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Exhumation and its Procedural Aspects in Pakistan

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Abstract

The instant study mainly emphasizes on procedural matters pertaining to exhumation in Pakistan. It discusses the main aim of exhumation is to find the real cause of death in case of any suspicious foul play. It deliberate arguments on issues concerning locus standi, limitation, second petition for exhumation admissibility, jurisdiction concerns, and fate of application for exhumation in case of non-registration of First Information Report (FIR). Further, the study also discusses the nature of inquiry under Section 176(2) Code Procedure Code (CrPC), 1898.

Keywords: Exhumation, Procedure, & Pakistan

1. Introduction

The exhumation is of central significance especially in cases of death wherein there is doubt about the possible intentional killing of the deceased. In Pakistan, provision for disinter corpse is provided under Section 176 clause 2 of the (Cr.PC), 1898. It is interlinked with Section 174 and 175 of Cr.PC.

The basic purpose of exhumation is to know about the real cause of death when there is doubt whether subject person died of natural or accidental or suicidal death. Another issue of paramount nature is that who can file application for exhumation or who got *locus standi* in such instances. The study discusses various cases laws. One class of cases adjudicates that only the legal heirs or relatives of the deceased can file such petition. Meanwhile, other precedents of higher courts in Pakistan decide that even the stranger can also file such petition, but such cases may render suspicion on close relative being accused in the killing of the deceased.

Further, as far as the question of limitation period for filing application for exhumation is concerned, nowhere in Cr.PC or Limitation Act, 1908 any period is fixed. It may be argued whether Article 181 of Limitation Act would be applicable for cases where limitation period is not given. Implying this limitation period shall be three years. Nevertheless, that is not the case in case availing such petitions as higher courts in Pakistan held in various occasions that for filing of such application, no limitation period can be fixed. Such application can be filed and accepted even after years passed after burial.

The question of jurisdiction with regard to area Magistrate, before whom such application should be filed, has remained an area of confusion. Guidance with regard to this issue cannot be found anywhere in Cr.PC, 1898. However, the guiding principle would be; first, in case direction of exhumation and post mortem issued by higher or apex court, Magistrate directed to hold the inquiry shall assume jurisdiction. Secondly, no such direction issued, and FIR is registered, the area Magistrate in whose jurisdiction FIR is registered shall have the jurisdiction. Thirdly, in case neither FIR is registered nor any direction is issued by higher court or Apex Court, the place where the dead body was buried, the area Magistrate of such place shall only get the jurisdiction and no other Magistrate can entertain such petitions. Before going into further discussion, there is need to understand what exhumation is or disinter corpse?

a) Research Questions

1. What is the purpose or grounds of exhumation?
2. Who got the *locus standi* to file petition for exhumation?
3. What is the limitation for filing such petition?
4. Whether exhumation for another fresh post mortem can be allowed?
5. Which area Magistrate got jurisdiction either area Magistrate where the deceased died or FIR lodged or buried?
6. Whether non-registration of FIR is impediment for holding such inquiry?
7. Whether the nature of Inquiry is judicial or administrative?

b) Research Objectives

- a) To discuss the procedural aspects pertaining to exhumations petitions in Pakistan.
- b) To highlight the purposes of exhumation.

c) Research Methodology

The study involves qualitative approach. It is a desk based study that analytically and comparatively tries to answer the research questions while analyzing the provisions pertaining to exhumations in Cr.PC, 1898; it mainly relies on cases laws of Apex or Higher Courts in Pakistan. Meanwhile, resort to the opinions of scholarly work or other secondary sources has also been made for purpose of better conduct of research in hand.

2. Definition of Exhumation

The term 'exhumation' is not provided or defined anywhere in the whole of Cr.PC. The word used for it is 'disinter corpse' under Section 176(2) of Cr. PC. The *Longman Dictionary of Law*, 1997 also terms exhumation as "disinterring of the buried corpse. Unlawful unless authorized." Meanwhile, it may also be defined as "Disinterment; the removal from the earth of anything previously buried therein, particularly a human corpse" (*Black's Law Dictionary*, 1968). Thus, exhumation means disinterment of body particularly of human being who was already buried. Such disinterment shall be subject to authorization by the competent authority. In Pakistan such authority or power has been given to the Magistrate under the above stated provision of Cr.P.C.

3. General Purposes of Exhumation

We know there are some crimes when the victim of the crime is alive¹; he is himself a star witness against the accused. Such witness can narrate all the circumstances under which a crime was committed against him. However, in case of murder, homicide or *qatl-i-amd* is committed; in such circumstances when the cause of death is shrouded in mystery whether the deceased died naturally or unnaturally. In such circumstances, exhumation would be a tool to inquire about the circumstances or manner of the death.

The prime aim of conducting exhumation of the buried is to judge what was the cause of death of the deceased? When there was some suspicion that some sort of foul play (Mirza et. al., 2012; Hussain, et. al., 2019) or some criminal act would have been committed against him on the basis of some new information after burial in criminal cases. Further, exhumation may also be helpful in finding out manner of death or to identify the identity of the deceased (Kremer, & Sauvageau, 2008).

The objectives of exhumation may include; suspicion of intoxication, murder, possibility of medical malpractice, manner or cause of death along with identity of the deceased or possibility of accidental death (Karger et. al., 2004). Additionally, exhumation may be required when first autopsy of the dead body does not disclose cause of death properly due any ambiguity or it is under challenge (Humayun et. al., 2010).

4. Exhumation and its grounds under Cr.PC, 1898

As far as Section 176(2) Cr.PC in nexus with Section 174 Cr.PC is concerned, the purpose of disinterment is to know the cause of death of the deceased when there is suspicion that either the deceased died due to commission of suicide or he was subject to *qatl-e-amd*, intentional killing, or killing was due to either some work place accident or road

¹ Offences relating Hurt and its kinds

accident or killing caused by animal. In short, the main aim is to determine whether the deceased was died naturally or unnaturally. For better understanding Section 176 and 174(1) are reproduced as under respectively;

“176. Inquiry by Magistrate into cause of death. (1) When any person dies when in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(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.”

Section 176 Cr.PC empowers Magistrate to hold inquiries into cause of death of any person on either of the grounds (i) death in custody of police, or (ii) under circumstances mentioned in clause (a) to (c) of Section 174 Cr.PC. It actually shows that both of the provisions are intertwined. Section 174 empowers Station House Officers (SHO) or empowered Investigation Officers (IOs) to hold investigation into cause of death of any person. It states grounds for proceeding the provision as; *“(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 intimate to the nearest Magistrate...”*. In case, Magistrate receives information as to unnatural cause of death of any person from any person or police or dissatisfied with the investigation of police held under Section 174 Cr.PC, he may cause the inquiry to be held. In extension of such inquiry, sub-clause 2 of Section 176 bestows power upon Magistrates to hold even exhumations without any application; Magistrate himself or on petition for exhumation may grant approval for such request.

The only requirement for exhumation is ‘mere suspicion’ of unnatural death. Supreme Court of Pakistan held that mere suspicion as to unnatural death of person buried is sufficed to conduct exhumation in *Ameer Afzal Baig v. Ahsan Ullah Baig*, (2006). Reliance can also be placed on *Mansab Ali v. Asghar Ali Faheem Bhatti ASJ*, (2007). In both of the above cases request for exhumation was made by some of legal heirs of the deceased. However, in *supra Mansab Ali case* (2007), and *Ghulam Nabi v. District Magistrate Okara*, (1989) recognized that on suspicion of unnatural death, legal heirs have a right to determine the cause of death.

5. Locus Standi to file petition for Exhumation

a) By Legal Heirs

In case of legal heir and close relatives, as discussed in the *supra, Mansab Ali* (2007) and *Ghulam Nabi* (1989) both cases, generally, it is the right of the relative or legal heir of the deceased that they can seek exhumation of the deceased. Similarly, Supreme Court of Pakistan in *Supra Ameer Afzal Baig* (2006) held that at least legal heirs have a right to have exhumation for the removal of their suspicion. Reliance can also be placed on 1997 PCr.LJ 126 wherein exhumation on petition of maternal uncle was allowed. Yet, we cannot find anywhere in judgment of Supreme Court in *Supra Ameer Afzal Baig Case* (2006) or above other mentioned cases that exhumation on application of stranger could not be allowed or Magistrate own his own cannot proceed for exhumation. Reliance can also be placed on cases; 1985 Law Notes Lah. 1010, and 1985 MLD 782.

Nevertheless, it was Peshawar High Court which, in recent past, stretched the idea one step ahead by calling exhumation as unnecessary and a sin when the legal heirs were not willing for it, in *Yar Muhammad v. The State*, (2017) whereby impugned order of Magistrate allowing the petition of the local police for exhumation was dismissed by the Peshawar High Court on ground that father and all legal heirs unanimously were of the view that the deceased committed suicide. It is pertinent to mention that witness statements of the numerous legal heirs and relatives of the deceased were recorded by the police. Therefore, they did not want to exhumation as it will further it would against the dignity of dead body and it would also amount to desecration of the grave. Court also considered unjustified exhumation is a sin under Islam and expressed it in the following words;

“The petitioner being father of the deceased is the trustee of the grave of her deceased daughter to keep it maintained not only the grave but respect and dignity of the dead body also. Islam accords great respect to the dead body of a Muslim. Exhumation without any justification is a sin in Islam. Order of exhumation must be based on detailed reasoning, logic and fairness.”

Overall, the judgment set a total different jurisprudence. Plain reading of Section 176(2) in nexus to Section 174 CrPC crystal clearly empowers the police to inquire about the death cause. Thus, the application was moved by police for exhumation. When allegedly it is claimed by all legal heirs that suicide was committed by the deceased and no autopsy was conducted and she was buried; exhumation could have been ordered by the Court as suicide is not a natural death by any stretch of imagination.

In-depth analysis of facts of *Supra Yar Muhammad* case (2017) suggests that failure of police to collect any evidence to unnatural death and unanimous statements of various witnesses who were legal heirs or relatives of deceased, both facts in nexus resulted into such a decision. Perhaps, it may not be a good precedent; in terms of jurisprudence, it may amount to *per incurrium*.

In Pakistan, honour or customary killings of women by their relatives are rampant (Lari, 2011; Fatima, et. al., 2017) and some studies found such crime ratio in Pakistan is one of the highest in the world (Knudsen, 2004); the possibility of killings by any of legal heirs cannot be easily negated. In such situation, non-ordering of exhumation --and calling it as a sin in Islam-- it would not be an upright approach. Islam categorically recognizes right of life as one of the most scared right in Islam. Holy Prophet PBUH once said one who saves one life saves whole humanity and one who kills someone kills the whole humanity.

Thus, it is a duty of state to protect the divine right of life, and to condemn the culprits of any suspicious killings.

To the contrary, there are certain decisions of higher courts in Pakistan which disallowed the exhumation petitions moved by the accused relatives when the cause of death was already known during investigation or inquiry, and the purpose was to harass the complainant (Zafar Ali v. Mst. Mardan, 2017; Zaffar Iqbal alias Kaka v. Additional Sessions Judge and 3 others 2005). Courts should take extra caution while trying such petitions of the accused relatives as it may be a tool to hassle court, complainant, or relatives and investigation agencies.

b) Stranger as petitioner

To inquire about cause of death and to punish the offenders, plethora of judgments of Supreme Court of Pakistan and other Higher Courts envisages that Magistrate is empowered to order exhumation on a ‘*mere suspicion*’ which may be accruing from the information of a stranger even. The Lahore High Court in *Mst. Shama v. The State*, (2017) held that there is no specific requirement under the Cr. PC that *locus standi* is only available to any definite individual to move petition for exhumation. High Court further extends that even Magistrate can on his own motion further proceed to inquire into the cause of death. The judgment expresses such view point in the following words;

“notwithstanding, sovereign paramountcy of the State requires no approvals or permissions by the relations, therefore, to achieve the above purpose any person can set the law into motion; subsection (2) of Section 176 of the Code of Criminal Procedure, 1898 does not put any clog of locus standi upon an applicant to approach a Magistrate to undertake the exercise; it can be carried out by a Magistrate even on his own nor any specific period of limitation for this purpose is provided under the law.”

It can be ordered on even request or information of stranger. Purpose is to unearth true facts about the death and set law into motion as inquire about the happening of the cognizable offence. Reliance can be placed on cases; *Damsav v. Assistant Mukhtiarkar Revenue/Special Judicial Magistrate and 2 others*, 2010; 2006 YLR 2953)

c) Police request for exhumation

As far *locus standi* of police is concerned, it is duty of state to protect the lives of citizen (Mst. Shama Supra case, (2017). In circumstance of suspicion or information police may proceed to file application before the magistrate under rule 25.34 of Police Rules, 1934. The SHO, or superior officer or officer lawfully authorized who is investigating into cause of death of any person who is already buried without autopsy shall record such information along with the grounds of such information. Thereafter, he shall forward such information to the nearest Magistrate. Meanwhile, he

shall also make arrangements for guarding or protection of the deceased's grave. In case, Magistrate order exhumation and it is not to be conducted by Magistrate, police may conduct exhumation in presence of two witnesses, "inhabitants from neighbourhood", while complying with Section 174 CrPC and examining such witnesses with regard to identity before starting investigation. However, such disinterment by police shall not be made when three weeks passed after burial of the corpse without opinion of 'District Health Officer' and permission of the Magistrate.

6. Limitation for filing exhumation Petition

Insofar the issue of limitation for filing application to disinter corpse, neither Cr.PC nor Limitation Act, 1908 envisages any definite period to file such petition. Any party may aver that Article 181 of Limitation Act would be germane in circumstances when limitation period is not given. Implying it, limitation period shall be three years. Many a times, when exhumation petitions are filed, the first objection raised by the respondent or objectors is used to be that huge span of time, e.g., one or two or more years, has already been lapsed from the day of burial of the deceased. Any such exhumation followed by autopsy shall not be of any benefit.

Nevertheless, such argument is misconceived in *toto*. Apex or Higher courts in Pakistan held, time to time, that for filing of such application, no limitation period would run.

In a case, lower court to higher court it was held that limitation would run in exhumation cases and any delayed exhumation was of no fruit; later, the aggrieved party approached to the Apex Court of Pakistan whereby it overruled such objection and held exhumation can be held even after one year of passing from the date of the burial of the deceased. Meanwhile, it further directed that no specific time span is need for holding of such inquiry as to cause of death. *Muhammad Ramzan and others v. The State and another* (1987).

Later, similar opinion was taken up by courts in numerous cases including *Faryad Ali v. The State case*, (2008); *Mst. Ghazala Begum v. The District Magistrate, Khanewal*, (1996); *Muhammad Hanif v. ADJ Pakpattan Sharif*, (2016); *Supra Mst. Shama v. The State*, (2017); *Muhammad Saleem v. The State*, (2014).

Such interpretation of the courts originates from the estimation of *Modi* expressed in *Medical Jurisprudence and Toxicology*, "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" (Modi, 2013; Rajesh Bardale, 2011).

7. Exhumation for another fresh post mortem

Once exhumation ensuing post mortem is conducted on the corpse of the dead, subsequent exhumation followed by the autopsy may be questioned or objected. In such situation, a Magistrate should act judicially and apply the prudence while hearing all the parties including accused, complainant (if any) or Prosecutor; he should allow the second such petition *Khizhar Hayat v. The State*, (1995); *Muhammad Anwar v. District Magistrate; Sahiwal* (1991). He should keep in mind the following questions;

- i) Whether the cause of death during investigation or earlier post mortem or exhumation inquiry sufficiently or just-fully was explained or not?
- ii) Whether there was any intended or unintended error committed by the Medical petitioner or not?
- iii) Who is filing second petition for exhumation either accused or legal heirs/close relative of the deceased; or
- iv) Whether accused's petition is to harass the legal heirs or relatives of the deceased; to disrespect or degrade the body of the dead?

In criminal law, each case stands in its own footing due to variance of facts. Therefore, above provided issues may only provide a tentative guideline; perhaps, other circumstances may lead to a different conclusion.

For instance, under conditions while answer to first question is 'no', and to second query is imperative, and petition is filed by the legal heir or close relative; Magistrate should allow the petition. Reliance can be placed on last *supra three Khizhar Hayat* (1995), *Muhammad Anwar* (1991), and *Muhammad Hanif v. ASJ Pakpattan Sharif*, (2016). Nevertheless, the decision of the court may diverge in situation answer to first two questions in negative and accused, either amongst legal heirs or strangers, filed such petition.

In *Zafar Ali v. Mst. Murdan*, (2017), case better illustrates to above given threshold, wherein the cause of death was sufficiently provided in inquest report under Section 174 by police followed by post mortem report of the Woman Medical Officer, without any error, on petition of accused Zafar Ali, allowance of fresh exhumation would amount to harassing the legal heirs of the deceased; it would also be against the cardinal principles provided for exhumation in Islam.

As an additional requirement for fresh exhumation, *supra* judgments of *Khizhar Hayat case* (1995) and *Muhammad Anwar*, (1991) require a Magistrate to issue notice to the Public Prosecutor and to the opposite party before grant of fresh petition.

8. Non-registration of First Information Report (FIR) & holding exhumation inquiry

At times, it is confused that non-registration of FIR creates a bottleneck on holding of the exhumation. Such objection if outstretched and acknowledged by any Magistrate while determining any such petition, it would, without any iota of doubt, frustrate the object of the scheme of Section 174 in nexus with Section 176 of Cr. P.C. The core aim of unearthing corpse is to know about the cause of any suspicious death; as a consequence, it may perhaps be likely that FIR might not have been registered. Lahore High Court in *Khalid Pervez Through Special Attorney v. Haji Akhtar Nisar* (2008), and *Supra Mst. Shama v. The State*, (2017), held that lodging of the FIR is in no fashion a *sine qua non* for holding a probe into any foul play causing demise of any person. Reliance can also be placed in 2010 MLD 5. *Contra* view was taken in *Ghulam Mustafa v. The State* (2015) in which Lahore High Court held that resorting to Section 174 and 176; police can only collect evidence after registration of FIR.

Paradoxically, *supra Ghulam Mustafa case* (2015) would be against the quintessence of the Section 176 Cr. P.C; setting up misnomer not only against the *Mst. Shama Case* (2017), but also it refutes to the jurisprudence set in *Ameer Afzal Baig* (2006) envisaging mere suspicion is suffice for disinter corpse probe.

9. Remedy against order passed under Section 176(2) Cr. P.C.

In case an order is passed by Magistrate under Section 176(2) Cr.PC, any aggrieved person of such order may want to challenge such direction. It can be confused that such an order is either a judicial or executive order.

Pre-partition, 1947 jurisprudence had divergence of opinion on the issue. In AIR 1958 PJ. 430 and AIR 1959 Mad. 294, Courts held that object of the Section 176 is keep an additional check on the police investigating about the suspicious deaths. Any order passed by Magistrate under Section 176 is passed in administrative capacity. Hence, such order cannot be challenged in revision. Nevertheless, in *Laxminarayan Tiimnanna Kavki* (1928), Bombay High Court held that proceeding taken by Magistrate under Section 176 Cr.PC is 'inquiry' in terms of Section 4(k) of Cr.P.C. It defines inquiry "It includes every inquiry, other than a trial conducted under this Code by a Magistrate or Court". The proceedings under Section 176 fall within the scope of the inquiry definition. Further, it might be questioned whether such inquiry was a judicial or executive proceedings. The definition of judicial proceeding is provided in Section 4 clause (m). It states "Judicial Proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath". Examining the inquiry proceedings u/s 176 CrPC certainly fell within the ambit of the 'judicial proceedings' as Magistrate could record statement of witnesses on oath. Thus, exhumation inquiry was judicial and revision under Section 435 or 435A was competent. Later, Pakistani Courts in various cases adopted the interpretation of Bombay High Court *supra* titled verdict. Reliance can be placed on *Khuda Bakhsh case* (1957); *The State v. A Ch. Altaf Hussain Magistrate 1st Class, Gujrat and others* (1978); *Muhammad Anwar v. Sheikh Qurban Ali and 3 others* (1973); *Ghulam Hussain v. District Magistrate, Muzaffargarh and 3 others*, (1993); *Mst. Nargis v. The District Magistrate Gujrat and others* (1985); and *Mansab Ali v. Asghar Ali Faheem Bhatti ASJ, & others* (2007).

10. Jurisdiction

The matters relating jurisdiction many a times remains perplexing for the litigants and also for the courts. Parties, on occasion, suffer when they file exhumation petition; it is rejected for the lack of jurisdiction. Every so often, it may be looked into which court has the jurisdiction either the Magistrate under whose area the corpse of the dead is buried or the Magistrate under whose area FIR is registered, or the Magistrate who has been directed by higher court to hold such inquiry?

First, in case any direction has been issued by the Court of Session or High Court or Apex Court of Pakistan specifically directing any Magistrate, no other Magistrate but the one who is so directed shall hold such inquiry.

Secondly, in case FIR is registered regarding the suspicious killing of the deceased whose exhumation is sought, the area Magistrate under whose jurisdiction such FIR is recorded, the exhumation petition shall be entertained by such Magistrate; he will do the exhumation.

Thirdly, in case FIR is lodged; corpse is buried in some other area Magistrate jurisdiction either in different District or Province, the Magistrate in whose area FIR is registered he shall entertain the exhumation petition, but he shall send a request to the Sessions Judge in whose District/jurisdiction the corpse of the dead is buried. Further, such Sessions Judge shall nominate any Magistrate from the District who shall hold inquiry of exhumation.

Forth, the Magistrate under whose area of Magistrate the dead body of the deceased is either recovered or buried shall have the jurisdiction to try the petition and hold exhumation (*Abdul Ghani v. Ist Judicial Magistrate, Tando Adam & Others*, 2018), in case no FIR is registered nor any nomination of Magistrate is made by higher courts, but dead body is buried in different area Magistrate jurisdiction, only the Magistrate in whose territorial jurisdiction, dead body is buried shall have jurisdiction to entertain such petition, subject to FIR registration rule provided in third point.

10. Conclusion

To conclude, the basic aim of the exhumation to fetter out the cause of death of any suspicious killing and to further holding of judicial inquiry into the matters of envisaged in Section 174 of Cr. P.C. 1898 i.e., relating to judging either the death of the deceased was natural or unnatural; in cases especially when earlier post mortem was not conducted and deceased was buried, or in previous autopsy of the corpse, Medical Officer committed any material error as to determination of cause of death.

Concerning pertinent debate that who can file petition u/s 176(2) for exhumation, in this regard, it can be easily concluded, in general, *locus standi* is available to any person either legal heir or relative or any stranger or on request of the police. However, in criminal cases, such general rule cannot be taken as a *rule of thumb*, rather each case has its own peculiarities; thus, must be decided by according to facts. For instance, a legal heir being accused may not be given much credence than a stranger. Further, another substantial issue is the period within which such petition can be filed? Pakistani Courts follow the opinion of Modi who envisaged that no limitation period was provided in India for limitation within which exhumation had to be conducted, the Supreme Court of Pakistan in *supra Ramadan Case* (1989) held accordingly. In addition, the debate pertaining to subsequent or fresh or second exhumation is also of paramount consideration; as earlier identified, there may be *de-novo* inquiry in context when in former exhumation following autopsy, and Medical Officer committed any material fault to conclude the reason of demise.

Either principal or fresh disinterment, it is once ordered; it can be confronted by the person aggrieved of such an order. Exhumation's order is passed under his judicial capacity; consequently, it is a judicial command. In pre-partition jurisprudence, there was departure of opinion by Indian Courts as to the nature of order. *Laxminarayan Tiimnanna Kavki supra case*, (1928) held such proceedings were judicial; so as the nature of order. The dictum of *supra* Indian case was later followed by Pakistani Courts. Additionally, the matter pertaining to jurisdiction of Magistrate in exhumation inquiry is much cumbersome; however, it is tried to simplify it in three facets.

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