IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 9092 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO
	Circulate the judgement amongst the Judges of the subordinate Judiciary.	

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BHAVANBHAI PREMJIBHAI VAGHELA & 4....Applicant(s)

Versus

STATE OF GUJARAT....Respondent(s)

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Appearance:

MR K S CHANDRANI, ADVOCATE for the Applicant(s) No. 1 - 4

MR DHARMESH DEVNANI, APP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 30/11/2017

ORAL JUDGMENT

1 Rule returnable forthwith. Mr. Dharmesh Devnani, the learned Additional Public Prosecutor waives service of notice of rule for and on behalf of the State of Gujarat.

2 By this application under Article 227 of the Constitution of India, the applicants – original accused persons call in question the legality and validity of the order dated 15th November 2017 passed by the 5th Adhoc Additional District and Sessions Judge, Surendranagar below Exhibit: 130 in the Sessions Case No.53 of 2014.

3 The facts giving rise to this application may be summarised as under:

3.1 The applicants before me are put on trial on the charge of they having committed murder. It appears that one *Muljibhai alias Bhim Makwana* lodged a First Information Report at the Thangadh Police Station, District: Surendranagar bearing I-C.R. No.0036 of 2013 for the offence punishable under Sections 302, 147, 148, 149, 452, 504, 506(2) and 120B read with 34 of the Indian Penal Code.

4 I need not discuss the case of the prosecution, as I am called upon to answer a neat question of law.

5 It appears that when the trial commenced, the original first informant namely *Mulji alias Bhim Makwana* was no more. During the pendency of the trial, he passed away. It was a natural death. After examination of almost thirty witnesses by the prosecution, ultimately, in the last, the Investigating Officer stepped into the box. While the evidence of the Investigating Officer was being recorded, he deposed that *Mulji alias Bhim Makwana* had come to the police station and lodged

a First Information Report as regards the murder of his nephew namely *Kanubhai.* The Investigating Officer, thereafter, proceeded to depose the exact contents of the entire F.I.R. At that stage, the defence counsel raised an objection stating that it is not permissible in law for the Investigating Officer to prove the contents of the F.I.R. if the first informant is dead. The defence counsel pointed out to the Trial Court that all that the Investigating Officer can depose is with regard to the signature of the first informant, his own signature on the First Information Report and the fact that on a particular date, the First Information Report was taken down and registered. Nothing beyond this can be deposed by the Investigating Officer.

6 It appears that the objection was overruled by the Trial Court. In such circumstances, the defence filed an application Exhibit: 130. The application Exhibit: 130 came to be adjudicated by the Trial Court and by order dated 15th November 2017, the same was rejected. The order passed by the Trial Court reads as under:

"Order below Ex-130
In
Sessions Case No.53/2014.

1. Read the application. Present application is preferred by Ld advocate for accused no.1 to 4 for raising objection against narrating the facts of complaint/FIR by PW-31 in his deposition and further not to admit the original complaint in the record by exhibiting the same.

2. Ld. Advocate Mr. Bharadwaj argued that PW-3l is the PI who at the relevant point of time write down the information give by informant/complainant. In the present case the informant is died during ' the trial and hence the prosecution "could not procure his evidence. The . Original complaint was given by complainant to PW-31, hence the contents of the complaint are to be termed as hearsay evidence and hence the same is not admissible in evidence. Ld. Advocate further submitted that PW-31 is police officer hence the complaint is the statement before the police hence also the original complaint can't be admissible as it hit by sec-

162 of Cr.P.C. Therefore Ld advocate prayed not to note sown the contents of the complaint in the deposition of PW31 and further not to give exhibit no. to original complaint.

3. Hd. The Ld.DGP Mr. Sabhani for the Prosecution. Ld DGP mainly submitted that PW-31 was the PI of Thangadh Police Station and at the relevant time he has written down the complaint/FIR. Thus it is not termed as hearsay evidence. Moreover the complaint was. Noted down before registering the offence and then the investigation was started hence the same can not be hit by sec-162. Therefore Ld DGP prayed to reject the application.

4. Read the record. Here the Ld advocate for the defense raised Two issues.

(1) whether the contents of complaint/FIR taken by police officer be termed as Hearsay evidence ?

(2) Whether the complaint taken by Police officer statement under sec162 of Cr.P.C?

5. *Now before adverting to the issues it is necessary to looked in to factual h matrix of the case. Here the accused are tried for the offences punishable U/S-302, 412, 148,149,452,506(2),120(B),34 of IPC registered at Thangadh police station vide CR.No.I 36/13. It is alleged by the prosecution that, the deceased and Accused no.1 was in the same business of Construction and due to business rivalry the accused no.1 had grudge over the deceased hence all the accused constituted conspiracy to kill the deceased and in furtherance of their common intention the accused went to the house of deceased in Bolero Motor-car with deadly weapons and the deceased was sleeping in faliya of the house where the Accused no. 2,3,4 have caught hold the accused and Accused No.1 inflicted several blows of knife, the accused no.5 restricted the family members of deceased and when informant tried to save the deceased, the accused no.1 has inflicted blows of knife on him and thus cause death of deceased Kanubhai and caused grievous hurt to informant Muljibhai.*

6. *The Prosecution has examined 'total 30 witnesses till date. The complainant/informant was died by natural course during the trial. The Prosecution is now examining the PW-31 who is the PI of Thangadh Police station and at relevant point of time he has taken information and forwarded the complaint for registering the offence.*

7. *Now with this factual background considering the contentions of Ld.*

Advocate for accused, the first contention raised by defense counsel is that, the PW-31 while in deposition can not state the contents of complaint and the same is hearsay evidence and it can not be admissible in evidence. Now here from the record it transpires that the first information regarding commission of offence was given by informant to PW~31 who was lit-charge of Thangadh police station at the relevant point of time, the same was reduced in writing by PW-31 and it was signed by informant and PW-Bl. Thus the contents of original complaint is not the hearsay Evidence but it is information noted down U/s-154 of Cr.P.C and the original complaint is FIR.

8. *The term "hearsay" refers to an out-of-court statement made by someone other than the witness reporting it. In other words Hearsay evidence can be (1) Testimony based on what a witness has heard from another a person, of which he has no personal knowledge or experience. (2) Unverified information acquired from another person, which is not part of one's own knowledge. While an information given under sub-section (1) of Section 154 CrPC is first information report (FIR) and it is a very important document. As per sec-154, it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is further settled law that FIR is public document. Hence here in case on hand it is not disputed that PW-3l was in-charge of Thangadh Police station at relevant point of time. Hence being the iii-charge officer of Police station PW-Bl has write down the complaint given by informant at hospital, and the same contents were noted in form of 154 and same was forwarded to Magistrate as provided by the law. The PW-3l has noted down the complaint in his own hand writing and the was signed by him. Hence except the complainant only the police officer who get the information and reduced the same in writing can prove the contents of FIR as per Sec-67 of Evidence Act. Thus the contention of the defense counsel that the contents of FIR are hearsay evidence has no force of Law hence not tenable.*

9. Now from the record it is further evident that after recording the FIR/complaint the PW-31 forwarded the same to police station and on that basis the offence was registered and then investigation was started. Thus the first information given by deceased informant before starting investigation would not fall under the purview of Sec-162 of Cr.P.C. Hence the second contention raised by Ld. Advocate also against the provisions of Law hence rejected. Thus in view of forgoing reasons the objections raised by Ld defence counsel are not tenable hence following final order is passed:

ORDER

The present application is rejected.
No order to cost.

Signed & pronounced in the open Court on this 15th day of November, 2017.

Date: 15.11.2017 *(H.M. Pavar)*
Surendranagar *5th (Ad-hoc) Addl. District Judge*
Surendranagar
UID: GJ00673."

7 Mr. Chandrani, the learned counsel appearing for the applicants vehemently submitted that the impugned order is not tenable in law. The Trial Court ought to have upheld the objection and should not have permitted the Investigating Officer to prove the contents of the First Information Report in the absence of the original first informant. Mr. Chandrani, the learned counsel submitted that the contents of the First Information Report would be admissible in evidence only if Section 32 of the Evidence Act is applicable. According to the learned counsel, the statement in the F.I.R. does not relate to the cause of death of the first informant. Mr. Chandrani, the learned counsel pointed out that indisputably, the first informant passed away on account of natural death.

8 In such circumstances referred to above, Mr. Chandrani, the learned counsel submitted that the impugned order be quashed.

9 Mr. Dharmesh Devnani, the learned A.P.P. appearing for the State of Gujarat, with his usual fairness, submitted that what has been submitted by Mr. Chandrani, the learned counsel appearing for the applicants is the correct position of law. The Trial Court committed a serious error in passing the impugned order below Exhibit: 130.

10 It is very unfortunate that on such an issue, the matter had to be carried upto the High Court. As the issue has been raised, let me explain the correct position of law.

11 The basic purpose of filing a First Information Report is to set the criminal law into motion. A First Information Report is the initial step in a criminal case recorded by the police and contains the basic knowledge of the crime committed, place of commission, time of commission, who was the victim, etc. The term 'First Information Report' has been explained in the Code of Criminal Procedure, 1973 by virtue of Section 154, which lays down that:

> *"Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf".*

12 F.I.Rs. can be registered by a victim, a witness or someone else with the knowledge of the crime. The police can record three different kinds of statements. The first kind of statement is one which can be recorded as an F.I.R., the second kind of statement is one which can be recorded by the police during the investigation, and the third kind of statement is any kind of statement which would not fall under any of the two categories mentioned above. Evidence is the matter of testimony manifesting the fact on a particular precision or circumstances. The First Information Report is not by itself a substantial piece of evidence and

the statement made therein cannot be considered as evidence unless it falls within the purview of Section 32 of the Evidence Act. It is an admitted fact that the original first informant because of the injuries caused by the applicants. The relative importance of a First Information Report is far greater than any other statement recorded by the police during the course of the investigation. It is the foremost information the police gets about the commission of an offence and which can be used to corroborate the story put-forward by the first informant under Section 157 of the Evidence Act or to contradict his version by facts under Section 145 of the Act in case he is summoned as a witness in the case by the Court. It may happen that the informant is the accused himself. In such cases, the First Information Report lodged by him cannot be used as an evidence against him because it is embodied in the basic structure of our Constitution that a person cannot be compelled to be a witness against himself.

13 In certain cases, the First Information Report can be used under Section 32(1) of the Evidence Act, 1872 or under Section 8 of the Evidence Act as to the cause of informant's death or as a part of the informant's conduct. Section 32 of the Evidence Act reads as under:

> ***"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant***
>
> *Statements, written or verbal, of facts in issue or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose presence cannot be procured without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable, or who is kept out of the way by the adverse party, are themselves relevant facts in the following cases:*"
>
> *(1)**When it relates to cause of death :-**When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

*(2)**Or is made in course of business:-**When the statement was made by such a person in the ordinary course of business and, in particular, and without prejudice to the generality of the foregoing provisions of this clause, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business.*

*(2A)**Or is made in discharge of professional duty etc:**-When the statement consists of an entry or memorandum made by such person in the discharge of professional duty or of an acknowledgement written or signed by such person in respect of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him*

*(3) **Or against interest of maker;-** When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.*

***Explanation:**A recital as regards boundaries of immovable property in document containing such statements, as to the nature or ownership or possession of the land of the maker of the statement or of adjoining lands belonging to third persons, which are against the interests of the maker of the statement, are relevant and it is not necessary that the parties to the document must be the same as the parties to the proceedings or their privies."*

*(4) **Or gives opinion as to public right or custom, or matters of general interest;-** When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.*

*(5) **Or relates to existence of relationship;-** When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship a [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.*

(6) ***Or is made in will or deed relating to family affairs;****- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.*

*(7)****Or in documents relating to transactions mentioned in section 13, clause*** *(a):When the statement is contained in any deed, will or other document, being a deed, will or other document which relates to any transaction by which a right or custom was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence, as mentioned in clause (a) of section 13.*

Explanation I:-*Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom or if such statement related to facts collateral to the proceeding and it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.*

Explanation II:*-A recital as regards boundaries of immovable property in a document containing such statement, as to the nature or ownership or possession of the land of the maker of the statement or of adjoining lands belonging to third persons, shall be relevant and it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies."*

(8) Or is made by several persons and expresses feelings relevant to matter in question.-

When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is whether A was murdered by B: or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable were under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e)The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact."

14 If the informant dies, the First Information Report can be, unquestionably, used as a substantive evidence. A prerequisite condition must be fulfilled before the F.I.R. is taken as a substantive piece of

evidence i.e. the death of the informant must have nexus with the F.I.R. filed or somehow having some link with any evidence regarding the F.I.R. This is what has been explained by the Supreme Court in the case of **Damodar Prasad vs. State of U.P. [AIR 1975 SC 757]**.

15 There are plethora of decisions taking the view that an F.I.R. can be a dying declaration if the informant dies of his injuries after lodging the same. [***See Munna Raja vs. State of M.P. (AIR 1976 SC 2199)].***

16 Another important thing is that for an F.I.R. lodged by a deceased person to be treated as substantial, its contents must be proved. It has to be corroborated and proved for there to be any value of the same in the case. The F.I.R. can be used by the defence to impeach the credit of the person who lodged the F.I.R. under Section 154(3) of the evidence Act. In case the death of the informant has no nexus with the complaint lodged i.e. he died a natural death and did not succumb to the injuries inflicted on him in relation to a matter, the contents of the F.I.R. would not be admissible in evidence. In such circumstances, the contents cannot be proved through the Investigating Officer. The Investigating Officer, in the course of his deposition, should not be permitted to depose the exact contents of the F.I.R. so as to make them admissible in evidence. All that is permissible in law is that the Investigating Officer can, in his deposition, identify the signature of the first informant and that of his own on the First Information Report and he can depose about the factum of the F.I.R. being registered by him on a particular date on a particular police station.

17 It is absolutely incorrect on the part of the Trial Court to say that in the absence of the first informant, the police officer can prove the contents of the F.I.R. as per Section 67 of the Evidence Act.

18 In the case of **Harkirat Singh vs. State of Punjab [AIR 1997 SC 3231],** the Supreme Court observed as under:

> ***"In our considered view, the High Court was not justified in treating the statement allegedly made by Kharaiti Ram during inquest proceedings as substantive evidence in view of the embargo of Section 162, Cr. P.C. Equally unjustified was the High Court's reliance upon the contents of the FIR lodged by Walaiti Ram who, as stated earlier, could not be examined during the trial as he had died in the meantime. The contents of the FIR could have been used for the purpose of corroborating or contradicting Walaiti Ram if he had been examined but under no circumstances as a substantive piece of evidence."***

19 In the case of **Hazarilal vs. State (Delhi Administration) [AIR 1980 SC 873],** the Supreme Court, in para 7, observed as under:

> *"The learned counsel was right in his submission about the free use made by the Courts below of statements of witnesses recorded during the course of investigation. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by S. 145 of the Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in the re-examination of the witness for the limited purpose of explaining any matter referred to in his cross-examination. The only other exception to this embargo on the use of statements made in the course of an investigation relates to the statements falling within the provisions of S. 32 (1) of the Indian Evidence Act or permitted to be proved under Section 27 of the Indian Evidence Act. Section 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing and reduced into writing and relevant to matters in question, without such writing being shown to him or being proved but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Courts below were clearly wrong in using as substantive evidence statements made by witnesses in the course of investigation. Shri H. S. Marwah, learned counsel for the Delhi Administration amazed us by advancing the argument that the earlier statements with which witnesses were confronted for the purpose of*

contradiction could be taken into consideration by the Court in view of the definition of "proved" in Section 3 of the Evidence Act which is, "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man, ought, in the circumstances of the particular case to act upon the supposition that it exists". We need say no more on the submission of Shri Marwah except that the definition of proved does not enable a Court to take into consideration matters, including statements, whose use is statutorily barred."

20 I have to my benefit a very lucid and erudite judgment rendered by a learned Single Judge of the Madhya Pradesh High Court in the case of **Umrao Singh vs. State of M.P. [1961 Criminal L.J. 270]**. In this case, the petitioners *Umrao Singh* and *Kunwarlal* were convicted of the offence punishable under Section 323 of the Penal Code and sentenced to two months rigorous imprisonment. The case of the prosecution was that on 27th August 1959, the petitioners named above belaboured Barelal who had gone out to graze his cattle, and who was blamed by the accused to have caused damage to their crops. *Barelal,* however, died a natural death after six months of the occurrence, but before he could be examined as a witness. It was contended that the F.I.R. lodged by *Barelal* could not be considered by the Courts below and that the evidence of the solitary witness, *Pannala* was unreliable, as he was not mentioned in the list of witnesses filed by the prosecution. In this set of facts, the Court observed as under:

"4. It is true that the first information report is not by itself a substantive piece of evidence and the statement made therein cannot be considered as evidence unless it falls within the purview of S. 32 of the Evidence Act. It is an admitted fact that Barelal did not die because of the injuries caused by the petitioners. Section 32 was inapplicable.

5. It is true that in the list of witnesses Pannalal's name has been mis-spelt as 'Dhannalal', but this doubt is removed when the first information report is looked into. There, Pannalal's name is mentioned. Shri Dey contends that it is not permissible to look at the F. I. R. at all. In my opinion this argument cannot be accepted. It is proved by Ram Ratan P. W. 6 that he

recorded the report which was lodged by Barelal. There is a distinction between factum and truth of a statement. It has been aptly pointed out by Lord Parker C. J. in ***R. v. Willis (1960) 1 W. L. R. 55*** *that evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay.*

It is hearsay and inadmissible when the object of the evidence is to establish what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made. According to Ram Ratan, Barelal mentioned Pannalal's name to him. Applying the above dictum, Ramratan's evidence is inadmissible to prove that Pannalal was in fact present at the time of the occurrence; but Ram Ratan's statement is admissible to prove that Barelal had mentioned the name of Pannalal to the witness."

21 In view of the aforesaid discussion, this application is allowed and the impugned order passed by the Trial Court below Exhibit: 130 in the Sessions Case No.53 of 2014 is hereby quashed and set aside. The trial Court shall now proceed further with the recording of the evidence of the Investigating Officer keeping in mind the principles of law explained in this judgment. Exhibit: 130 filed by the applicants in the Sessions Case No.53 of 2014 stands allowed. Rule is made absolute. Direct service is permitted.

(J.B.PARDIWALA, J.)

chandresh