that the cause of death of deceased is still uncertain which itself has raised question on the death either it is natural or*

*unnatural and could only be ascertained after exhumation of dead body and its examination. In the given facts and circumstances of the case in hand and particularly in the light of guidelines settled by Hon'ble Supreme Courts on the subject, I am of the considered view that disinterment of the dead body of deceased Dr. Aamir Liaquat Hussain is inevitable to determine the actual cause of his death in order to remove suspicious and clouds over his death. Consequently, application in hand stands allowed.*

*Office is directed to issue letter to Secretary Health Department Government of Sindh to constitute Medical Board and fix date of exhumation of dead body of deceased "Dr. Aamir Liaquat Hussain under intimation to this Court. SHO of Police Station Brigade is directed to make necessary arrangements in accordance with law."*

3. It is essential to mention here that prior to the filing of application under section 174 read with Section 176 (2) Cr.P C. by the respondent No.1 (the applicant herein), the District Police preferred an application for conducting proceedings under section 174 Cr.P.C, as per law. Where after SIP Mehboob Ali along with ASI Rai Yaqoob arrived at Chhipa mortuary and proceedings under section 174 Cr.P.C. were initiated under the supervision of the concerned Judicial Magistrate. The legal heirs of the deceased filed an application stating therein that they do not want the post-mortem of their father's dead body. At the time of proceedings under Section 174 Cr.P.C, the external examination of the dead body was conducted and a Medico Legal Certificate was issued on 10.06.2022 wherein it was reported that on the basis of external examination, nothing can be opined regarding the cause of death. The application of the legal heirs of the deceased was allowed and after observing the legal formalities, the dead body of their deceased father was handed over to them for burial vide order dated 10-06-2022 passed by the incharge/vacation Judge. After four days of the order dated 10-06-2022, the present applicant filed an application for disinterment/exhumation of the dead body of deceased Dr. Aamir Liaquat Hussain, which was allowed by the concerned Magistrate through detailed order dated 18-06-2022, which was assailed through an appeal before the learned Sessions Judge Karachi East, which was entrusted to the Court of Additional Sessions Judge-II, Karachi East for its disposal in accordance with law. The learned appellate Court set-aside the order dated 18-06-2022 vide order dated 16.08.2022. The operative paras of the order being relevant are reproduced hereunder: -

*“However, order dated 10.06.2022 has not been challenged before the Appellate Court which has already been attained the finality. The legal heirs of the deceased buried the dead body Dr. Aamir Liaquat Hussain after getting permission from the learned concerned Judicial Magistrate who has given permission to the applicants to bury the dead body of deceased. The respondent No.2 has passed second order dated 18.06.2022 in which overruled/supersede the order dated 10.06.2022, it seems that the respondent No.2 has committed material irregularity and illegality in passing impugned order, which is illegal and requires interference by this court.*

*Under the above discussed reasons, I am of the humble view that the trial court has committed material irregularity and illegality in passing impugned order dated 18.06.2022, which is illegal and is hereby set aside and the instant revision application is hereby allowed. The case laws submitted by the learned counsel for respondent No.1 are and not to the facts and distinguishable applicable circumstances of the instant case.*

4. The applicant, who himself is a lawyer, contends that impugned order passed by learned Additional Sessions Judge-II Karachi East, while setting aside order passed by the Magistrate is based on unsound reasons. His main contention is that the learned Additional Sessions Judge has referred a Facebook post of applicant, wherein it was shown that he was annoyed with deceased Dr. Amir Liaquat Hussain due to change of his loyalties. This fact is not disputed by the applicant. According to the applicant, requirement of section 173 & 174 Cr.PC were not fulfilled and learned Additional Sessions Judge failed to refer to the relevant section which speaks that anyone can file application for post mortem/exhumation of body, if same is necessary to know the cause of death. He has also referred medical examination report of Dr. Summaya Syed, wherein; it is opined that cause of death is unknown. Besides, he further contends that there is no harm if body is exhumed in order to unearth the truth. He further contended that even police officials tried to get postmortem of the deceased conducted, but the legal heirs did not permit them, however, according to him, such permission was not requirement of law. He has also referred the relevant para of impugned order which speaks that application under Order 1 Rule 10 CPC filed by third wife of deceased was declined, whereas according to him, she was necessary and proper party, therefore, he prays that impugned order is against the settled principle of criminal administration of justice, hence requires interference by this Court. He has relied upon case laws reported in PLD 2021 Sindh 118 [Mst. Iqra

Faisal and 5 others Vs. Zubair Khan and 7 others], PLD 2020 Lahore 394 [Begum Mai Vs. Additional Sessions Judge and others], PLD 2017 Lahore 337 [Mst. Shama Vs. The State & 3 others], 2008 SCMR 1086 [SC] [Faryad Ali Vs. The State], 1987 SCMR 272 [Muhammad Ramzan and others Vs. The State & another], 1996 P.Cr.L.J 389 Lahore [Mst. Ghazala Begum and others Vs. The District Magistrate, Khanewal and others] and PLD 2022 Lahore 55 [Sajid Ali Vs. The State and 5 others].

5. The third wife of the deceased/ respondent No.3 through her counsel is also insisting exhumation of body though she filed suit seeking Khula which was pending adjudication in the lifetime of deceased and after his death that suit was withdrawn. According to learned counsel they have also approached concerned SHO for lodgment of FIR under Section 302 PPC.

6. In contra learned counsel for respondents No.1 & 2 emphasized over Inquest Report which is available at Page-77 of the file, which speaks that body was examined, the death is natural which was endorsed by learned Magistrate vide order dated 10.06.2022; that report is also appended with body examination report which shows no mark of violence is found on the dead body of deceased, it was supervised and endorsed by the Magistrate and only thereafter permission was granted for burial on the request of concerned SHO by the learned Magistrate, hence, after funeral proceedings, the deceased was buried. However, after four days of burial, the applicant filed application for exhumation of body before the same Magistrate and that was allowed by 18.06.2022; which order was challenged before this court by preferring Constitution Petition, which was disposed of with direction to file revision application before the learned District & Sessions Judge. Accordingly, respondents No.1 & 2 challenged the same before District & Sessions Judge; that was assigned to Additional Sessions Judge-II Karachi East who while adjudicating the issue between the parties reached on the conclusion that there is no need of post mortem as well as exhumation of body will not serve any purpose.

The fore-most question involved in the matter is that whether the order dated 18-06-2022 passed by the learned Magistrate was maintainable or otherwise?

7. As mentioned above that; on the application of the legal heirs of Dr. Aamir Liaquat Hussain, the Magistrate concerned vide order dated 10-06-2022 allowed burial of the dead body. Prior to passing that order the proceedings under section 174 Cr.PC were observed, the dead body was externally examined by the medical officer, such medico-legal certificate was issued and then the dead body was handed over to the legal heirs for burial. Surprisingly the present applicant did not appear to raise objection or shown his apprehension regarding the unnatural death of the deceased. The order dated 10-06-2022 passed by the Incharge/ Link/ Vacation Magistrate in the capacity of concerned Magistrate under the provisions of 173 Cr.PC, which provides *Power of Magistrate to agree/disagree with summary police report*. Thereafter the present applicant filed an application U/s 174/176 (2) Cr.PC before the same Court, who passed the earlier order dated 10-06-2022, for disinterment of the body of the deceased which application was allowed vide order dated 18-06-2022, hence the Judicial Magistrate-XX Karachi East while entertaining and adjudicating upon the application of the present applicant travelled beyond his jurisdiction because after passing the order dated 10-06-2022, which was never challenged by any party, the Judicial Magistrate-XX Karachi East had become "*functus officio*", the legal definition is provided that "*of no further legal authority or legal effect*". Besides this the application by the present applicant was "*Coram non-judice*" [*before a Judge not competent or without jurisdiction*].

8. As discussed above, the learned Magistrate was not competent enough to pass fresh order when that exercise had already undertaken by him under Section 173/174 Cr.PC and that order was not challenged either by the Applicant or any of the legal heirs, hence the same admittedly attained the finality.

9. Even on merits, admittedly, the instant application has been filed by the applicant, who is neither legal heir nor the close-relative of the deceased on the contrary his own admission regarding his Facebook post shows that he was unhappy with the deceased due change of his political loyalties, hence, the partiality of the present applicant is apparent on the record and is elaborately discussed in the impugned order. Mere mentioning the word suspicious is insufficient to allow an application for disinterment of the body.

The applicant has not mentioned any sufficient or cogent reason and has not annexed any authentic proof regarding suspicion of death of the deceased. Moreover the legal heirs of the deceased including his real son and daughter are not showing any suspicion with regard to the death of their deceased father. The perusal of coronary statement and detailed examination by the concerned police officials under the supervision Magistrate shows that deceased died natural death and medical examination itself is showing that not a single circumstance surfaced which depicts that death was unnatural. No doubt, Section 176(2) of the Code does not place an embargo of locus-standi to approach a Magistrate for exhumation of dead body but there should be "reasonable suspicion" or "circumstance" to invoke the jurisdiction of the Magistrate under the aforesaid provision of law. In case of *Damsaz v. Assistant Mukhtiarkar Revenue/Special Judicial Magistrate and 2 others*(2010 MLD 1681), it has been held that "It is consistent view of the Superior Courts that exhumation of dead body could be ordered on the request or information of even a stranger for the purpose to know the actual cause of death so that criminal machinery be set into motion". However, in this case, the Applicant has failed to show "Reasonable Suspicion" or a single "Circumstance", which may require the Magistrate to exercise powers under Section 176(2), of the Criminal Procedure Code, 1898. In any event, Islam accords great respect to the dead body of a Muslim, as such exhumation without any justification is a sin in Islam. In the case of *Zaffar Iqbal alias Kaka v. Additional Sessions Judge and 3 others* (2005 PCr.LJ 736), it was observed that being Muslim, we have to respect a dead body and its disinterment could only be allowed against serious accusation.

10. Under these circumstances, the impugned order passed by the learned Additional Sessions Judge-II Karachi is well-reasoned and needs no interference by this Court, which is hereby maintained.

11. In view of above, the instant Criminal Miscellaneous Application is dismissed alongwith listed application[s].

JUDGE