

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

CRIMINAL APPEAL NO. 154 OF 2014

Kalam Gulab Patel	]	
Aged about 31 years, Occ.Agriculturist,	]	
At present undergoing sentence of life	]	
imprisonment at Kolhapur Central Prison,	]	
as Convict Prisoner No. C-5784	]	
R/o. Navin Padali (Kese), Ta.Karad,	]	
District : Satara.	]	... Appellant.

V/s.

The State of Maharashtra	]	
Through P.I. Police Station Karad City,	]	
Tal. Karad, District : Satara.	]	... Respondent.

- Mr.Yug Mohit Chaudhry for the Appellant.
- Mr.Arfan Sait, A.P.P. for the Respondent-State.

**CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

DATED : 27th SEPTEMBER, 2017.

JUDGMENT (PER : DR. SHALINI PHANSALKAR-JOSHI, J.) :-

1] This appeal is directed against the judgment and order passed by Additional Sessions Judge, Karad, District Satara, in Sessions Case No. 27 of 2010 on 28/02/2013, thereby convicting the Appellant for the offence under Section 302 and 201 of the Indian

Penal Code (IPC) and sentencing him to suffer R.I. for life and to pay fine of Rs.5000/- in default of payment of fine to suffer R.I. for 6 months on the first count; and R.I. for three years and to pay fine of Rs.3000/- in default of payment of fine to suffer R.I. for 4 months on the second count.

2] Brief facts of the prosecutions case can be stated as follows :-

Deceased Sikandar Ismail Patel was the uncle of informant PW-8 Ajmir Jahangir Patel. Deceased was residing along with his brothers PW-6 Mahamad Ismail Patel, Jahangir Ismail Patel and Ahmad Ismail Patel at Old Padali, Tq. Karad, District Satara; whereas Appellant, who is the cousin brother of the deceased, was residing at the distance of 2 k.m. at New Padali, Tq. Karad, District Satara. The lands of Appellant and the deceased were adjacent to each other. The land of the deceased was irrigated through Lift Irrigation Scheme. About 5 to 6 years prior to the incident, Appellant had demanded the water of Lift Irrigation of the deceased to his sugar-cane field. However, the deceased refused to give such water and therefore, the relations between Appellant and the deceased were not cordial.

3] On 26/12/2009 at about 9.00 p.m. to 9.15 p.m., PW-8 Ajmir Jahangir Patel was going to the place of Panja (*Tabut*), at that time, on the road, near the old school, Old Padali (Kese), Tq.Karad, Dist. Satara, he saw Appellant was assaulting the deceased with iron pipe by falling him on ground. The deceased was shouting loudly. Thereupon, Appellant inflicted several blows of axe on the neck of the deceased. Seeing it, PW-8 Ajmir Jahangir Patel got frightened. By that time hearing the shouts, his father Jahangir Ismail Patel and uncle PW-6 Mahamad Ismail Patel also rushed there. During this time, Appellant had separated the head of the deceased and carrying that head by holding it with hair in one hand and carrying axe and iron pipe in another hand Appellant started running on the road shouting that he will not spare any one (*"Kisiko Choudunga Nahi"*). Appellant threw away that decapitated head of the deceased at the distance of 200 to 250 ft. by the side of the road.

4] After witnessing this incidence, PW-8 Ajmir Jahangir Patel went to Police Station at Karad. PW-10 P.I. Mahadev Dhere has recorded the complaint of PW-8 Ajmir Jahangir Patel, vide Exh.62, and on his complaint registered C.R. No.389 of 2009 against Appellant for the offence under Section 302 and 201 of IPC. Then,

PW-10 P.I. Dhere and police staff went to the spot of incident. There he conducted the inquest panchanama vide Exh.35, of the dead body and the decapitated head, and sent the same for postmortem examination. On the same night, he prepared the spot panchanama vide Exh.43 and from the spot he collected the blood mixed soil, battery (torch), plastic tambya i.e. pressed pot, turkish towel, iron pipe and other incriminating articles. Thereafter, he arrested Appellant and seized the clothes on his person under panchanama Exh.72. On the next day, he recorded the statements of about eight witnesses including that of PW-6 Mahamad Ismail Patel. As per the opinion received from the Medical Officer, the various injuries found on the person of the deceased were caused due to the blows of the axe. During the course of investigation, at the instance of Appellant, the axe was seized under panchanama Exh.74. All the seized Muddemal Articles were sent to Chemical Analyzer and after completion of usual investigation, PW-10 P.I. Dhere has filed Charge-sheet in the Court against Appellant.

5] On committal of the case to the Sessions Court at Karad, the Trial Court framed Charge against Appellant vide Exh.27. The Charge was read-over and explained to Appellant. Appellant pleaded

not guilty and claimed to be tried, raising the defence of denial and false implication. In the alternate, the plea of insanity or unsoundness of mind was also advanced.

6] In support of its case, the Prosecution examined in all 10 witnesses and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of Appellant to be proved beyond reasonable doubt for both the offences and convicted and sentenced him as aforesaid. At this stage, it may be stated that, the Trial Court did not accept the plea of insanity as raised by Appellant on count that there was no sufficient evidence on the record produced to that effect.

7] In this appeal, we have heard, learned counsel for Appellant, who has mostly advanced the submission on the plea of insanity, by pointing out that there is ample evidence on record to that effect, including the medical case papers of Appellant, while he was in Magistrate Custody and in jail, immediately after the incident. According to learned counsel for Appellant, the burden lying on the Appellant to prove his plea of unsoundness of mind is not heavy, in comparison with the burden lying on the prosecution to prove the case beyond reasonable doubt. The Accused can probabilize his defence on preponderance of probability and in this

case, according to him, the Appellant has discharged the said burden. Therefore, the Trial Court should have accepted his plea and acquitted the Appellant.

8] Per contra, learned A.P.P. has supported the judgment of the Trial Court by submitting that there is a difference between medical insanity and legal insanity. The Accused has to prove legal insanity and not medical insanity. He has urged that every person suffering from mental disease is not *ipso-facto* exempted from criminal liability. In the instant case, according to him, the evidence on record does not prove or probabalize the defence of unsoundness of mind raised by Appellant and hence, the Trial Court has rightly rejected the same.

9] In our considered opinion, before adverting to these rival submissions advanced on the plea of unsoundness of mind of Appellant, it would be useful to refer to the evidence on record as adduced by the prosecution to prove the guilt of Appellant. The prosecution has, though examined as many as 10 witnesses, the main reliance of the prosecution is on the evidence of two eye-witnesses, namely, PW-8 the informant Ajmir Jahangir Patel and PW-6 Mahamad Ismail Patel. PW-8 Ajmir Jahangir Patel is the eye-

witness to the actual incident of assault on the deceased at the hands of Appellant. His evidence clearly goes to prove that on that night at about 9.15 p.m. when he had gone to *Tabut*, on the way, near old school, he found that Appellant was assaulting the deceased with iron pipe and thereafter, with the axe. His evidence further proves that Appellant has, by inflicting several blows of axe on the neck of the deceased, separated the head and started running away with the said head in his hand and shouting that he will not spare any one (*"Kisiko Choudunga Nahi"*). According to his evidence, hearing the shouts of Appellant, his father Jahangir Ismail Patel and uncle PW-6 Mohamad Ismail Patel came near the spot and found dead body of the deceased, with head separated, lying there.

10] This evidence of PW-8 Ajmir Jahangir Patel is amply corroborated from the evidence of PW-6 Mahamad Ismail Patel, brother of the deceased. He was residing jointly with the deceased and another brother Jahangir Ismail Patel. According to him, at about 9.00 p.m., on that day, deceased went to answer nature's call near the river taking along with him plastic water pot and torch. Deceased was wearing baniyan and lungi. PW-8 Ajmir Jahangir Patel had at that time gone to see the *Tabut* near old school. This witness

has then heard the noise of shouts. Therefore, he and his brother Jahangir Ismail Patel came out of the house and they saw the Appellant carrying human head severed from the body holding in one hand and carrying axe and iron pipe in another hand. The Appellant was found running and shouting that he will not spare any one (*"Kisiko Choudunga Nahi"*). According to his evidence, he and his brother Jahangir Ismail Patel rushed on the road after the Appellant went ahead and they saw PW-8 Ajmir Jahangir Patel was crying near the school. They went there and found the dead body of Sikandar lying in the pool of blood decapitated with the head. They confirmed from Ajmir that it was the dead body of their brother Sikandar. They found decapitated head of Sikandar thrown by the Appellant at the distance of about 200 to 250 ft. Thereafter, PW-8 Ajmir Jahangir Patel went to Police Station and lodged the complaint against the Appellant.

11] In our considered opinion, the evidence of both these eye witnesses is more than sufficient to prove the manner in which the incident has taken place and the involvement of the Appellant therein. Though, both the witnesses are cross-examined at the length, nothing worthwhile is elicited in their cross examination to

disbelieve them in any way. Moreover, their cross-examination is mostly directed to prove the plea of unsoundness of mind.

12] In addition to this evidence of two eye-witnesses directly implicating the Appellant, there is also corroborating circumstantial evidence like the recovery of the axe at the instance of the Appellant, proved through the evidence of PW-4 panch Vijay Pandurang Sawant. The spot panchanama then proves the presence of blood stained soil and the articles of the deceased lying there; it is proved through the evidence of PW-3 panch Shivaji Shinde. Further the evidence of PW-5 Dr.Dhondiram Dattu Jadhav, who has conducted the autopsy and found several injuries on the body of the deceased and his head severed with those injuries. According to his opinion, the cause of the death was neurogenic shock due to sudden decapitation of head due to hard and sharp object.

13] As a matter of fact, this ocular and circumstantial evidence proving the occurrence of the incident is not seriously challenged by learned counsel for the Appellant, as the main plank of his submission is on the alternate the plea of unsoundness of mind.

14] Section 84 of IPC provides that, "*Nothing is an offence*

which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”

15] Thus, to meet the requirements of Section 84 of IPC, it must be shown that:

- “i. at the time of doing the act, the Accused was of unsound mind;*
- ii. and because of his unsound mind, the Accused:*
 - a) did not know the nature of the act, or*
 - b) did not know that the act is wrong, or*
 - c) did not know that the act is contrary to law.”*

16] The law is fairly well settled that whenever the Accused wants to rely upon this exception, the burden of proof is upon him, in view of Section 105 of the Evidence Act. However, the burden lying on the Accused is much lighter than the burden placed on the prosecution of proving the guilt of the Accused beyond reasonable doubt. The Accused has to merely discharge the Civil burden of proving his case on the balance of probabilities. Moreover, the fact that the Accused has pleaded an exception or a defence does not in any way relieve the prosecution of discharging its original burden of proving that the accused has committed the offence as charged.

17] Learned counsel for the Appellant has in this respect relied on the judgment of the Apex Court in the case of *Dayabhai Thakkar Vs. State of Gujrat, AIR 1964 SC 1563*, wherein the Apex Court has while dealing with the extent of burden lying on the Accused, when he pleads the defence of insanity held that,

“Even if the Accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the Accused or by the prosecution may raise reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the Accused and in that case the Court would be entitled to acquit the Accused on the ground that the general burden of proof resting on the prosecution was not discharged.”

18] In the instant case, therefore, the Court has to see whether the Appellant has brought on record sufficient material, may be from the evidence led by the prosecution itself that makes it reasonably possible to entertain a reasonable doubt that he was suffering from unsoundness of mind at the relevant time. In other words, this Court has to ask itself whether the plea of unsoundness of mind, as raised by the Appellant can reasonably be ruled out in

the facts and circumstances of this case. If this Court entertains, a reasonable doubt about the unsoundness of mind of the Accused at the time of incident, the Appellant would be entitled to acquittal as then it has to be held that he has discharged the burden lying upon him of proving his plea on preponderance of probabilities.

19] Learned A.P.P. has relied upon the judgment of the Apex Court in the case of *Surendra Mishra vs. State of Jharkhand, 2011 Cri.L.J. 1161*, to submit that in order to seek exoneration from liability, the Accused has to prove not only medical insanity but also legal insanity. It is submitted that, as held in this authority, the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the Accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or the behavior is queer are not sufficient to attract the application of Section 84 of the

IPC.

20] In this case, the Apex Court has also considered its earlier decision in case of *Hari Singh Gond vs. State of Madhya Pradesh*, (2008) 16 SCC 109, in which it has been held as follows;

“Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity.”

21] Keeping in mind this legal position if the evidence on record is scrutinized, then in our considered opinion, there is more than sufficient material produced on record by the Appellant to prove his plea of legal insanity or unsoundness of mind.

22] In the instant case, the incident has taken place on 26/12/2009 at night time. The very manner in which it has taken

place shows that apparently there was no immediate motive, genesis or the cause for the Appellant to commit such brutal murder of his cousin brother Sikandar. The only cause tried to be attributed to him by PW-6 Mohamad Ismail Patel and PW-8 Ajmir Jahangir Patel is that, about 5 to 6 years prior to the incident, the Appellant had demanded the water for his sugar-cane field from the Lift Irrigation Scheme of the deceased and the deceased had refused to give such water. According to their evidence, the Appellant was therefore, angry with the deceased. However, in the first place, this incident has taken place about 5 to 6 years before the incident; and secondly, in his cross-examination PW-8 Ajmir Jahangir Patel has admitted that, at the time of incident, the Appellant was having his own pipeline and water supply from irrigation scheme in his field. He has further admitted that, during this period of 5 to 6 years, there was no quarrel at all between the Appellant and the deceased.

23] Thus, whatever incident of demanding the water and the deceased refusing to give the same has happened, it was about 5 to 6 years prior to the incident and, thereafter, there was not a single quarrel between them and, at the time of incident, the Appellant was having his own water supply to the field. Therefore, as rightly

submitted by learned counsel for the Appellant, in the instant case, there does not appear to be any motive as such or any immediate cause or genesis for the Appellant to commit the murder of his cousin brother and that too in the manner in which he has done so. While adjudicating the plea of insanity, the aspect of motive assumes significance, the absence of motive being one of the important pointers to suggest that the offence was committed under unsoundness of mind.

24] In this case, both these eye witnesses who are close relatives of the deceased have categorically admitted in their cross-examination that the Appellant did not have any enmity with the deceased or his family. As a matter of fact, PW-6 Mohamad Ismail Patel has further admitted that there was nothing to fear from the Appellant, nor they suspected that the Appellant or somebody will kill the deceased. Thus, the complete absence of any rational motive, immediate cause or genesis on the part of the Appellant to launch such a merciless attack on the deceased is a relevant factor rendering probable his plea of unsoundness of mind.

25] Another material aspect to be considered for testing this plea of insanity is the way the attack was made and the conduct on

the part of the Appellant at the time of the attack and thereafter. It is pertinent to note that the Appellant has made assault on the deceased on the road near the old school where the religious festivities were conducted. As admitted by PW-6 Mohamad Ismail Patel and PW-8 Ajmir Jahangir Patel, the place of incident was in full view of the passersby. There was electric light near the spot of the offence. Not only this, but at the time of assault, the Appellant was screaming loudly. After severing the head of the deceased, the Appellant picked up the head in one hand and axe and iron pipe in another hand and ran down on the main road screaming loudly for a distance of 50 to 60 ft.. Thereafter, he dropped the head and iron pipe by the side of the road at the distance of 200 to 250 ft.. Infact the Appellant was screaming so loudly that PW-6 Mohamad Ismail Patel and his brother who were inside house at the distance of 150 ft. from the road heard the screams and came outside to see what was happening. At that time, the clothes of the Appellant were drenched in blood. The Appellant did not make any attempt to take off his blood stained clothes or to hide them. The Appellant was arrested at about 1.00 a.m. i.e. almost 4 hours after the incident and still he was wearing the same clothes. Thus, it can be seen that the Appellant has made no attempt to conceal the incident or his involvement therein.

No person can normally after committing such merciless attack by iron pipe and axe inflicting several blows decapitating the head, thereafter will carry the head screaming loudly attracting the attention of the villagers. It clearly indicates that the Appellant was at the relevant time not in his senses to be aware of the consequences and gravity of his action, thereby implying the absence of *mens rea*.

26] It is also pertinent to note that the Appellant was also shouting that he will not spare any one (*"Kisiko Choudunga Nahi"*). There is nothing on record to show that he has enmity with any other person for him to give such shouts.

27] Then the cross-examination of PW-8 Ajmir Jahangir Patel reveals that 10 to 12 blows with iron pipe were given to the deceased on front side and back side of neck and after giving those blows by iron pipe, the Appellant kept aside the iron pipe and picked up the axe. He again assaulted the deceased with axe for about 5 minutes without taking any break. Needless to state, even after the head was separated from the trunk in the first assault itself, the Appellant had continued his assault and infliction of blows, thereby clearly indicating that the Appellant has totally lost control of

himself.

28] In this respect the cross-examination of PW-6 Mohamad Ismail Patel, the cousin brother of the Appellant, goes to prove that since beginning the conduct of the Appellant was paranoid. He was suspecting that some person had played back magic (*Jadu tona*) against him and therefore, his wife have left him within 7 to 8 days after the marriage.

29] There is also medical evidence proving that the mental condition of the Appellant was not at all sound during the relevant period. It is a part of record that while the Appellant was in jail in Magistrate Custody, on the count of his abnormal conduct, he was referred by Superintendent, Satara District Prison to the Medical Officer, Government Hospital, Satara for the treatment of his mental illness and the said hospital has advised that he be sent to Regional Mental Hospital, Yerwada. Accordingly on 16/02/2010, he was referred to Mental Hospital at Yerwada with observations by Medical Officer that "his behaviour was abnormal. He was not taking food and he was suffering from Schizophrenia and insomnia". There he was kept under observation for 10 days and then as per the order passed by the Court he was admitted to Yerwada Mental Hospital on 18/23

25/02/2010. His case papers of the said hospital dated 03/03/2010 reveal the observations made by the Medical Officer to the effect that “his conduct was affected. He was suspicious, fearful, suffering from auditory hallucinations, delusions of black magic etc.”.

30] As per the observations made by the Medical Officer of Regional Mental Hospital, Yerwada on 03/03/2010, the brother of the Appellant had corroborated the findings that the Appellant was suffering from suspicion and fearful affect in the said Mental Hospital. The Appellant was subjected to six rounds of electro convulsive treatment from February 2010 to March 2010. The record of Government Hospital, Satara also shows that the Appellant was given a daily dose of Phenargan and Serenace injection from 08/02/2010 to 16/02/2010, which medicines are used to treat aggressive psychosis, mental illness and psychotic disorder.

31] The evidence on record further proves that in May 2011 also the Appellant was again sent to Regional Mental Hospital, Yerwada for further treatment. The psychiatric assessment report of the Appellant is produced on record. It was done by B.J. Medical College and Sasoon General Hospitals, Pune and it shows that, “he was suffering from psychomotor retardation, non-spontaneous

speech and dysphoric restricted affect. His thinking revealed ill elaborated fearfulness, ideas of persecution and depressive features with suicidal ideas". The observations of the Superintendent of the Medical Officer of B.J. Medical College and Sasoon General Hospital, Pune, which are produced at page 146 also reveal that he was expressing wish to die and suffering from restlessness and vague fearfulness. His conduct was abusive, assertive and depressed.

32] Thus, Medical Record in this case also goes to prove that even before the Charge-sheet was submitted in the Court on 15/03/2010, the Appellant was under treatment for psychosis and for mental illness from 08/02/2010 and only after being subjected to 6 rounds of electric convulsive shocks, he was discharged from the mental hospital on 20/03/2010. Even thereafter also he was exhibiting the same symptoms in the year 2011.

33] Thus, the symptoms displayed by the Appellant, as spelt-out in his Medical Record and as deposed to by the witnesses are sufficient to probabalize his plea that at the time of incident, he was suffering from unsoundness of mind. At-least from the evidence on record his plea of insanity cannot be ruled out. There is definitely a reasonable doubt to that effect. Hence, it cannot be said that the

prosecution has succeeded in proving its case against the Appellant beyond reasonable doubt. This appeal, therefore, needs to be allowed, as the Appellant deserves to be acquitted on this plea of unsoundness of mind as per the provisions of Section 334 of CrPC.

34] When the acquittal is recorded u/s.334 of CrPC, we have to follow the provisions of Section 335 of CrPC. The provisions of Section 335 of CrPC reads as follows;

“335. Person acquitted on such ground to be detained in safe custody.

(1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence,-

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) order such person to be delivered to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause (a) of sub-section (1) otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3) No order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub-section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the

person delivered shall-

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under sub-section (1)."

35] In order therefore to ascertain the present mental condition of the Appellant, we had called for latest Medical Report from Central Jail, Kolhapur. The Superintendent of Kolhapur Central Jail has, accordingly, referred the Appellant to the Civil Hospital at Kolhapur where the psychiatric evaluation of the Appellant was done and it was reported that at present his behaviour is stable.

36] Even then, by way of abundant precaution, in view of the provisions of Section 335 of CrPC we think it fit to handover the Appellant in the safe custody of his brother Harun Gulab Patel, who has made an application for the said purpose under Section 335(3) of CrPC. He has undertaken to properly take care of the Appellant and preventing him from doing injury to himself or to any other person. He has also assured that the mother, sister and three brothers of the Appellant who are having affection and love for him,

are supportive of him and they will provide the social and family support to him to enable him to lead as normal a life as possible.

37] In view thereof, as per the provisions of Section 335(3) CrPC, the Superintendent of Central Jail, Kolhapur where the Appellant is lodged needs to be directed to handover the custody of the Appellant to his brother Harun Gulab Patel.

38] The Appeal is, accordingly, allowed. The Appellant is acquitted under Section 334 of CrPC for the offence punishable under Section 302 and 201 of IPC on the plea of unsoundness of mind at the time of incident, under the Exception available under Section 84 of IPC. His bail bond stands cancelled.

39] The Superintendent of Kolhapur Jail is, however, directed to handover the custody of the Appellant to his brother Harun Gulab Patel.

40] The copy of this order be sent to the State Government, as contemplated under Section 335(4) of CrPC.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (SMT. V.K. TAHILRAMANI, J.)