Bombay High Court
Ananda Genu Rajapure vs The State Of Maharashtra on 9 April, 2010
Bench: B.H. Marlapalle, Mridula Bhatkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 206 OF 1992

Ananda Genu Rajapure .. Appellant
(Org. Accused.)

Vs.

The State of Maharashtra .. Respondent

Mr. P. J. Shinde for appellant.
Mr. J. P. Yagnik, APP for State.

CORAM: B. H. MARLAPALLE &
MRS. MRIDULA BHATKAR, JJ.

April 09, 2010.

ORAL JUDGMENT (Per Mrs. Mridula Bhatkar, J.):

1. This appeal is preferred against the Judgment and Order dated 18/3/1992 passed by the 3rd Additional Sessions Judge, Satara in Sessions Case No. 220 of 1990 thereby convicting the appellant-accused for the offences punishable under Sections 302, 394 and 449 of IPC and sentencing him for life under all the counts.

2. Complainant - Dagadu Dhondiba Rajapure (PW 1) is a son of Chandrabhaga. He was residing with his mother Chandrabhaga along with his wife - Yashoda Dagadu Rajapure (PW 7) and two sons and the youngest daughter at the relevant time. His two daughters were married and daughter Kalpna had come to the maiden home to meet the family members. On the date of the incident i.e. on 21/8/1990 Kalpna was to go back to her matrimonial home and complainant was to go to her village to drop her back. At that time, deceased Chandrabhaga was at home and accused - Ananda had come to visit their house at about 10 a.m. After having their meals, the complainant and his wife Yashoda (PW 7) and his school going son - Sanjay (PW 6) left house along with Kalpana, leaving in the house the accused in the company of the mother. The complainant, after leaving Kalpna near the village of her matrimonial home, went to the field for the purpose of doing agricultural work along with his wife and Sanjay went to school. At around 3 to 3.30 p.m. one person Maruti Dhondi Rajapure came running to the field and informed the complainant that his mother was serious. The complainant, therefore, hurriedly left the field, went to his house and saw people gathered around his house and he noticed his mother Chandrabhaga lying injured. He was shocked to see his mother in such condition and he and family members started crying in grief. The complainant found blackish and blueish marks around her neck and blood stains near her lips. He and other villagers also noticed blood in the store room near the kitchen in the house. Deceased was wrapped in a quilt and was made to sit near front door of the house (Oti/osari of the house). It is the case of the prosecution that on that day at around 2 p.m. Sanjay had come from the school during the recess to eat and saw his grandmother lying injured in the store room. He started shouting, therefore, neighbour

- Kisan Vithal Rajpuri (PW 10) who was chatting along with PW 3 - Dilip Tukaram Rajapure, rushed to the spot and then they informed the persons in the vicinity and thereafter Maruti went and informed the complainant in the field. The cremation took place on the next date i.e. 22/8/1990. After the cremation in the afternoon of 22/8/1990, the complainant remembered about the golden necklace which his mother deceased Chandrabhaga used to wear. It was a traditional jwellery, namely, "Vajratik" and was not found on the person of Chandrabhaga when she was found dead and when she was cremated. Complainant enquired about this gold ornament to his wife

- Yashoda (PW 7) who also expressed her ignorance about the said gold ornament. After search in the house, the ornament was not found so he made enquiry with his near relatives. PW 3 - Dilip Tukaram Rajapure, a maternal brother of the complainant in search of that ornament went to pachgani thinking that ornament might be sold to any trader or jweller. In random enquiry, Dileep came across the information given by owners of Bhairav Cloth Centre by PW 4 - Hasalchand Ratnaji Bhandari and PW 5 -

Rajendra Hasalchand Bhandari on 25/8/1990 that on 21/8/1990 one Ananda i.e. accused had come to the Bhairav Cloth Centre and wanted to purchase cloth from PW 5 on credit. However, when such credit was refused by PW 5, accused offered to pledge one ornament, namely, Vajratik and PW 5 accepted the pledge and in lieu of that he allowed accused to buy cloth of Rs.525/-. Dilip (PW 3) on verification of the said ornament with PWs 4 and 5, communicated this information to the complainant on 25/8/1990.

Complainant approached the police in the evening of 26/8/1990 and PW 11

- Manohar Ramchandra Chikale, PSI of Pachgani Police Station thereafter registered offence at C.R. No. 29 of 1990 at Pachgani Police Station punishable under Sections 302, 394 and 449 of IPC. The IO immediately arrested accused on the same day at around 8 O'clock in the night. After disclosure by the accused about the ornament, namely, Vajratik, IO drew recovery panchanama at Exh.10. On the next day, IO conducted spot panchanama, recorded statements of the relevant witnesses and collected sample for chemical analysis. After completion of the investigation he filed charge-sheet in the court of Judicial Magistrate, First Class, Pachgani and thereafter the case was committed to the court of Sessions which was numbered as Sessions Case No. 220 of 1990. The charge was framed at Exh. 3 for the offences as mentioned in the charge-sheet. It was tried by the learned Judge and the trial concluded in the conviction under all the counts of the charge. Hence, this appeal.

3. The learned counsel Mr. Shinde appearing for the appellant-

accused has submitted that the judgment and order passed by the learned Sessions Judge is illegal and erroneous. He submitted that there is no sufficient evidence against the appellant-accused and yet on the basis of the suspicion the learned trial Judge has convicted the accused. The learned counsel, at the out set, has challenged the proof of the fact of homicidal death of Chandrabhaga. He has submitted that though Chandrabhaga was found dead in the house and complainant and the family members noticed the blood and blueish - blackish marks around her neck, they did not report about the incident to the police so also there was no post mortem of body of Chandrabhaga. The learned counsel argued that in the absence of post mortem or any medical report stating cause of death of Chandrabhaga, it was totally incorrect on the part of the learned trial Judge to hold the accused guilty for the offence of murder punishable under Section 302 of IPC. The learned counsel has further submitted that the conviction is based on a very week circumstantial evidence. The prosecution has also not proved motive. The accused has claimed the ownership of the ornament and this defence adopted by the accused ought to have been appreciated in the proper perspective by the learned trial Judge. On the conduct of the accused, he submitted the evidence of the witnesses especially PW 9 -

Prakash Mahadev Dagade that accused was though talkative was quiet after the death of Chandrabhaga has, in fact, no meaning. On the contrary, PW 3 has given admission in the cross-examination that accused has attended the funeral and cremation of Chandrabhaga so also he attended the post death rituals which were performed in the family. The learned counsel has further submitted that there is no eye witness and the case standing on very shaky circumstances should not have been ended in holding accused guilty and the said judgment deserves to be set aside and accused is to be acquitted. The learned counsel has also claimed that the prosecution case is imaginary and by way of an after thought. The death occurred on 21/8/1990 and the FIR came to be filed for the first time on 26/8/1990 in the evening. Thus the case was fabricated against the accused.

4. The learned APP, while opposing this appeal, has submitted that though there is no eye witness in this case, the prosecution has tendered concrete, cogent and consistent evidence on the point of

circumstances. The learned APP argued that accused was last seen together in the company of the accused by the complainant and his family members on the date of the incident. Evidence of all these witnesses is not destroyed by the defence and it is correctly accepted by the learned trial Judge. He argued that the prosecution has tendered evidence about suspicious condition of the body of Chandrabhaga. The learned APP submitted that besides last seen together, prosecution has relied on the recovery of Vajratik from the shop of PW 5 i.e. Bhairav Cloth Centre. This recovery connects the accused and the act of murder. He argued that learned trial Judge has rightly appreciated this evidence holding it strong incriminating circumstance against the accused. Witness PW 8 - Shripati Maruti Dhudhane has deposed that he has seen the accused on the same day at around 12 noon proceeding towards Pachgani and he gave him lift on his scooter. PW 3 - Dilip Rajapure is a star witness who corroborated the evidence of PW 8 - Shripati Dhudhane as he saw accused and Dudhane on his way and further Dilip has corroborated the evidence of PWs 4 and 5 on the point of recovery of Vajratik. The learned APP argued that the defence adopted by the accused is false and the conviction of the accused under Sections 302, 394 and 449 of IPC is legal and be confirmed.

5. There is no eye witness to claim that Chandrabhaga died an unnatural death on 21/8/1990. In such circumstances, it could be only the medical evidence to support the prosecution case. The death has occurred on 21/8/1990 and for the first time on 26/8/1990, the complainant claimed before the police that his mother died a homicidal death at the hands of the accused. The dead body was cremated on 22/8/1990 and no post mortem was conducted. The fact of homicidal death of Chandrabhaga ought to have been proved through the opinion of the expert on the medical field.

Admittedly, the body was neither sent for post mortem nor any doctor was called to give opinion about the death of Chandrabhaga. There was no inquest panchanama drawn under Section 174 of Cr.P.C. so as to suggest the condition of the dead body. The provision for holding an inquest and preparing an inquest report is contained in Section 174 of Cr.P.C. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The Section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely whether it is suicidal, homicidal, accidental or by some machinery etc. The scope and purpose of the said Section was explained by the Apex Court in the case of Podda Narayana and ors. vs. State of Andhra Pradesh [AIR 1975 SC 1252] . Thus, there is no evidence on record to determine the cause of death as to whether Chandrabhaga died due to throttling, due to strangulation, due to fall or any other manner. Therefore, in the absence of the eye witness and medical evidence, we are not inclined to hold that prosecution has discharged the burden of proving the fact of murder. The order of conviction passed by the trial court for the offence punishable under Section 302 of IPC is, therefore, unsustainable.

6. The charge of robbery and house trespass is based on two major circumstances, (a) last seen together and (b) recovery of ornament of Chandrabhaga. On the point of last seen together, prosecution has tendered evidence of PW 2 - Dagadu Dhondiba Rajapure, PW 6 - Sanjay Dagadu Rajapure and PW 7 - Yashoda Dagadu Rajapure. These are family members of deceased

Chandrabhaga and all of them have stated that on that day in the morning accused - Ananda had come to their house and when they all left for their work, accused continued chatting with Chandrabhaga in their house. The prosecution has brought on record that accused is a distantly related to the complainant. All these witnesses are consistent in their evidence and, therefore, visit of the accused on that day to the house of the deceased is proved by the prosecution and the fact that he remained alone with deceased is also proved. On the point of finding Chandrabhaga dead in the house at around 2 p.m., evidence of prosecution witnesses i.e. Pws 3, 6 and 10 is credible and relied. Similarly, evidence of PW 3 - Dilip Rajapure and PW 8 - Shripati Dhudhane stating that accused at around 12 O'clock wanted to go to Pachgani and he took lift also cannot be disbelieved. Thus we have no hesitation to hold that the prosecution has proved the fact of last seen together on the basis of the evidence of these witnesses.

7. The sale of ornament by accused to PW 4 and PW 5 on 21/8/1990 i.e. on the date of the incident cannot be doubted. PW 4 and PW 5 are independent witnesses and their evidence not only corroborates each other but also corroborates with the evidence of PW 9 and the fact of production of ornament - Vajratik itself confirms the sale. On the point of identification of the ornament, we accept the evidence of PW 2 -

complainant and his wife Yashoda - PW 7 as they have deposed that Chandrabhaga used to wear the said Vajratik since last many years. PW 7

- Yashoda has deposed that she had seen the said ornament on the person of her mother-in-law since PW 7 got married and, therefore, identification of the ornament that it belonged to Chandrabhaga is also proved by the prosecution. PW 11, I.O. Shri Manohar Chikale has deposed that after the arrest of accused - Ananda at around 8 p.m., accused made voluntary statement about the production of Vajratik and pursuant to his disclosure, memorandum was drawn and recovery of Vajratik was made under the panchanama. We specifically note that this cannot be treated in true sense as a disclosure statement under Section 27 of the Indian Evidence Act.

Such kind of recovery at the instance of the accused is not admissible because the information was very much within the knowledge of the police. PW 3 - Dilip Rajapure has deposed that he had received the information about pledging Vajratik with PW 4 and he communicated this information to the complainant and this was informed by the complainant while lodging FIR to the police. Thus, the fact that the ornament was pledged with PW 4 and PW 5 for Rs.525/- was very much within the knowledge of police and this fact was known to the police from the other source. Section 27 of the Indian Evidence Act contemplates that the information should not be within the knowledge of the police and it should be disclosed and known to the police through the accused only. We place reliance on the land mark judgment in the case of Pulukuri Kottaya and ors.

vs. Emperor [1947 Privy Council 67]. Thus, the circumstance of recovery under Section 27 of the Evidence Act is not going to help the prosecution and cannot be held against the accused. However, the circumstance that he did visit to the shop of PW 4 and PW 5, he pledged the ornament with PW 4 for an amount of Rs.525/- and purchased the cloth is independently proved by the prosecution through PW 3, PW 4, PW 5 and PW 8 and, therefore, we have no hesitation to hold the fact that

Vajratik belonged to Chandrabhaga, accused came in possession of it on the same day i.e. after death of Chandrabhaga and he went to shop of PW 4 and PW 5, pledged it for some amount is proved by the prosecution. Thus the offence of theft punishable under Section 379 of IPC is proved by the prosecution but the charge under Section 394 i.e. of robbery with intention to cause death or injury is not made out from the evidence brought before the trial court by the prosecution.

8. Thus the evidence brought on record by the prosecution is not sufficient to hold the accused guilty for the offences punishable under Section 394 and also under Section 449 of IPC. Last seen together is one circumstance and sale of ornament and its recovery is the other circumstance. However, on these two pillars the building of the prosecution cannot stand. It requires much more evidence to prove the offence of robbery and trespass against the accused. Criminal trespass is defined under Section 441 of the IPC, however, accused admittedly entered the house of the deceased being their relative and he was chatting with the family members and deceased. No where his intention to commit crime at the time of entry has been proved and, therefore, he cannot be held guilty for the offence of criminal trespass, much less, the offence punishable under Section 449 of IPC. While answering to question nos.15 and 20 which were in respect of sale of Vajratik in his accused statement recorded under Section 313 of Cr.P.C., the accused has admitted that he did pledge Vajratik with PW 4. He adopted defence that Vajratik belonged to him.

This defence is not probable and not acceptable in view of consistent evidence of Pws 2, 3, 4, 5, and 7. The learned Judge of the trial court has erred in holding the accused guilty on the basis of circumspection and suspicion and there is much gap in the circumstantial evidence which was not bridged up by the prosecution. There was absolutely no evidence in support of the charge of robbery as well as trespass against the accused.

9. In the premises, we allow the appeal partly. We quash and set aside the conviction of appellant-accused under Sections 302, 394 and 449 of IPC. However, while deciding the charge under Section 394 of IPC, we hold the appellant-accused guilty for the lesser offence of theft punishable under Section 379 of IPC.

ig The appellant-accused was arrested on 25/8/1990. He was in jail throughout the trial and he was released on bail by this court, pending appeal, on 20/4/1992 and, therefore, he is sentenced to the period already undergone by him. His bail bonds stand cancelled.

(MRS. MRIDULA BHATKAR,J.) (B. H. MARLAPALLE, J.)