

"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

THURSDAY, THE 16TH DAY OF DECEMBER 2021 / 25TH AGRAHAYANA, 1943

WP(C) NO. 33874 OF 2015

PETITIONERS:

1	KERALA MEDICO LEGAL SOCIETY REPRESENTED BY ITS SECRETARY DR.HITESH SANKER T.S., AGED 45 YEARS, S/O.T.M.SANKARANARAYANAN, RESIDING AT THOTTUNKAL HOUSE, KOZHIKUNNU, MULANKANNATHUKAVU P.O., THRISSUR-680596.
2	DR.JIJU V.S. AGED 38 YEARS S/O.V.K.SREEDHARAN, RESIDING AT SREEPADAM, KANTHAKKAD, KONDOTTY P.O., MALAPPURAM-673638.
	BY ADVS. SRI.A.JAYASANKAR SRI.MANU GOVIND SRI.C.V.MANUVILSAN SRI.S.SABARINADH

RESPONDENTS:

1	THE GOVERNMENT OF KERALA REPRESENTED BY ITS CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM-695001.
2	THE DIRECTOR OF HEALTH SERVICES THIRUVANANTHAPURAM-695031.
3	THE DIRECTOR OF MEDICAL EDUCATION DIRECTORATE OF MEDICAL EDUCATION, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM-695011.
4	THE PRINCIPAL SECRETARY TO GOVERNMENT DEPARTMENT OF HOME, SECRETARIAT, THIRUVANANTHAPURAM-695011.

5	THE SECRETARY TO GOVERNMENT HEALTH AND FAMILY WELFARE DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.
6	THE JOINT SECRETARY TO GOVERNMENT HEALTH AND FAMILY WELFARE DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.
7	<u>ADDL.R7</u> KERALA GOVERNMENT MEDICAL OFFICERS' ASSOCIATION PALAYAM-AIRPORT ROAD, VANCHIYOOR, THIRUVANANTHAPURAM - 695 035, REPRESENTED BY ITS HONORARY GENERAL SECRETARY. IS IMPLEADED AS PER ORDER DTD 8.12.2015 IN IA NO.17739 OF 2015
8	<u>ADDL.R8.</u> N.A.NELLIKUNNU, M.L.A., AGED 67 YEARS, S/O.ABDUL KHADER, BANGARKUNNU ROAD, NELLIKUNNU, KASARAGODE-671 121. IS IMPLEADED AS PER ORDER DATED 29-10-2021 IN IA 1/2021.
	BY ADVS. SRI.N.MANOJ KUMAR, STATE ATTORNEY SRI.K.R.RANJITH, GOVERNMENT PLEADER M.ISHA SRI. K.K.MOHAMED RAVUF FOR ADDL.RESPONDENTS SRI.AMAL KASHA FOR ADDL.R7 SRI.T.B.HOOD SRI.A.MOHAMMED

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 06.12.2021, THE COURT ON 16.12.2021 DELIVERED THE FOLLOWING:

"C.R"

P.V.KUNHIKRISHNAN, J

W.P.(C)No. 33874 of 2015

Dated this the 16th day of December 2021

JUDGMENT

The right to dignity and fair treatment is not only available to a living man but also to his dead body. A decent burial of a dead body of a human being immediately after the death, if intended by the kith and kins of that person is far more important than certain legal formalities to be conducted if it is an unnatural death. The obligation of the State to do the needful in such a situation is paramount. The laws of procedure, whether statutory or otherwise can not be a hurdle for an early burial of a dead body, if the relatives and friends of the dead person requested for the same. Nowadays if unfortunately, an unnatural death happened in a family, the bereaved family members of the dead person can not sit in their house, but they have to stand in a queue in front of the police station for early conduct of the inquest of the dead body and thereafter in front of the hospital authorities for early conduct of the postmortem. This is not only the worry of the bereaved family of the dead person but the representatives of the people like local M.L.A(Member of Legislative

Assembly), Panchayath presidents, Ward members etc. Everybody will be either in the police station or in the hospital to get the dead body released early so that the relatives can see the dead body finally and they can pay homage to it and do their customary religious rights as per their religious belief.

2. The first hurdle for the delay in getting the dead body to the relatives is probably the timing scheduled for the conduct of autopsy which is to be done by Medical experts. From time immemorial, there is a belief that autopsy can not be conducted during the night and it is to be conducted in broad daylight. If we go through the medical jurisprudence and Toxicology Textbook of Mody, it can be seen that as far as possible the postmortem examination should be performed in daylight and not in artificial light. According to medical books, the verification of colour matching is more accurate in natural light than in artificial light. According to the old medical jurisprudence book, the differentiation of various colours under artificial light is misleading and all the striking colours can't be made out easily at night under artificial light. Since much water has flown below the bridge, the technology is now completely changed. The State of Kerala came with a brave decision by way of a Government order in 2015 implementing 24 hours autopsy and accorded sanction to conduct night autopsy in five Government Medical Colleges namely, Thiruvananthapuram, Alappuzha, Kottayam, Trissur, and Kozhikode and also in the General Hospital

Kasargod as a pilot project. The M.L.A fund is directed to be utilised to start the facility in Government Hospital, Kasargod. Exhibit P4 is the order.

3. When the above Government order was notified, the Kerala Medico-Legal Society represented by its Secretary and another Doctor who is a member of the Forensic Medicine Faculty of Kottayam approached this Court with the following prayers:

“i. issue a writ in the nature of Mandamus commanding the Respondents to provide the manpower and facilities, as contemplated in Exhibit P4, within a time frame to be stipulated by this Hon'ble Court;

ii. Issue a writ in the nature of Mandamus directing the Respondents not to compel the members of the Petitioner Society for performing autopsies on a 24-hour basis, unless the personnel for conducting autopsies and essential infrastructure are made available;

iii. Pass such any other direction, order or reliefs, as this Hon'ble Court may deem fit in the interest of justice, equity and good conscience.”

4. Ext.P4 is the Government Order, G.O(MS) No.239/H/FWD

dated 26/10/2015 of the Government of Kerala allowing night autopsy in five Government Medical Colleges and at General Hospital, Kasargod. According to the petitioner, Ext.P4 order is impracticable due to the following reasons.

“i. Police Surgeons will have to attend Court frequently to give evidence. The Police Surgeons working in Medical Education Department will have to take classes to MBBS students and also to postgraduate students in Forensic Medicine;

ii. They will also have to attend to duties in relation to internal and University examinations of undergraduate and postgraduate students;

iii. They will have to be engaged in discussions with investigating police officers while giving statement as per section 161 of Criminal Procedure Code, 1973, which may extend to hours;

iv. All exhumations and site post-mortems are to be done by the police surgeons;

v. The staff pattern fixed in 1960 is still followed and this has created a

situation where every Forensic doctors in Government Service are overburdened;

vi. Most of the Forensic Medicine departments in Government Medical Colleges is that, only one or two faculty will be available in the department on most of the days;

vii. If night autopsy is implemented with the present staff strength, many of them will have to work continuously for two or three days to fulfill all these responsibilities;

viii. Night autopsy should be avoided as far as possible in complicated cases. In many of such cases the second opinion may become necessary which may not be available during the night;

ix. The practice followed in the Forensic medicine departments is that all available doctors will be present during the conduct of such complicated cases;

x. This would not be possible during the night because the insufficient opinion of a relatively inexperienced single person will have to be depended and this may lead to loss of evidence and miscarriage of justice;

xi. The Government is shifting posts to the newly established medical colleges to comply with the requirements of the Medical Council of India. This is an added burden which shall be taken note of. In such circumstances, implementation of this order would create disastrous effects;

xii. Various Mortuaries are situated at places distant from the main hospital building, in many institutions. They are devoid of a separate compound wall. The security problem to the doctors and staff during the night shall also be addressed while night autopsy is implemented;

xiii. No mortuary in the state has facilities for accommodation to doctors and staff during the night;

xiv. Artificial light matching daylight is not provided in any mortuary. The Police department has not provided police vehicles to all Forensic Medicine departments even though an order for the same was issued by the Home department decades ago;

xv. If doctors are the makers of the medico-legal reports, the investigating police officers are the intermediary users and the Judiciary is the end user of such reports.

Incomplete, insufficient and erroneous reporting may affect the justice delivery system and may cause the miscarriage of justice;"

5. This Court admitted this writ petition because of the concern pointed out by the petitioners and passed an interim order on 09.11.2015, not to compel the members of the petitioner society to conduct autopsies beyond the present time limit of 5 p.m., without the infrastructural facilities are provided like additional manpower as stipulated by circulars from Government of India and also artificial lights. The interim order was extended until further orders on 17.06.2016.

6. Thereafter the matter came up for consideration only on 29.10.2021. The M.L.A of Kasargod constituency filed I.A.No.1 of 2021 to implead himself as an additional respondent. I.A. was allowed on 29.10.2021. On that day, the learned Government Pleader submitted that he will get instruction about this matter. Again the matter came up for consideration on 03.11.2021. On that day also the case was adjourned to 10.11.2021. Again the matter came up for consideration on 10.11.2021. On that day, this Court directed the Government Pleader to get instruction and file additional statements, if any, on or before 23.11.2021. The case was again listed on 23.11.2021. No counter or additional statement was filed on behalf of the Government

officials on that day also. This Court conveyed the dissatisfaction to the Government Pleader for not taking any interest in this case even though the writ petition is pending from 2015 and the issue involved in this case is a serious one affecting the entire society. Thereafter the case was listed on 06.12.2021. In the meanwhile, respondents 3 and 5 filed a counter affidavit.

7. Respondent No.3 is the Director of Medical Education. In the counter affidavit, it is stated that the Government of India, Ministry of Health and Family Welfare has issued guidelines by office memorandum No.H-11021/07/2021-H-I dated 15.11.2021 for conducting postmortem in hospitals after sunset fulfilling the fundamental requirements. The 3rd respondent submitted that, as per the guidelines, the fitness and adequacy of infrastructure shall be assessed by the hospital in charge to ensure that there is no dilution of evidentiary value and also the adequate infrastructure facilities have to be ensured. It is also submitted by the 3rd respondent that the guidelines further state that, cases under categories such as homicide, rape, decomposed bodies, suspected foul play, etc need not be subjected for postmortem during nighttime unless there is a law and order situation. It is also submitted by the 3rd respondent in the counter that the night autopsy is done for special cases as noted below:

- (a) Those cases which involve exigencies for the purpose of organ transplantation (wherein there is no suspicion regarding cause of death).

(b) In a law and order situation.

(c) For those cases of mass death due to accident or disasters (only upon special orders issued by district collectors).

8. According to the 3rd respondent, at present there are no permanent facilities for conducting 24 hours autopsy in the Government Medical Colleges. According to the 3rd respondent, the availability of legal persons and completing inquest during the night will be difficult without proper assistance. The 3rd respondent also raised an apprehension that sometimes the relatives and the public may face difficulties in public homage and cremation while releasing the body at night after autopsy. It is also submitted by the 3rd respondent that, out of the 43 sanctioned posts of forensic medicine faculties in various categories in five Government Medical Colleges, 37 posts are occupied and six posts are lying vacant. It is also stated that 35 forensic medicine specialists are necessary for Government Medical College, Thiruvananthapuram itself whereas only 10 faculties are there in Government Medical College, Thiruvananthapuram at present. According to the 3rd respondent, a similar situation exists in other Medical Colleges also. It is also stated that the supporting staff is also insufficient. Therefore, an increase in working hours may require the creation of more posts by the Government. A chart is produced in the counter affidavit to show an example as far as the Government Medical

College, Thiruvananthapuram is concerned. The additional posts to be created are also mentioned in the chart. Similar additional posts as per this pattern are required in other major medical colleges also. The chart extracted in the affidavit of the 3rd respondent is extracted hereunder:

Sl. No.	Designation	Present Strength	Required Strength	No. of posts to be created
1	Professor	2	2	0
2	Associate Professor	2	5	3
3	Assistant Professor	11	22	11
4	Technician	2	8	6
5	Laboratory Technician	1	8	7
6	Junior Lab Technician	1	4	3
7	Morgue Attendants	nil	8	8
8	Cleaners	8	15	7
9	Security staff	nil	5	5
10	Driver	nil	2	2
11	Clerk typist	1	3	2

9. It is also submitted that full fledged mortuary with the following amenities are required to conduct autopsy.

- Sufficient lighting equivalent to that of natural light certified by the appropriate authorities.

- Separate duty rooms/resting space at a secure area for both male and female medical and paramedical staff. The public coming to the mortuary are most often inebriated, unruly and brash.
- A fully fledged histopathology lab and a wing of the toxicology division of chemical examiners laboratory have to be set up.
- Specifications of the autopsy room can be provided once the spot of the proposed construction is identified.
- Adequate ventilation.
- Fly proofing
- Running water facility.

10. These are the facilities and infrastructures demanded by the 3rd respondent for implementing Ext.P4 Government Order.

11. The 5th respondent filed a counter affidavit. Ext.P4 is an order passed by the 5th respondent. The 5th respondent states that for implementing night autopsy additional posts have to be created and infrastructure facilities have to be strengthened. An increase in the number of faculty and other paramedical staff are inevitable for conducting the night autopsy is the contention of the 5th respondent. Moreover, it is also submitted by the 5th respondent that, as per the guidelines adequate infrastructure facilities have to be ensured for

implementing night autopsy. The 5th respondent filed the counter affidavit on 01.12.2021 in which it is stated that at present there is no facility for conducting a round-the-clock autopsy in Government Medical Colleges. It is also stated that the availability of legal persons and completing inquest during the night is very difficult. Even though the 5th respondent issued Ext.P4 in the year 2015, they have not withdrawn Ext.P4. But even now the 5th respondent says that there are no infrastructure facilities for implementing night autopsy. This stand itself is surprising.

12. The additional 8th respondent who is the M.L.A of Kasargod constituency filed a detailed counter affidavit disputing the allegation in the writ petition. The 8th respondent contended that, even as per Clause 17(1) and (2) of the Kerala Medico-Legal Code, which is approved by the Government as per G.O(MS)No.232/2011/Home dated 22.10.2011, postmortem at night is permitted. The MLA deposed in the affidavit that a minimum of 200-300 causalities are there every day due to Corona Virus disease and due to the refusal to do postmortem during the night, on the reason of stay order of this Court, is making misery to the public at large. The counsel who appeared for the 8th respondent submitted that about 50,000 postmortems are done every year and since no postmortem is conducted after 5 pm and during the night, the funeral of even those persons who died of Corona Virus disease is now delayed causing very high health risk and social problem. The counsel for the 8th

respondent submitted that the time immemorial concept of not conducting postmortem during night hours is to be removed because the technology is developed that much. The artificial situation of daylight is possible because of the new technology. The counsel also submitted that in Maharashtra, the Government issued strict orders to conduct postmortem in dead bodies immediately, irrespective of time. The counsel takes me through Ext.R8(a) which is an order passed by the District Collector, Kasaragod in which administrative sanction was granted for doing the work of installing lighting facility to postmortem room at General Hospital, Kasargod. Ext.R8(b) is a letter from the Superintendent, General Hospital, Kasaragod to the 8th respondent, requesting to allot the amount from MLA fund in order to complete the work as per Ext.P4. The counsel who appeared for the 8th respondent takes me through Ext.R8(c) issued by the District Medical Officer, Kasaragod to the 8th respondent in which it is clearly stated that there are sufficient light facilities in the hospital for conducting night postmortem. But the District Medical Officer only stated that there is only one Forensic Surgeon post in the hospital. Two Forensic Surgeon posts, 3 Nursing Assistant posts, and also 2 Hospital Attendant Grade-II posts are to be created for conducting the autopsy. The counsel then takes me through Ext.R8(d) – which is a question raised by the 8th respondent and the answer given on the floor of the Kerala Legislative Assembly by the Hon'ble Minister. It is stated that the writ petition is

pending before this Court and the contents of the writ petition and the lawyers who are appearing in the writ petition are also informed to the 8th respondent. Ext.R8(e) is another question raised by the 8th respondent on the floor of the Assembly on 04.11.2019. In the answer given by the Hon'ble Minister to that question, it is stated that the lighting facility is the main hurdle for conducting postmortem during night hours and the Government is taking all steps to remove the hurdles to implement Ext.P4 order. Ext.R8(g) is another question raised by the 8th respondent on the floor of the Assembly regarding the same issue. The Hon'ble Minister informed the petitioners that the Government is taking steps to file a counter affidavit in the writ petition. According to the 8th respondent, the Government, after passing Ext.P4 order, is not taking any steps to implement the same and the sufferers are the general public. A reply affidavit is also filed by the petitioners to the counter affidavit filed by the 8th respondent in which also the main thrust is that there is lack of facilities in the hospital. The petitioners filed a reply affidavit to the counter affidavit of the 8th respondent and contended that they are not against the conduct of night autopsies, but their submission is that, without infrastructure and sufficient lighting facilities, the night autopsy is impossible.

13. The 7th respondent also filed a counter affidavit. The 7th respondent is the Kerala Government Medical Officers' Association. They also submitted that there is no sufficient infrastructure in the

hospital to do the night autopsy. The 7th respondent also produced a Division Bench judgment of the Madras High Court in W.P. No.10694 of 2019 dated 16.04.2019, which was a writ petition dismissed with cost and the writ petition was filed challenging an order by which the Tamil Nadu Government has withdrawn the earlier order to conduct night autopsy.

14. I heard the counsel for the petitioners Sri.Manu Govind, Government Pleader, and Sri.K.K. Muhammed Rauf for the 8th respondent. I also heard the counsel who appeared for the 7th respondent.

15. According to my considered view, it is the duty of the State to complete the legal formalities forthwith if an unnatural death happened. The officials of the Government should hand over the dead body to the kith and kins of the deceased person immediately. It is part of the fundamental right of a person under Article 21 of the Constitution of India to live with dignity and the dignity includes not only the dignity of a person when he is alive but also the dignity following his death. A decent burial of the dead body immediately after death without unnecessary delay in completing legal formalities is also a part of the constitutional right. The State cannot say that there is no adequate infrastructure or insufficient staff in the hospitals and there are financial difficulties to create such additional facilities for early completion of legal formalities in unnatural death cases. I am aware

that this Court is not an expert to say that night autopsy should be conducted in all the hospitals. It is also true that from time immemorial there is a concept that autopsy will be conducted only in the daylight. But as I said earlier, the scenario when the medical jurisprudence was written by Modi is changed a lot. Much water has flown under the bridge and now even in the developed countries, night autopsy is conducted. The 8th respondent produced an article written by Dr.B.Umadathan as Ext.R8(f). He was the Director of Medical Education, Kerala. There is nothing to disbelieve his statements in Ext.R8(f) article. It will be better to extract the article as such:

"If you have seen people waiting in front of a mortuary to get post-mortem done on the body of their relative, you can never forget their faces. An archaic practice of doing the examination only in daylight piles more misery on their plight. Authorities turn a blind eye to the inconvenience and hardship they cause to the relatives of a deceased when they refuse to accept an application for post-mortem after fixed hours.

This strange practice is unique to Kerala. District hospitals and Medical College hospitals accept applications for post mortem from 9 in the morning to 4 in the evening. Any request received after the deadline will be considered only for the next day, forcing the relatives to wait with the dead body.

Doctors and forensic surgeons hesitate to receive

applications for post-mortem after 4 in the evening, citing a couple of government circulars. Nothing in the criminal procedure code or the orders of the Police Department bars post-mortem at night. For some reason, doctors and surgeons continue doing it in the daylight, following an unwritten convention. Once an unnatural death is reported, the inquest takes at least two hours to complete. The body can be taken to the mortuary for post-mortem only after this.

When the relatives of the deceased reach the mortuary after going through the legal proceedings with the police, they are often told that the time is up.

I have faced this situation throughout my service life. I had to turn many people away because they had come late. I had to look the other way when their eyes were well up with tears.

Doctors and forensic surgeons refuse to conduct post mortem, citing a circular from the Health Department and another from the Home Department. Faced with a volley of criticism, the Home Department issued an order on February 23, 2013, directing the medical colleges in Thiruvananthapuram, Alappuzha, Kottayam, Thrissur and Kozhikode to conduct post-mortem at night as well. But this order left a loophole as it said post-mortem may be conducted at night, instead of clearly stating that it has to be done at night as well.

It also says that post-mortem can be done with the

help of the duty personnel as and when associated facilities are prepared. The order has not been implemented even after two years.

The doctors at the Alappuzha Medical College are worth emulating though. Only here the doctors conduct post mortem and release the body even though the application is received late in the evening. Why can't the other Medical Colleges follow the same system?

Post-mortem is done smoothly at night in many foreign countries. Major hospitals in India too follow this practice.

People who insist that post-mortem has to be done only in the daylight and that night-time proceedings will tinker with evidence are trying to sabotage the latest government order.

The Health Department has to create facilities such as the shadowless lights in mortuaries so that post-mortem can be done round the clock. The state government has to release a special fund for this.

(The writer is the head of Forensic Department at the Amrita Institute of Medical Sciences, Kochi. He had served as the Medical Education Director, Government of Kerala)"

16. The above article is written in the light of Ext.P4 Government Order.

17. When the Government came forward with Ext.P4 order, it is improper on the part of the petitioners to approach this Court with

certain simple objections which are not at all convincing. In the writ petition, about 15 reasons are mentioned to contend that implementation of Ext.P4 order is impractical. The same is extracted in Paragraph 4 of this judgment. Except the point of insufficiency of staff and infrastructure facilities including lighting facilities, the other grounds mentioned in the writ petition are not acceptable. The government doctors and forensic experts are the pride of our country. All of us know their hard work and commitment. This Court cannot shut its eyes to the serious and complicated nature of the work while a doctor is conducting postmortem in medico legal cases. The State must provide all facilities including lighting facilities to implement Ext.P4 in its letter and spirit. Medical experts also should understand that the financial condition of our State is not good. But if the Government is providing a minimum facility without any luxury because of the poor financial condition, they should cooperate with the Government especially in a situation like the conduct of night autopsies. In other words, when the Government is providing an "**air conditioned Maruti Car with full facilities**", the doctors cannot claim or demand a "**BMW car with its royal facilities**". I made this observation not to insult the doctor's community or to underestimate their hard work and commitment. They are doing a fantastic job. But doctors are citizens first and then only their profession will come. They are also bound to serve people, with limited resources available in the State, according to

me. According to me, the Government should provide all minimum infrastructure including lighting facility to implement Ext.P4 order even if there are financial difficulties forthwith because it is the fundamental right of a person for a decent burial without delay even if his death was unnatural.

18. Kerala Medico Legal Code is a guideline for medico legal post-mortem examination. The Government, after having examined the guidelines in Kerala Medico Legal Code, was pleased to approve the Medico Legal Code as per G.O.(MS) No.232/11/Home dated 22.10.2011. Clause E of Kerala Medico Legal Code deals about the additional guidelines. Clause E (IX) of the Code deals about post-mortem examination. Clause E (IX)(17) deals with the timing of the post-mortem examination. It will be better to extract Clause E (IX) (17) here:

"(17) The time for conducting postmortem examinations is fixed between 9.00 am and 5.00 pm. The minimum time required to conduct one medico-legal postmortem examination is one hour. When there is more than one case of postmortem examination in an institution, the requisition for which was received first should be begun first. Except in situations where postmortem examinations are being done so that all the tables are occupied and other cases waiting or the Police Surgeon/Medical Officer is engaged in other unavoidable emergency official duty, postmortem examination for which requisition is received should be begun immediately. A delay of more than one hour

to begin the postmortem examination should be avoided at any cost. Since the minimum time required for conducting one postmortem examination is one hour, no medical officer shall accept requisition for postmortem examination after 4.00 pm. However, postmortem examinations may be undertaken at any time in the following situations -

1. In mass casualties where more than five persons died in one accident and a Government Order, based on the decision of a Special Cabinet meeting with at least two Ministers of the State Government taking part in the meeting, instructing the nearest Police Surgeon/Medical Officer, to undertake the postmortem examination of the persons died in the particular incident, beyond the prescribed time limit.
2. In Law and Order situations where, based on the report of the Superintendent of Police or District Magistrate of the particular district where such situation prevails, a Special Cabinet meeting with at least two Ministers of the State Government taking part in the meeting, instructing the nearest Police Surgeon/Medical Officer, to undertake the postmortem examination of the person(s), beyond the prescribed time limit.

The presence of two Ministers of the State Government

at the scene of such casualty and both concurring on the necessity for the immediate disposal of dead bodies to avoid Law and Order or other such adverse consequences, and that opinion transmitted to the District Magistrate or District Superintendent Police will also suffice for the purpose of Special Cabinet Decision. In all such situations, the doctor who has conducted such postmortem examination(s) will be exempted from the burden of substantiating the reasons for violating the rules of the State Government, in this regard."

19. In the light of the above clause, the Government considered the matter again as per GO(MS) No.51/2013/Home dated 23.02.2013. Clause (D) of the code deals about general guidelines for examination and certificate of medico legal cases. Clause (D) 44 says that for continued maintenance of the quality of medico legal work, a committee consisting of representatives of Government from Health, Law and Home Departments, Director of Health Services, Director of Medical Education and Senior-most Medico Legal experts from Health Services and Medical Education Department should be formed. It is also stated that periodic revision of the Code should be undertaken by the Committee at least on yearly basis. Accordingly, the Committee was constituted to suggest an amendment to the Code for facilitating the conduct of post-mortem during the night after ensuring necessary lighting and other facilities as per GO(MS) No.51/2013/Home dated

23.02.2013 of the Home Department. Thereafter, Ext.P4 order was passed. After passing Ext.P4 order in the year 2015, the Government now filed an affidavit before this Court on 03.12.2021. The relevant portion of the affidavit filed by the Joint Secretary of Health and Family Welfare Department of the Government of Kerala, is extracted hereunder:

"4. As per the guidelines, adequate infrastructure facilities have to be ensured for implementing night autopsy. It is submitted that at present there are no facilities for conducting round the clock autopsy in Government Medical Colleges. Moreover, the availability of legal persons and completing inquest during night is very difficult. Some times the relatives and the public may face difficulties in public homage and cremation while releasing the body at night after autopsy.

5. It is submitted that the Ministry of Health, by Circular No.Z-26015/40/2012-MH-1 dated 20.12.2012, has given direction to appoint two district medico legal experts in every district hospitals and to make certain minimum requirements in the mortuary of all district hospitals in the country. Even though this condition was implemented, night autopsy cannot be conducted smoothly except all other infrastructural facilities are not increased from the present condition. At present adequate infrastructure facilities and man power are not sufficient for conducting night autopsies in five

Government Medical Colleges. The consultation and coordination of different departments are necessary to complete the requirements and arrangements for implementing night autopsy and it will take time. The Government is taking effective steps to expedite the process for implementation of night autopsy in the State."

20. I failed to understand the above averments in the affidavit. Admittedly, Ext.P4 is in force even now, of course, it is stayed by this court. It is also clear that the Government has no intention to withdraw the same. But the Government says that as per the guidelines, adequate infrastructure facilities have to be ensured for implementing night autopsy and at present, there is no facility for conducting round the clock autopsy in Government Medical Colleges. After passing Ext.P4 Government Order in 2015, what has the Government been doing for the last six years? It is surprising.

21. Now the Government of India also issued a memorandum, by which the night autopsy (after sunset) is allowed in certain situations. It will be better to extract the recent Office Memorandum issued by the Government of India:

"F. No. H-11021/07/2021-H-I

Government of India

Ministry of Health & Family Welfare

(Hospital Section)

Nirman Bhawan, New Delhi

Dated 15.11.2021

Office Memorandum

Subject: Conduct of Post-mortem in Hospitals after sunset-reg.

With reference to the above mentioned subject, multiple references have been received in the ministry from various sources.

2. The issue has been examined by a technical committee in the Directorate General of Health Services, Ministry of Health & Family Welfare, Government of India. It has been ascertained that some institutes are already performing night time post mortem. In view of the rapid advancement and improvement in technology, especially availability of required lighting and infrastructure for post-mortem, performing night time post-mortem in hospitals is feasible.

3. Therefore, it has been decided that post mortem after sunset can be conducted at hospitals which have the infrastructure for conducting such post mortem on a regular basis. The fitness and adequacy of infrastructure etc shall be assessed by the Hospital In-charge to ensure that there is no dilution of evidentiary value.

4. However, cases under categories such as homicide, suicide, rape, decomposed bodies, suspected foul play should not be subjected for post-mortem during night time unless there is a law and order situation.

5. Post-mortem for organ donation should be taken up on priority and be conducted even after sunset, if adequate infrastructure is available.

6. It is also to be ensured that video recording of post-mortem shall be done for all night time post-mortem, to rule out any suspicion and preserved for future reference for legal purposes.

7. This issues with the approval of Competent Authority.

(Ganesh Kumar)

Under Secretary to the Govt of India

Tele: 23063481"

(Underline supplied)

22. Therefore, even the Government of India is now feels that in certain circumstances, the night autopsy should be allowed.

23. The 8th respondent, who is the Member of the Legislative Assembly of Kasaragod constituency produced certain documents. Ext.R8(a) is an administrative sanction order passed by the District Collector, Kasaragod for installing a lighting facility to the Post-mortem room at General Hospital, Kasaragod. Ext.R8(b) is an intimation from the Superintendent of General Hospital, Kasaragod to the 8th respondent for allotting the MLA fund. Ext.R8(c) is the intimation given by the District Medical Officer (Health), Kasaragod to the 8th respondent. The contents in Ext.R8(c) is extracted hereunder:

"മേൽ സുചന ശ്രദ്ധിച്ചാലും, കാസർഗോഡ് ജനറൽ അശുപ്തിയിൽ ബഹു. കാസർഗോഡ് എം.എൽ.എ ശ്രീ.എൻ.എ നെല്ലിക്കുന്നിൻ്റെ എം.എൽ.എ ഫണ്ട് പ്രയോഗിച്ച് എൻപ്പട്ടത്തിയ സംവിധാനങ്ങളും നടത്തിയ പ്രവർത്തനങ്ങളും സുചന (2) പ്രകാരം കാസർഗോഡ് ജനറൽ അശുപ്തി സുപ്രണിൽ നിന്നും റിപ്പോർട്ട് ലഭ്യമാക്കിയിട്ടുണ്ട്. ആയത് അങ്ങയുടെ അറിവിലേക്കായി ചുവടെ കൊടുക്കുന്നു.

എം.എൽ.എ അസ്തിവികസന ഫണ്ട് പ്രയോഗിച്ച് 4 ചേപൻ മോർച്ചറി ഫീസർ അശുപ്തിയിൽ പുതുതായി വാങ്ങിയിട്ടുണ്ട്. രാത്രി പോല്ല് മോർട്ടി നടത്താനാവശ്യമായ വെളിച്ചത്തിനുള്ള സംവിധാനവും എൻപ്പട്ടത്തിയിട്ടുണ്ട്.

നിലവിൽ ഹോറൻസിക് സർജ്ജൻ്റ് ഒരു തസ്തികയാണ് അശുപ്തിയിൽ ഉണ്ട്. ഹോറൻസിക് സർജ്ജൻ് - 2 എണ്ണം നഷ്ടസിംഗ് അസിസ്റ്റന്റ് - 3 എണ്ണം അശുപ്തി അതുകൊണ്ട് ഗ്രേ II- 2 എണ്ണം എന്നിങ്ങനെ തസ്തികകൾ കൂടി ലഭ്യമാവുകയാണെങ്കിൽ രാത്രികാല പോല്ല് മോർട്ടി നടത്താൻ പര്യാപ്തമാവുമെന്ന് അഭ്യന്തര അറിയിച്ചുകൊള്ളുന്നു."

24. From the above, it is clear that all facilities are available in the mortuary at Kasaragod General Hospital for night autopsy. They only want some additional staff to do the work. Therefore, as far as the General Hospital, Kasaragod is concerned, only additional staff is enough to start night autopsy.

25. As I observed earlier, the delay in conducting the post-mortem and the inquest by the police authorities in unnatural cases are the main reason for the delay in handing over the dead body to the kith

and kins of the deceased person. It is very normal in all parts of our state that if an unnatural death is reported to the police, the police authorities will not reach immediately. Some officers will reach there and post some constables in that particular area and the officer will leave the place saying that the superior officer has to conduct the inquest. The inquest will be conducted by the authorized officer after a long time. Section 174 of the Code of Criminal Procedure clearly says about the conduct of the inquest by the police authorities and the urgent need to do the same in dead bodies. Section 174 reads thus:

"174. Police to enquire and report on suicide, etc.

(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub- divisional Magistrate, 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 weapon 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 District Magistrate or the Sub- divisional Magistrate.

(3) When-

(i) the case involves suicide by a woman within seven years of her marriage; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

(iv) there is any doubt regarding the cause of death; or

(v) the police officer for any other reason considers it expedient so to do, he shall. subject to such rules as the State 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 State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate."

26. There is a purpose for the early conduct of inquest and postmortems. If the inquest and postmortem are not conducted immediately, some injuries in the dead body may disappear and the body itself will decompose. According to me, a joint effort from the police department and the health department is necessary for the immediate conduct of inquest on a dead body and the autopsy if an unnatural death happened. There is no time limit is fixed for conducting the inquest and the post-mortem to be conducted by the police and authorised doctors. According to me, the Chief Secretary of the State should convene a meeting of all stakeholders and fix a time limit for conducting the inquest and post-mortem in a dead body, if a person died in suspicious circumstances or if it is an unnatural death.

27. As I observed in the beginning, the right to dignity and fair treatment is not only available to a living man but also to his dead body. The importance of the same is considered by the different Courts including the Apex Court. There is no scope for doubt any more that the right to life enshrined in the Article 21 of the Constitution of India includes the right to life with dignity. Moreover, living with dignity includes not only the dignity of a person when he is alive but also the dignity following his death. The right to dignity and fair treatment under Article 21 of the Constitution is not only available to a living person but also to his mortal remains after his demise. In **Pt. Parmanand Katara, Advocate v. Union of India and another** **I(1995) 3 SCC 248** the Apex Court observed that the right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death.

28. The word and expression "person" in Article 21 of the Constitution includes a dead person in a limited sense and the right to life with dignity should be extended in such a manner that his dead body is given, which he would have deserved, had he been alive, subject to his tradition, culture and the religion which he prefers. The Society should not be permitted to show any disgrace to the deceased. (See **Ramji Singh @ Mujeeb Bhai v. State of U.P. and others** **I(2009) SCC Online Alahabad 310**).

29. The Division Bench of the Calcutta High Court in **Vineet**

Ruia v. Principal Secretary, Ministry of Health and Family Welfare, Govt. of West Bengal and others (2020 KHC 5506)

observed as follows:

"14. Traditions and cultural aspects are inherent to the last rites of a person's dead body. Right to a decent funeral can also be traced in Article 25 of the Constitution of India, which provides for freedom of conscience and free profession, practice and propagation of religion subject to public order, morality and health and to the other fundamental rights under Part III of the Constitution.

xxx

xxx

xxx

18. We are of the view that the right to live a dignified life extends up to the point of death including the dignified procedure of death. We are inclined to interpret the phrase 'dignified procedure of death' in an expansive manner so as to include dignified disposal of the human remains of a deceased. We unhesitatingly hold that the mortal remains of a deceased person must be treated with care, respect, and dignity and have to be disposed of by burial or burning, according to the religion, in so far as the same is ascertainable, that the deceased person practised. It makes no difference if the deceased person was infected with Covid -

19. Of course, all requisite safety and precautionary measures must be taken by the persons who carry out the funeral."

30. From the above discussion, it is clear that certain fundamental rights available in our constitution to a person will continue even after his death. The State cannot take a stand that since there is financial difficulty, the State cannot provide adequate infrastructure for night autopsies to all the Government Medical Colleges and other hospitals. The delay in conducting an autopsy will infringe the rights of a dead person. One of the reasons for the delay in conducting an autopsy is the existing practice of the conduct of autopsy only in daylight. Therefore the night autopsy permitted in Exhibit P4 is to be implemented in its letter and spirit. When there is an unnatural death, inquest, and postmortem are necessary to a dead body. In such situations, the State must do the needful to see that the legal formalities are completed forthwith and the dead body is handed over to the kith and kin of the deceased person within a time limit, which is to be fixed by the Government, after consulting the stakeholders. The bereaved family members and the well-wishers of the deceased person need not go to the Police Station or to the hospitals to get the dead body of a person if the death is unnatural. The State must do the needful immediately and return the dead body to the residence of the deceased

person at the cost of the State. No relatives, no politicians, and no well-wishers of the deceased need to stand in queue hereafter in front of the Police Station or hospitals for an early release of the dead body, after the inquest, postmortem, and other legal formalities. The bereaved family can sit in their house and the relatives and well wishers of the dead person can sit along with the bereaved family to console them. They need not go to the hospitals or Police Station. Once, an unnatural death has happened, the citizen only has to inform the nearest Police Station. Thereafter, the State machinery has to conduct the inquest, postmortem, and also to bear the expense for transporting the body from the place of death to the hospital or other places for legal formalities. It should be at the expense of the State and not at the expense of the bereaved family. As I observed earlier, this should be done within a time limit and the body should be released to the relatives, unless the relatives say that the dead body should be kept in the mortuary or other places, due to some other delay in conducting the cremation because of individual reasons. If an unidentified dead body is found, a separate procedure can be formulated by the Government. I am aware of the prayers in this writ petition. But during the course of argument, I informed the Government Pleader about the necessity to issue these orders. The Government Pleader fairly submitted that if this Court pass any order, the Government will take in that spirit and will do the needful.

31. Therefore, the Government should take appropriate steps to implement Ext.P4 by affording adequate infrastructure to the hospitals mentioned in Ext.P4 forthwith. The Government should constitute an expert committee as per Clause D(44) of the Kerala Medico Legal Code to find out whether the night autopsy facility can be extended to all the Medical Colleges and hospitals in Kerala where autopsies are now conducted. As I observed earlier, the police authorities should complete the inquest proceedings immediately in accordance with Secs. 174 of the Criminal Procedure Code and produce the dead body before the medical authorities for postmortem and the postmortem also should be conducted within a time frame to be fixed by the Chief Secretary by a separate circular. I am aware of the Division Bench judgment of the Madras High Court, which is produced as Ext.R7(b) by the 7th respondent. That was a case filed challenging the Government Order dated 2.5.2013 cancelling another Government Order dated 13.6.1996, which permitted the practice of doing postmortem during night hours in respect of accident cases. Ext.P4 order is passed after that and the State of Kerala after consulting with the experts decided to allow night autopsy. Moreover, now the Union of India also recognises night autopsies in certain situations. In such circumstances, this Court need not rely the judgment of the Madras High Court, in which Madras High Court only said that when the expert says that night autopsy cannot be done, the Court is helpless.

In the light of the above observations in this judgment, this writ petition is disposed of in the following manner :

1. The respondent Nos. 1 to 6 will do the needful to see that Ext.P4 Government Order is implemented and night autopsy is allowed in five Government Medical Colleges namely, Thiruvananthapuram, Alappuzha, Kottayam, Thrissur, and Kozhikode forthwith.
2. The respondent Nos.1 to 6 will provide all infrastructure including medical staff and paramedical staff to implement Ext.P4 order in the five Government Medical Colleges, namely, Thiruvananthapuram, Alappuzha, Kottayam, Thrissur, and Kozhikode, as expeditiously as possible, at any rate, within 6 months from the date of receipt of a copy of this judgment.
3. The respondent Nos. 1 to 6 will implement the night autopsy in General Hospital, Kasaragod forthwith in the light of Ext.R8(c) letter of the District Medical Office (Health), Kasaragod. The necessary staff should be deployed by respondent Nos. 1 to 6 in the General Hospital, Kasaragod within one month from the date of receipt of a copy of this judgment.

4. The Chief Secretary, Government of Kerala will convene a meeting of the officials of the Home Department including the State Police Chief and the officers of the Health Department to see that the inquest and postmortem of a dead body which is involved in unnatural death cases are completed within a time limit. The Chief Secretary will issue a circular fixing the time limit for conducting the inquest and also fixing a time limit for conducting the postmortem. It should be done within six months from the date of receipt of this judgment and a copy of the same should be produced before the Registrar General of this court.

5. The Chief Secretary should order that once an unnatural death is reported, it is the duty of the State machinery to complete the inquest and postmortem within a time frame and the body should be released to the bereaved family, after the inquest and postmortem within a time limit, to be prescribed by the Chief Secretary and it should also be mentioned in the above circular. In the circular, it should be mentioned that disciplinary proceedings will be taken against officers who delayed the conduct of inquest

and postmortem within the time limit to be prescribed by the Chief Secretary.

6. The Chief Secretary of the State should declare in the circular that the expense for taking the dead body in unnatural cases to the hospital for postmortem and to other places if necessary for conducting the inquest should be at the State expense.

7. The State Government will constitute a committee as per Clause D(44) of the Kerala Medico Legal Code for periodical revision to find out whether the night autopsy is possible in all the hospitals, where the autopsy facility is available. If the experts recommend the same, the Government will accept the same and will do the needful.

Sd/-

**P.V.KUNHIKRISHNAN,
JUDGE**

dm
JV
das
SKS

APPENDIX

PETITIONERS EXTS

EXT P1- COPY OF JUDGMENT PASSED BY THIS COURT IN WPC NO.4131 OF 2013 DTD 5.6.2015

EXT P2- COPY OF GO NO.43287/K2/12/HOME DTD 1.6.2012

EXT P3- COPY OF LETTER NO.EA1-44483/12/DHS DTD 13.6.2012 ISSUED BY THE DIRECTOR OF HEALTH SERVICES

EXT P4- COPY OF GO(MS) 239/H&FWD ISSUED BY THE GOVERNMENT ON 26.10.2015

EXT P5- COPY OF RELEVANT PAGES OF 23RD EDITION OF MODI'S TEXT BOOK OF MEDICAL JURISPRUDENCE & TOXICOLOGY, 2012 & THAT OF PRINCIPLES & PRACTICE OF FORENSIC MEDICINE ELABORATING THE PROMINENCE OF AUTOPSY AND ITS CONDUCT.

EXT P6- COPY OF MINUTES OF THE MEETING DTD 29.7.2015 FOR THE PURPOSE OF ISSUE OF NIGHT AUTOPSY

EXT P7- COPY OF PROPOSAL SUBMITTED BY MEDICAL SUPERINTENDENT OF KASARGOD HOSPITAL

EXT P8- PHOTOGRAPH SHOWING THE PRESENT NATURE OF AUTOPSY ROOM AT KANJIRAPPILLY

EXT P9- PHOTOGRAPH SHOWING THE LIGHT INSTALLED AT KASARGOD GENERAL HOSPITAL

RESPONDENTS EXTS:

EXT R5(A)- COPY OF OFFICE MEMORANDUM NO.H-11021/07/2021-H-I DTD 15.11.2021

EXT R7(A)- COPY OF COMMUNICATION SENT BY THE DIRECTORATE GENERAL OF HEALTH SERVICES, GOVERNMENT OF INDIA TO THE PRINCIPAL SECRETARY (HEALTH) OF THE STATES.

EXT R7(B)- COPY OF ORDER DTD 16.4.2019 IN WP NO.10694/2019 OF HIGH COURT OF JUDICATURE AT MADRAS.

EXT R8(A)- COPY OF PROCEEDINGS OF DISTRICT COLLECTOR, KASARAGOD DTD 23.12.2016

EXT R8(B)- COPY OF LETTER DTD 27.1.2016 OF THE SUPERINTENDENT OF GENERAL HOSPITAL, KASARAGOD A/W THE ESTIMATE BY THE ASST.EXECUTIVE ENGINNER, KASARAGOD

EXT R8(C)- COPY OF LETTER NO.C1-10753/14 DTD 22.7.2021 OF DMO, KASARAGOD

EXT R8(D)- COPY OF QUESTION AND ANSWER TO THE NON-STAR QUESTION NO.281 DTD 25.4.2017 RAISED BY THE PETITIONER ON THE FLOOR OF KERALA LEGISLATIVE ASSEMBLY.

EXT R8(E)- COPY OF THE QUESTION AND ANSWER TO NON-STAR QUESTION NO.2085 DTD 4.11.2018 RAISED BY THE PETITIONER ON THE FLOOR OF KERALA LEGISLATIVE ASSEMBLY.

EXT R8(F)- COPY OF ARTICLE BY DR.B.UMADATHAN

EXT R8(G)- COPY OF QUESTION AND ANSWER TO THE NON-STAR QUESTION NO.2178 DTD 11.2.2020 RAISED BY THE PETITIONER ON THE FLOOR OF KERALA LEGISLATIVE ASSEMBLY.

EXT R8(H)- COPY OF NOTIFICATION DTD 15.11.2021 ISSUED BY THE UNION OF INDIA

/TRUE COPY/

P.A.TO JUDGE