
(1979) 09 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 921 of 1975

Ganpat Raoji Suryavanshi	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 21-09-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 294

Citation : (1980) MhLj 60

Hon'ble Judges : R.A. Jahagirdar, J;D.N. Mehta, J

Bench : Division Bench

Advocate : R.S. Mohite for M/s D.V. Patil and N.G. Mahajan, for the Appellant;
J.A. Barday, Public Prosecutor, for the Respondent

Judgement

R.A. Jahagirdar, J.

(After dealing with the facts as came on record and other aspects arising for consideration in paras 1 to 29, the Judgment proceeds).

30. The next question is whether the prosecution has proved how Gangubai has died. In order to prove the cause of the death of Gangubai the prosecution has examined Dr. Tathe as P. W. 7. Dr. Tathe had not even performed the post-mortem examination of the body of Gangubai. In fact, it is not even shown that he had seen the body of Gangubai. He was at the relevant time Chief Medical Officer of the Cottage Hospital at Karad and two doctors were working under him in the year 1974. of them one was Dr. M. H. Kulkarni. It was this Dr. Kulkarni who had performed the postmortem examination on the dead body of Gangubai. Naturally Dr. Kulkarni alone was competent to come and to depose to the injuries which were found on the body of Gangubai and to give opinion as to whether those injuries were the cause of the death of Gangubai. Unfortunately, on 18th of September 1975 when Dr. Kulkarni was to be examined, Dr. Tathe appeared in the Sessions Court. The Public Prosecutor filed an application purporting to be one u/s 294 of the Code of Criminal Procedure in which it was mentioned that Dr. M. H. Kulkarni of the Cottage Hospital of Karad was on leave and he could not be

traced though the Court summons for his attendance was sent. The application then proceeded to mention that the prosecution, under the circumstances, begs to produce the post-mortem notes drawn by the doctor as evidence. It was also stated that the defence may be called upon to admit or deny the document of post mortem examination notes. We will show presently that this application, though purporting to be one u/s 294 of the Code of Criminal Procedure, cannot be one under that section. Even the recitals in the application which are briefly mentioned above cannot bring that application under the provisions of section 294 of the Code. Before we examine this application we must regretfully mention that the learned Advocate appearing for the accused made an endorsement that he had no objection for admitting the memorandum of post-mortem notes on record and for exhibiting the same. After this the learned Sessions Judge made an endorsement: "Granted". With this order having been passed at Exh. 22, Dr. Tathe stepped into the witness-box and gave his opinion on the basis of the entries made in the memorandum of the post-mortem examination.

31. Section 294 of the Code of Criminal Procedure is in the following terms:

294. (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed :

Provided that the Court may, in its discretion, require such signature to be proved.

This section cannot be abused by a Prosecutor or any other person when he is unable to secure the attendance of a witness as mentioned in the instant case in Exh. 22. In the first place, it was the duty of the Public Prosecutor to secure the attendance of Dr. Kulkarni on some day. The reason given for not securing his attendance in the Court on 18th of September 1975 is, in our opinion, wholly untenable. Dr. Kulkarni might have been on leave from his duty at the hospital; but he could not be on leave as far as his attendance in the Court is concerned. Even if the police were not able to serve the summons upon him, a fresh attempt was necessary to be made. It was the duty of the prosecution to secure the attendance of the doctor who had to depose to the injuries found upon the dead body of Gangubai and then to depose to the cause of the death. Almost in all cases these doctors are Government Servants working in one or the other of the Government or semi-Government hospital; some are with hospitals run by local authorities. It is difficult for us to accept that doctors cannot be traced for

securing their attendance in the Court. On the basis of this reason, namely, that the doctor could not be traced though the Court summons for his attendance was sent, the learned Public Prosecutor proceeded to apply u/s 294 of the Code for dispensing with the formal proof of the post mortem notes. In our opinion, section 294 is not meant to meet such a situation which, at any rate in the instant case, has been created by the prosecution itself. It will be an abuse of the provisions contained in section 294 if the said section is used for bringing on record the documents which are to be proved by examining witnesses whose presence the prosecution has without proper effort failed to secure.

32. We must now proceed to examine as to whether the memorandum of the post-mortem examination conducted by the doctor can be brought on record by resorting to the provisions contained in section 294 of the Code. It is well settled that the memorandum of the post-mortem examination is not substantive evidence by itself. It is a document containing the notes made by a doctor contemporaneously while he is conducting the post-mortem examination. That memorandum can be used by the doctor for refreshing his memory while he is giving evidence in the Court. It may be used by the defence, if necessary, for contradicting the doctor's evidence in the Court.

The memorandum itself can never be substantive evidence though it can be exhibited in the Court when the doctor is examined as a witness and has deposed to the contents of that document (See *Loku Basappa Pujari v. The State* 61 B L R 1271). By tendering the memorandum of the post-mortem examination alone in evidence the prosecution cannot pretend to prove the injuries found on the body of the person examined by the doctor or the cause of death of a person as it has happened in this case. The doctor has mentioned in the post-mortem examination report that particular injuries are the cause of death. That is an opinion which has to be expressed by the doctor from the witness-box and which has to be tested by the cross-examiner. The injuries found by the doctor as mentioned in the postmortem memorandum may be facts which are found by the doctor. The opinion regarding the sufficiency or otherwise of the injuries to cause death has to be given by the doctor and has to be tested on the anvil of the cross-examination. Apart from this, in criminal cases several facts and circumstances attendant upon a death of a person are to be investigated. Are the particular injuries sufficient in the ordinary course of nature to cause death? Were the blows given in a sudden fight? Have the injuries been inflicted by the accused while the victim was in a sitting or standing position? Is it possible that the injuries might have been caused by a fall of the victim on a weapon? These are some of the several questions which are to be answered before deciding the question of culpability of the accused. There may emerge various subtleties and nuances in the evidence which may be given by the doctor on the basis of the injuries which he found on the body of the deceased or of an injured person. The answers which the doctor may give will help the Court in arriving at the conclusion relating to the gravity of the offence committed by the accused. The murder apparent on the basis of injuries found in the memorandum of the post-

mortem examination may turn out to be only a culpable homicide or even a grievous or a simple hurt when the doctor is examined. Almost in every case the weapon alleged to be involved in the crime has got to be shown to the doctor before he gives his opinion as to whether that weapon was responsible for the injuries which he found. No Court can come to a proper conclusion relating to the culpability of an accused person only on the basis of the recital of the injuries in a memorandum of the post-mortem examination. Thus, apart from the fact that the post-mortem memorandum is not a substantive piece of evidence the doctor has got to be examined in every prosecution not only to prove the injuries mentioned in the post-mortem examination but also to give his opinion relating to those injuries.

33. In *Re Rangappa Goundan and another* I L R 59 Mad. 349, the Division Bench of the Madras High Court pointed out that in a murder case, no consent or admission by the accused's Advocate to dispense with the medical witness would relieve the prosecution of proving by evidence the nature of the injuries received by the deceased and that the injuries were the cause of death, it has been pointed out that the post-mortem report was not evidence and could only be used by the witness who conducted the post-mortem enquiry as an aid to memory. The facts of that case disclose that the Public Prosecutor asked the defence advocate if he wished to examine the medical witness, who had in fact been present in the Court. The defence advocate answered in the negative. The result was that no evidence was given at the trial with regard to the injuries received by the deceased or to the cause of his death or whether the injuries received by him were responsible for death. In view of this state of prosecution evidence, it was pointed out that the consequence was that an essential element of proof of the crime alleged against the two accused was wanting and the conviction which had taken place in the absence of that evidence could not stand. The learned Sessions Judge's reliance upon the post-mortem report as establishing beyond doubt that the man was murdered was disapproved in the following terms :

""But a post-mortem report proves nothing. It is not even evidence, and can only be used by the witness who conducted the post-mortem inquiry as an aid to memory. These propositions have already been stated in *Queen-Empress v. Jadub Das*.

If this is the correct, as we think it is the correct, legal position relating to the evidentiary value of the post-mortem report, it will not be difficult to see that such a report cannot be tendered in evidence by resorting to the provisions of section 294 of the Code.

Apart from section 294, there is another section, namely, section 293 which permits reports of certain Government Scientific experts to be received in evidence. Section 293 provides that any document purporting to be a report under the hand of a Government scientific expert to whom that section applies may be used in evidence in any inquiry, trial or other proceeding under this

Code. The Court, however, is given discretion to summon and examine any such expert as to the subject-matter of his report. Section 293 by its sub-section (4) is made applicable to only six categories of experts. Among them the doctor conducting the post-mortem examination is not one. Section 293 of the Code of 1974 corresponds to section 510 of the old Code and is not new. Section 294, however, is totally a new section inserted for the first time in the Code of 1974. A proper reading of the said section persuades us to hold that it is meant to cover those documents which require only formal proof. It has been introduced for the purpose of accelerating the pace of the Criminal trial by dispensing with the formal proof of certain documents. Where the contents of a document are to be proved by examining the author of that document, the provisions of section 294 of the Code cannot come into play. Where the relevance of a document depends entirely on its genuineness, the procedure prescribed u/s 24 of the Code can be followed and once the genuineness is admitted then that document itself may be read in evidence. The provisions of section 294 are not meant for circumventing the provisions of the Evidence Act and in particular the provisions relating to the proof of certain facts which can only be done by examining witnesses though those facts might have been mentioned in a document. Conceivably, section 294 of the Code may cover letters written, photographs taken and it may also cover specimen handwritings and finger prints. It is not necessary for our purpose to enumerate the documents which are conceivably covered by section 294. It is enough to mention that the memorandum of the post-mortem examination is not a document the proof of which can be dispensed with by resorting to the provisions of section 294 of the Code. Indeed, the memorandum of the post-mortem examination does not prove by itself. As we have already mentioned earlier, a document which is not substantive evidence by itself and the contents of which have to be deposed to by a witness, can never be tendered in evidence by following the procedure mentioned in section 294 of the Code. It is especially so in the case of memorandum of post-mortem examination. Interpretation of the various findings mentioned in the memorandum is to be made by the medical witness and is to be tested by the cross-examination.

34. We notice that fortunately a similar view has been taken by the Division Bench of the Gujarat High Court in *Kalu Raghav v. The State of Gujarat*³, wherein it has been pointed out that the Legislature while enacting section 294 in the Code must not have thought that this salutary provision would be abused in actual practice and the person in charge of the prosecution or defence would make it the handle of their inaction or indifference. It has been further pointed out that the underlying idea of section 294 seems to be that the formality of proving of some documents may not unnecessarily hamper the smooth flow of the trial. Proceeding further the Division Bench pointed out as follows :

But it could not have been envisaged that important witnesses like a Doctor who has examined patients would also be dispensed with by resort to this provision of section 294. We, therefore, emphasise the importance of medical evidence in such cases involving injuries, and particularly fatal injuries, and we insist that in

all such cases, the persons in-charge of prosecution or the defence would not tinker with the problem and leave the Court to decide the important questions by resorting to only surmises or conjectures on a technical subject like medical science. The Judges trying such cases have an important duty to perform and if they allow such shortcuts to be resorted to, they would obviously be remiss in their judicial duties.

Earlier in the judgment it has been mentioned that it was indeed astonishing or shocking that important medical evidence also is taken in a light manner in sessions cases where the Court is required to decide the nature of the injuries and the cause of death. It is needless to say that we have also found it highly astonishing that resort to section 294 of the Code was made to dispense with the examination of the doctor who conducted the post-mortem examination.

35. Similar view has also been taken by the Division Bench of the Allahabad High Court in *Jagdeo Singh v. State* 1979 Cri. L. J. 236, where it has been mentioned as follows:

A bare reading of the aforesaid section would reveal that it contemplates reading in evidence, upon admission about genuineness by the opposite party, only such documents which, when formally proved, speak for themselves. It does not refer to a document which, even if exhibited, cannot be read in evidence as a substantive piece.

Proceeding further the learned Judges pointed out how the notes of postmortem examination are nothing but contemporaneous record prepared by the medical officer while performing the post-mortem examination on a dead body. The post-mortem report itself proves nothing, as they said, as it is not a substantive piece of evidence. We respectfully agree with the views expressed in the above two judgments. We have mentioned above additional reasons as to why it is necessary for a doctor to be examined even if the post-mortem notes are taken as an exhibit in evidence.

36. In view of this legal position which to us is clear, the examination of Dr. Tathe as a substitute for Dr. Kulkarni was of no use to the prosecution. By his evidence Dr. Tathe could not depose to the injuries which were found by Dr. Kulkarni on the body of Gangubai; he could not depose to the cause of death as found by Dr. Kulkarni; he could not establish whether the injuries caused by the assailant, whoever it was, were sufficient in the ordinary course of nature to cause death. Since, however, he had been examined by the prosecution, he went on referring to the notes and repeating whatever was contained in the notes. One question which was asked to him was in the following terms:

Q : Could the external and internal injuries described in the postmortem note be caused by knife Art. No. 7 now shown to you ?

He answered in the affirmative. In our opinion, this is a bravado on the part of Dr. Tathe. We do not see how he could have made himself bold to say that the

internal injuries which he had never seen could be caused by a particular knife viz. Article 7. It is not merely the description or measurements of the injuries mentioned in the post-mortem notes that will give an indication as to whether they were caused by a particular knife? It is an ocular examination of the injuries that will enable a doctor to give an opinion which is of any value to the Court. In our view, the entire evidence of Dr. Tathe has to be kept out of consideration. If this is done in the instant case, the prosecution has failed to prove the injuries which were caused to the body of Gangubai and the cause of death of Gangubai. If this is done, naturally, the accused is entitled to acquittal also on this ground.

37. Before parting with this appeal, we must once again emphasise that Public Prosecutors should not resort to the provisions of section 294 of the Code of Criminal Procedure on the ground that because summons has not been served upon a witness the witness is not available. A proper understanding of the scope of section 294 will, we hope, prevail. In the present case the doctor was said to be unavailable because he was on leave. This also, in our opinion, is a very flimsy ground given by the Public Prosecutor which ought not to have been accepted by the learned Sessions Judge. The Public Prosecutors as well as the presiding officers of the Court would also do well to note that the Government of Maharashtra has by a Notification dated 23rd of October 1975 framed a rule in exercise of the powers conferred upon it by sub-section (2) to section 294. The said rule has been published in the Maharashtra Government Gazette of 6th of November 1975. The said rule requires that the list of documents referred to in sub section (1) of section 294 shall be filed before the Court in the form mentioned therein. In our case, we notice that not only no form was used but suddenly the Court was informed by an application that Dr. Kulkarni was not available and by the same application the defence was called upon to admit or deny the document of post-mortem examination notes. In fact the Public Prosecutor's application at Exh. 22 even does not call upon the defence to admit or deny the genuineness of the document. There is an element of haste imprinted upon Exh. 22 which to say the least is not commendable in a criminal trial.

38. In our opinion, therefore, the prosecution has totally failed to prove the charge against the accused. The order of conviction and sentence passed by the learned Sessions Judge of Satara in Sessions Case No. 19 of 1975 is not sustainable and is, therefore, set aside. The accused is acquitted of the offence with which he was charged. We have already directed that he be set at liberty forthwith.