

AFR
(On admissibility of P.M.R.)
Reserved
Chief Justice's Court

Case :- CRIMINAL APPEAL No. - 3079 of 1985
Appellant :- Bijendra Singh
Respondent :- State of U.P.
Counsel for Appellant :- R.S. Yadav,Ajay Kumar
Srivastava,Jitendra Pal Singh Chauhan
Counsel for Respondent :- A.G.A.

Hon'ble Govind Mathur,Chief Justice
Hon'ble Vivek Varma,J.

(Per.:-Hon. Vivek Varma, J)

1. By the impugned judgment dated 08.11.1985, the learned 2nd Addl. Sessions Judge, Aligarh convicted accused appellants Bijendra and Smt Khazani for the offence punishable under section 302/34 Indian Penal Code and sentenced them to under go life imprisonment.

2. The prosecution case, in brief, is that on 25/26.12.1984, a written report (Ex-ka-1) was submitted by Smt Kartari (Informant/P.W.-1) at Police Station Tappal, District Aligarh wherein she alleged that she was living with her maternal uncle Ramchand's house in village Palar after her marriage. Bijendra (appellant no.1) is son of Ram Chand. His wife and his family were also living in the same house for quite some time. Ram Chand, after the death of Bijendra's mother married (कराब) Ram Devi. Ram Chand had transferred the house and 11-12 bighas of land to Ram Devi. After his death, Ramdevi wanted to get her name mutated in the land and her share in land segregated. This annoyed accused Brijendra, who 9-10 days prior to the incident had told her not to do so. Ram Devi was issue-less. She did not heed Brijendra's advice, causing Brijendra to threaten her. It was then asserted by the informant that, on the

fateful night at about 12 O'clock when she and her son Jaggo were sleeping in her maternal uncle's house. They were awakened by shrieks of (*mami*) Rama devi and saw that Bijendra was inflicting gandasa blows at Mami's naval (नार) and an unknown person was holding mami's head and Bijendra's wife Khajani (co accused-appellant no. 2) was holding her legs. When they raised an alarm Bijendra threatened them. After killing Ramdevi, he and the unknown person went outside. It was also asserted that due to fear, informant and her son remained in the house whole night. In the morning after getting the complaint transcribed by Bishambhar the same was sent to the Police Station.

3. On the basis of the said written report, the First Information Report (Ex-Ka-5) was lodged on 26.12.1984 at 8.15 a.m, vide Case Crime No. 152, under Section 302 IPC against the accused appellants at P.S. Tappal, District Aligarh. The investigation was entrusted to Mahavir Singh (P.W.-5). The inquest (Ex- Ka-4) on the dead body of the deceased was conducted on 26.12.1984 at 10 a.m and thereafter it was sent for autopsy. The postmortem report is available on record as Ex-Ka-16. As per Dr J. L. Agarwal, following ante-mortem injuries were found:-

1. *Incised wound 12 cm X 2.5 cm X bone deep into right side scalp 10 cm on the ear.*
2. *Incised wound 3 cm X 3 cm X bone deep into right side joint 12 cm above right eye brow longitude.*
3. *Incised wound 2 cm X 12 cm X bone deep in right side face and middle of neck with muscular rim and body, trachea and jaw.*
4. *Abrasion 3 cm X 1 cm in the left shoulder.*
5. *Lacerated would 1 cm X ½ cm on the lob of*

left ear.

4. The police submitted charge-sheet (Ex-Ka-13) only against the appellants Bijendra and Smt Khazani under Sections 302/34 IPC. The third unknown accused of the F.I.R. could not be traced out by the police.

5. During the course of trial, the prosecution produced five witnesses in support of its case. PW-1 Smt Kartari, is the informant and eye witness. Another eye witness is PW-2 Jaggo son of PW-1. The scribe of the F.I.R. Bishamber is PW-3. Budh Singh, a witness of extra judicial confession is PW-4. The investigating officer of the case is Mahaveer Singh, who is PW-5.

6. Opportunity was accorded to the accused appellants as per provisions of section 313 Cr.P.C, to explain the adverse and incriminating circumstances against them in the prosecution evidence. Both denied all the circumstances appearing against them in prosecution evidence and claimed false implication. Accused Bijendra stated that he is the only son of his father and the prosecution witness wanted to implicate him falsely to grab his property.

7. The doctor who conducted autopsy was not examined before the trial court. The formal proof of the post-mortem report was dispensed with, as its contents were admitted by the defence.

8. The trial Court relied upon the evidence of eye witnesses viz. P.W.-1 Smt Kartari and P.W.-2 Jaggo and held the appellants guilty and convicted and sentenced them as mentioned. Hence this appeal.

9. Heard learned counsel for the appellants, Mr S. A.

Murtaza, learned AGA and perused the material on record.

10. Learned counsel for the appellants at the first instance submitted that the doctor, who conducted the postmortem examination of the deceased Smt. Ram Devi, was not examined in the court, though the same has been marked as exhibit by the court. Such a procedure adopted by the trial court could not be approved, as the contents of the postmortem report could not be admitted under Section 294 of the Code of Criminal Procedure, unless, the same was duly proved by the doctor, who had prepared the same.

11. The submission of the learned counsel for the appellants is legally not sustainable, in view of the settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party, it can be treated as substantive evidence under sub-section (3) of Section 294 Cr.P.C. The Hon'ble Supreme Court in case of **Akhtar Vs State of Uttaranchal (2009) 13 SCC 722**, has observed that if the defence has admitted the genuineness of the postmortem report before the trial court, the genuineness and veracity of the document stands proved and shall be treated as valid evidence under Section 294 Cr.P.C. The relevant portion is quoted below:-

“21. It has been argued that non-examination of the concerned medical officers is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem examination reports before the trial court. So the genuineness and authenticity of the documents stands proved and shall be treated as valid evidence under Section 294 of the CrPC. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-Section (3) of Section 294 CrPC. Accordingly, the post-mortem report, if its genuineness is not disputed by the opposite party, the said

post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined."

12. We may also refer to a **Full Bench** decision of this Court, reported in **1981 Cr.L.J. 379, Sadique and other Vs State of UP**, wherein it was held -

"(Para-9)-" It is open to the prosecution or the accused to dispute the genuineness of a document filed by the opposite party under Sub-section (1) of Section 294, Cr. P.C. In such a case the signatory of the document must be examined by the party filing the document to prove his signature and also the correctness of its contents and the evidence of the signatory will be the substantive evidence and the document may be used to corroborate or discredit his testimony. But where the genuineness of a document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. is not disputed by the opposite party, Sub-section (3) of Section 294, Cr. P.C. is applicable and such a document may be read as substantive evidence. Section 294, Cr. P.C. is a new section as it had no equivalent in the Code of Criminal Procedure 1898. It is based on the rule of evidence that facts admitted need not be proved contained in Section 58, Evidence Act. The object of enacting this section appears to be to avoid the time of the Court being wasted by examining the signatory of the document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. to prove his signature and the correctness of its contents if its genuineness is not disputed by the opposite party. If the signature and the correctness of the contents of a document filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. whose genuineness is not disputed by the opposite party are still required to be proved by examining the signatory of the document, the very object of enacting Section 294, Cr. P.C. will

be defeated. We are, therefore, of the opinion that all documents filed by the prosecution or the accused under Sub-section (1) of Section 294, Cr. P.C. whose genuineness is not disputed by the opposite party may be read as substantive evidence under Sub-section (3) of Section 294, Cr. P.C."

13. In view of the aforesaid legal position the genuineness of the postmortem report, filed by the prosecution, has since been admitted by the defense the same can be read as substantive evidence.

14. The learned counsel for the appellants next contended that from the deposition of the PW-1 before the trial court, the authenticity of the F.I.R. becomes quite doubtful because according to the F.I.R., PW-1 is the author of the F.I.R. but PW-1 stated in her cross-examination that the F.I.R. was got written by the police Inspector at about 10 a.m. when she had come to the place of incident.

15. We have examined the version of the F.I.R. and the deposition of the informant PW-1. From the contents F.I.R. it is evident that the author of the F.I.R. is PW-1, and PW-3 Bishambhar is the scribe. We further find from the contents of the F.I.R., that it was written by the said scribe in the village of incident itself and thereafter the said scribe went to the police station to lodge the same, which was registered at the police station at 8.30 a.m. Whereas, the PW-1, in her statement before the trial court deposed that said PW-3 Bishambhar (scribe of the F.I.R.) had called the Police Inspector in the village of incident and thereafter the Police Inspector had got the F.I.R. written on which she had put her thumb impression. This witness further stated that all this was done at about 10 a.m. This part of the statement of PW-1 is extracted below:-

“मुझे गांव की औरतों ने चुपाया था फिर दरोगा जी आ गये थे विशम्बर बुलवाया था फिर लिखा पढ़ी करी फिर अंगूठा रिपोर्ट पर लगाया था सुबह के 10 बजे थे दरोगा जी ने मुझसे अंगूठा लगाने को कहा था। दरोगा जी ने कहा था कि तू पढ़ी तो है नहीं अंगूठा लगा दे दरोगा जी ने पढ़कर सुनाई थी।”

16. It is thus apparent from the aforequoted substantive evidence of PW-1 that the F.I.R. was got written by the Police Inspector. This being so, the F.I.R. version that the F.I.R. was dictated by the PW-1 and PW-3 Bishambhar scribed the same stands discredited. From the aforequoted evidence it is also apparent that the F.I.R. was got written by the police Inspector at about 10 a.m. and if this is so, the prosecution case that F.I.R. was lodged at the police station at 8.30 a.m. also stands falsified. From the said substantive evidence on record it cannot but be held that the F.I.R. of this case has been prepared with the confabulation and manipulation of the police and the same was not lodged at the police station at the time when it is said to have been lodged. In these facts once the very authenticity of the F.I.R. becomes doubtful the entire prosecution case becomes doubtful.

17. Learned counsel for the appellants then contended that though PWs 1 and 2 are said to be eye witnesses of the incident but from the evidence on record a reasonable doubt is created that they have not seen the incident. To appreciate this argument of the learned counsel we have examined the evidence on record and we find substance in the submissions of the appellants' counsel. We find that there is a material contradiction between medical and oral evidence, inasmuch as, in the F.I.R. the informant PW-1 has stated that the appellant Bijendra inflicted *gandasa* blows on the naval region of the deceased but in the post-mortem report there is no injury

on the naval region. In fact all the *gandasa* injuries are on face and head. Faced with this situation the prosecution gave up the initial or the founding prosecution story that Bijendra inflicted *gandasa* blows on the **naval** region. The said two eye witnesses testified that appellant Bijendra inflicted *gandasa* blows on the deceased. In this regard we also notice another significant fact on record which belies the eye witness account of the said witnesses. These witnesses have deposed in the trial that when the appellant Bijendra was inflicting *gandasa* blows on the deceased one unknown accused had held the deceased by her head. From the post mortem report it is evident that except one lacerated wound and one abrasion, all other *gandasa* injuries are on the right side of head and face of the deceased. This would be possible only when the deceased was sleeping turning to her left side and her right side was exposed, that is why all the injuries are on right side of her head and face. Thus from the nature of the injuries it cannot be believed that one accused had held the deceased by her head while another accused was inflicting *gandasa* blows on the head and face. It appears to be improbable that a person may inflict *gandasa* blows on head and face while the head is held by another person. Therefore, this part of the prosecution story is highly improbable and doubtful. This circumstance clearly speak that the said two eye witnesses have not seen the incident and are giving false version with regard to manner of assault on the deceased. Once we hold the eye witnesses are unreliable on the manner of assault, and as noticed above, there is also contradiction in oral and medical evidence as no injury was found on the naval region of the deceased the conviction of the appellants cannot be sustained.

18. Now we may also deal with the motive as pleaded by the prosecution. The motive for committing the crime is assigned to the appellant Bijendra. According to prosecution appellant Bijendra's father Ramchand had transferred his 11-12 bighas of land to the deceased Smt. Ram Devi. The deceased was trying to get her name mutated on the said land, which was objected by the appellant Bijendra. However, when the deceased did not listen to the objections of the appellant and continued to pursue her efforts in that regard the appellant Bijendra murdered her. We find from the evidence on record that the deceased Ram Devi was issue-less, therefore, after her death appellant Bijendra alone would inherit entire properties of his father, and that being so, there was no reason for the appellant Bijendra to have committed murder of his step mother, who, according to evidence on record, had brought up the appellant after the appellant's mother had died when the appellant was only 7-8 years old. Even other-wise the prosecution story that the father of the appellant Bijendra had transferred his 11-12 bighas of land to the deceased and the deceased was making endeavors in the consolidation proceedings to get her name mutated on that property does not merit acceptance as the prosecution has not proved by documentary evidence the fact of transfer of said land in favour of the deceased by her husband Ramchand and the fact that the deceased had initiated any mutation proceedings for recording of her name on the said transferred properties. In the circumstances we are unable to accept the version of motive as set up by the prosecution. On the other hand there may be a reason or motive for the PW-1 to implicate the two appellants in this case, as she was aware that if the appellants are convicted she would be a beneficiary of the

properties of the father of the appellant Bijendra. It was for this reason that the defence has given a suggestion in the trial that it is not the appellants but the informant had murdered the deceased.

19. Hence, on the cumulative evaluation of the evidence on record and testing the prosecution evidence on the anvil of probabilities we are of the view that the prosecution has failed to establish the guilt of the appellants beyond all reasonable doubts and as such the appellants are entitled to get the benefit of doubt. We, therefore, allow the appeal and set aside the judgement and order of conviction and sentence of the appellants and acquit them of the charges. The appellants are on bail, their bail bonds are cancelled and sureties are discharged.

Order Dated: 17.12.2019
Ravindra Kumar Singh

(Vivek Varma, J.) (Govind Mathur, C.J.)