

Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 721 OF 2000

Shivaji Shankara Zagade	]	
Age about 25 years, Occ. Mason,	]	
R/o. Zagade Vasti, Mhaswad.	]	
Tal. Maan, Dist. Satara	]..Appellant	

Vs.

State of Maharashtra	].. Respondent
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Ms. Shradha Sawant, appointed advocate for the appellant
Ms. M.M. Deshmukh, APP for respondent - State

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, J.J.**

**RESERVED ON : 1st FEBRUARY, 2022
PRONOUNCED ON : 26th FEBRUARY, 2022**

JUDGEMENT :- (Per Prithivraj K. Chavan, J.)

1. By this appeal, the appellant impugns judgment of conviction rendered by 3rd Additional Sessions Judge, Satara on 30th September, 2000, by which he has been sentenced to suffer imprisonment for life and fine of Rs.500/- in default to suffer R.I. for three months, for having committed murder of his father – Shankar (“deceased”).

2. The prosecution's story goes like this. Laxmi S. Zagde, wife of the deceased and mother of the appellant is the first informant. The prosecution's case is that the appellant hails from Zagade Mala, Mhaswad, Tal. Maan, Dist. Satara. At the relevant time, he was serving in Mumbai. Back in the village, his father and mother were staying. The appellant was working as Mason in Mumbai. His other brother namely Tanaji was also out of station for his livelihood. Gajanan was staying at Pandharpur, while younger brother Vijay was staying at Mhaswad. Father of the appellant was also working as Mason whenever work was available. Father of the appellant, however, was addicted to liquor.

3. The appellant had been to the village eight days prior to the incident. He noticed the deceased continuously abusing his mother under the influence of liquor which had become a routine. On the fateful day of 2nd March, 1997 around 8.30 a.m. the deceased had gone to Mhaswad. His mother (appellant's) was busy in cooking. Around 11.00 a.m. the deceased returned home under the influence of liquor and started abusing his wife

on the ground that her behavior was improper and she should vacate his house. His wife however, told the deceased that she had four sons and she had no place to go at such an advanced stage. She also told her husband that she would stay with him only and he may do whatever he likes. The quarrel continued. The deceased, therefore, pounced upon his wife and started beating her. The incident continued till 4.00 p.m. By that time, the appellant returned home. He waited in the courtyard and heard the quarrel. He could not control himself. He intervened and asked the deceased as to why he was quarreling with his mother. The deceased asked the appellant his authority to question him. The deceased asked the appellant to vacate his house and pushed him away. The appellant too got up and pushed the deceased. The deceased fell down. The appellant then brought a stone and threw it on the head of the deceased resulting into bleeding injury. The deceased started groaning. Someone had gone to call the doctor. Dr. Prakash Deshmane arrived at the scene and after examining the deceased, declared him dead.

4. Mother of the appellant went to the police station and thereafter

the Investigating Officer, PW-2 – P.S.I. Sanjay Tathe, who was on patrolling duty rushed to the spot. An offence came to be registered against the appellant on the same day bearing C.R. No. 6 of 1997 under Section 302 of the Indian Penal Code.

5. The Investigating Officer had recorded statements of the witnesses, drew spot and inquest panchanama and the dead body of the deceased was sent for autopsy. The appellant was arrested on 4th March, 1997. During interrogation, the appellant alleged to have discovered the stone used in the commission of the offence, which was concealed in the cottonwood, towards the back side of his house. The muddemal property including the blood stained clothes of the deceased and other articles were seized for chemical analysis. After investigation, a charege-sheet came to be filed against the appellant in the Court of Judicial Magistrate First Class, Dahivadi, which was ultimately committed to the Sessions Court, Satara as the offence under Section 302 of the Indian Penal Code was exclusively triable by the Sessions Court.
6. The appellant appeared before the learned Additional Sessions

Judge. After hearing both the sides, a charge was framed under Section 302 of the Indian Penal Code, which was explained to the appellant. He abjured the guilt and claimed to be tried. His defence was of total denial and false implication.

7. The learned Additional Sessions Judge after going through the evidence on record and after hearing the prosecution and defence witnesses found that the prosecution has proved the case beyond all reasonable doubts and, therefore, convicted and sentenced the appellant to suffer imprisonment for life *inter alia* fine of Rs.500/-.
8. We heard the learned Counsel for the appellant and the learned APP at length. With the assistance of learned Counsel for the appellant we have scanned the evidence of the prosecution witnesses.
9. At the outset, indisputably the deceased died a homicidal death, which is evident from the autopsy report as well as the evidence of PW-3 Dr. Jaiwant Galande. He conducted an autopsy on 3rd March, 1997 and noticed the following injuries :-

“External Injuries :-

1. *Site Ziagomatic bone 1”x 1/2” x 1/2” contused.*
2. *C.L.W. over left ear 2” x 1/4” x 1/4”*
3. *C.L.W. over pinna of left ear 1” x 1/2”*
4. *C.L.W. over posterior aspect of left ear 2” x 1” x 1/2”*
5. *C.L.W. over occipital area 2.1/2” x 1” x 1”*
6. *C.L.W. lower area of pinna of ear 1 cm.*
7. *Fracture of ziagomatic bone.*

Internal Injuries :-

1. *Fracture of temporal bone left.*
2. *Fracture of ziagomatic bone left*
3. *Fracture of left side of skull.*
4. *Haemotoma over right and left temporal region.”*

10. According to the expert, the death was due to cardio-respiratory arrest due to head injury. He further opined that the injuries are possible if a stone is hit on the head. He categorically denied that the injuries described at Sr. Nos. 1, 2, 3, 4, 6 and 7 in Column No.17 are not possible due to fall on such stone. His evidence could not be rebutted during the cross by the defence. Once it has been established that the deceased died a homicidal death, the next important question would be whether the prosecution has succeeded in establishing a nexus between the homicidal death and the accused. In the sense, whether the appellant was an author of the injuries sustained by the deceased.

11. The only eye-witness and the mother of the appellant PW-1

Laxmi Zagade has turned hostile. The sum and substance of her evidence is that the deceased (her husband) was addicted to liquor. He always used to pick up quarrel with her and also used to beat her whenever she refused to give money. It is testified by PW-1 Laxmi Zagade that on the day of incident, the deceased returned home around 1.30 p.m. under the influence of liquor and asked this witness to serve food. She could not serve the food as it was not ready. She asked him that she would cook the food and then serve him. However, he caught hold of her hand and drove her out of the house by abusing her. In that dispute, he himself fell down on the same stone resulting into injuries. The witness, therefore, started screaming and crying. Thereafter, the appellant came over there. He called a Doctor. The Doctor after examining her husband, declared him dead. He was then removed to the hospital.

12. During her cross-examination by the learned APP, it transpired that father-in-law of PW-1 Laxmi Zagade namely, Tatoba Zagade and sister-in-law Mangal Kadam were at home at the relevant time. The prosecution, however, has not examined these two important material witnesses, who could have been the best

persons to depose about the alleged incident. She admits that deceased always insisted that this witness should not co-habit with him. However, this witness used to say that at that stage of life, she cannot go anywhere by leaving her family alone. The witness had denied a suggestion that when the appellant came over there, the deceased abused him also in filthy language and asked him to leave the house. She has further denied that the appellant picked up a stone from a dilapidated wall and hit it on the head of her husband. She denied that the deceased started giving jerks to his limb and, therefore, she raised hue and cry. She however, admits that Dr. Prakash Deshmane was called, who after examining her husband declared him dead. She admits that the dead body of the deceased was lifted and kept on the bed and thereafter it was taken to the hospital. However, she denied visiting the police station and reporting against the appellant.

13. We wonder as to why the prosecution did not confront PW-1 Laxmi Zagade with the portions of her complaint, which according to her were not narrated by her to the police. It is, therefore, difficult to accept the prosecution's case that it was the appellant who had assaulted his father at the relevant time.

Non-examination of Tatoba Zagade and Mangal Kadam also results in drawing an adverse inference against the prosecution for withholding the evidence of these two material witnesses, even though they have been cited as witnesses in the charge-sheet. The prosecutor did not confront PW-1 Laxmi Zagade *qua* her complaint bringing to her notice the contradictions. It is, therefore, difficult to rely upon the said complaint (Exh.22) as the one lodged by PW-1 Laxmi Zagade, for, she had clearly denied of lodging any such complaint. The evidence of PW-1 Laxmi Zagade, therefore, is of no assistance to the prosecution in bringing home the guilt of the appellant.

14. There is one more conspicuous aspect of this case which would go to its root. The prosecution's case is that one Dr. Prakash Deshmane had examined the deceased immediately after the incident and declared him dead. Surprisingly, he had not been cited as an important prosecution witness in the charge-sheet for the reason best known to the Investigating Officer. As a matter of fact, he would have been the best witness and an expert to opine as to whether the deceased was alive or otherwise when he immediately examined him on the spot itself. No explanation

has been given by the prosecution for not citing Dr. Prakash Deshmane as its witness, which would also lead to drawing an adverse inference against the prosecution.

15. It appears that the defence had admitted the memorandum and discovery panchanama executed at the behest of the appellant under Section 294 of the Criminal Procedure Code. However, even if it has been admitted by the defence as regards genuineness of the said document, yet, the learned Additional Sessions Judge ought to have exercised his judicial discretion requiring the signatures of the pancha witnesses to be proved by examining them. This is because it is a very important piece of evidence to connect the appellant with the crime. The only evidence on record is of the Investigating Officer, PW-2 Sanjay Tathe according to whom, while in police custody, the appellant made a statement that he would recover the stone, which was used in committing the offence. According to this witness, the appellant led the team to his house in a jeep and then he took out the stone kept beneath cottonwood. He had also produced his clothes kept on a stick in the house. Those articles were seized under the panchanama. This witness even does not say as to

whether there were blood stains on the clothes of the appellant which were said to have been recovered at the instance of the appellant. As per the evidence of PW-2 PSI Sanjay Tathe, the weapon of offence i.e. the stone, was disinterred at the instance of the appellant from beneath the heap of cottonwood and it was stained with blood. It would be quite unsafe to accept and believe the Investigating Officer *sans* any evidence of an independent panch witness.

16. The Chemical Analyzer report (**Exh.12**) in respect of the articles seized by the Investigating Officer is as below :-

“Description of articles contained in parcels :

- 1. Earth and dung wrapped in paper labelled – A1*
- 2. Earth and dung wrapped in paper labelled – A-2*
- 3. Blanket wrapped in paper labelled – B-1*
- 4. Bandi (cut and torn) wrapped in paper labelled – B-2*
- 5. Chaddi wrapped in paper labelled – B-3*
- 6. Dhoti wrapped in paper labelled – B-4*
- 7. Stone wrapped in paper labelled – C-1*
- 8. Full shirt wrapped in paper labelled – C-2*
- 9. Full pant wrapped in paper labelled – C-3*

RESULT OF ANALYSIS

- Exhibit (1) is mixed with blood.*
- Exhibit (3) and (5) are stained with blood at places.*
- Exhibit (4) has moderate number of blood stains ranging from 0.1 cm to 10 cms in diameter spread at places.*

- *Exhibit (6) has innumerable blood stains ranging from 0.1 cm in diameter – to big blood stains spread at places.*
- *Exhibit (7) is stained with blood*
- *Exhibit (8) has few blood stains ranging from 0.1 cm to 1 cm in diameter.*
- *spread at places*
- *Exhibit (9) has two blood stains each of about 0.5 cm in diameter at left bottom.*
- *No blood is detected on exhibit (2).*
- *Species origin and grouping results are as follows. –*

<i>Ex. No.</i>	<i>Origin</i>	<i>Grouping</i>
<i>1.</i>	<i>Human</i>	<i>Inconclusive</i>
<i>3.</i>	<i>Human</i>	<i>A'</i>
<i>4.</i>	<i>Human</i>	<i>Inconclusive</i>
<i>5.</i>	<i>Human</i>	<i>A'</i>
<i>6.</i>	<i>Human</i>	<i>A'</i>
<i>7.</i>	<i>Human</i>	<i>A'</i>
<i>8.</i>	<i>Human</i>	<i>A'</i>
<i>9.</i>	<i>Human</i>	<i>A'</i>

17. The Chemical Analyzer's report indicate that stone (article 7) was found with human blood of 'A' group. The spot panchanama did not show existence of any stone. The question is whether it can be safely inferred that it was the appellant who was the only person knowing as to where the stone was concealed? However, the evidence to that effect is not satisfactory and convincing in the absence of evidence of an independent panch witnesses.

18. It is apparent that the place from where the stone was said to have been recovered is an open space. The possibility of someone else had kept the stone over there cannot be totally ruled out. The learned Additional Sessions Judge erred in reasoning that even though the courtyard was an open space, it cannot be frequented by all and sundry. It is of common knowledge that in the village, the villagers wander and take any path convenient to them to reach their destinations. The appellant, therefore, cannot be fastened with both the knowledge and authorship of concealment. Only because human blood of 'A' group was found over the said stone does not *ipso facto* mean that it belongs to the deceased only because there is no evidence on record whether the appellant was also medically examined and that there were no injuries on his person. There was human blood on the clothes of the appellant as per the report of the Chemical Analyzer, which is at Sr. Nos. 8 and 9. The blood group of the appellant is also 'A'. However, the learned Additional Sessions Judge erroneously stated that appellant had no injuries on his person *sans* any evidence to that effect. The appellant was arrested on 4th March, 1997. The incident was dated 2nd March, 1997. There is no evidence indicating as to how the appellant

came to be arrested after two days and why his medical examination was not conducted immediately after the arrest as per Section 53 of the Criminal Procedure Code. The evidence of the Investigating Officer – PW-2 Sanjay Tathe cannot be accepted as a gospel truth since he is not an independent witness and would naturally be interested in conviction of the appellant. Even, there is no evidence that the appellant had made voluntary statement before discovering the alleged article namely, the stone behind his house.

19. Thus, the evidence of alleged recovery which is rather the only important evidence relied upon by the prosecution goes away. PW-1 Laxmi Zagade disowned the prosecution. From the evidence available on record, it is difficult to hold that the appellant was in fact present on the spot at the time of alleged incident. It is equally difficult to construe that he was the author of the injury on the vital part of the body of the deceased.
20. There is one more important feature of this case. It appears from the evidence of the Investigating Officer, PW-2 Sanjay Tathe that muddemal articles were not properly seized and sealed and,

therefore, possibility of its tampering cannot be totally ruled out. It creates a suspicion as to whether the seizure and sealing of the muddemal property was as per the prescribed norms. As already stated, non-examination of the panch witnesses to that effect could lead drawing an inference that those articles were not properly seized and sealed. The evidence of the Investigating Officer simpliciter would not be sufficient. Merely because there is no cross-examination of the Investigating Officer on that count does not *ipso facto* mean that the prosecution has succeeded in establishing the charge beyond all reasonable doubts.

21. It has been held by a catena of decisions that suspicion howsoever strong cannot take the place of proof, however the learned trial Court misread the evidence in holding the appellant guilty for the offence of committing murder of the deceased sans acceptable material. The judgment is based on surmises and conjectures. Thus, the impugned judgment warrants interference in appeal.

22. Consequently, the following order would follow :-

ORDER

(i) The appeal is allowed.

- (ii) The judgment and order of conviction and sentence passed by the 3rd Additional Sessions Judge, Satara in Sessions Case No. 119 of 1997 dated 30th September, 2000 is quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (iv) The appellant be released forthwith, if not required in any other case.
- (v) The fine amount be refunded to the appellant.
- (vi) The appeal stands disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)

(SMT. SADHANA S. JADHAV)