

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

CRIMINAL APPEAL NO.968 OF 2010

Santosh Jambu Koge,]
Age: 21 years, Occ: Agriculture,]
Residing at Koge Galli,]
Chinchwad, Taluka : Karveer,]
District : Kolhapur.]
(At present lodged at Kalamba]
Central Prison, Kolhapur)]..Appellant

Versus

The State of Maharashtra,]
Through Gandhinagar]
Police Station, District: Kolhapur]..Respondent

Shri. Uday P Warunjikar for the Appellant.
Mrs. P P Shinde, APP for the Respondent - State.

**CORAM : R. M. SAVANT &
SMT. SADHANA S. JADHAV, JJ.**

**JUDGMENT RESERVED ON : 18.07.2017
JUDGMENT PRONOUNCED ON : 06.09.2017**

JUDGMENT (Per R. M. Savant, J)

1 The conviction of the accused i.e. the Appellant herein above under Section 302 of the Indian Penal Code (For short “IPC”) and he being sentenced to suffer life imprisonment and pay a fine of Rs.5,000/- by the judgment and order dated 19.11.2010 passed by the Learned Sessions Judge-4, Kolhapur is taken exception to by way of the above Appeal.

2 The case of the prosecution is as follows :-

That the Complainant was one Ajit Annaso Patil. In the said complaint, the Complainant has stated that he resides with his family, his brother by name Shital Patil, brother's family and parents. It is stated by him that on 06.05.2009 at around noon time, there was marriage ceremony in their village. The marriage was of one Rajendra Sahadev Jadhav, near Renuka Mata Temple. It is stated by him in the complaint that his brother Shital Patil went on his motorcycle to attend the said marriage, for which he had left the house at around 12.15 noon. It is further stated by him that shortly thereafter while he was in his house one Subhash Aappaso Patil came running to his house and informed him that his brother Shital Patil was beaten by Santosh Jambu Koge and Shital Patil had fallen unconscious. On receiving the said information, the Complainant immediately thereafter, along-with the said Subhash Aappaso Patil went towards the house of Shinde and found that Shital Patil was unconscious on the road and there was bleeding through his mouth and nose. He has further stated that he has asked one Ashok Maruti Shinde who was standing there as to what had happened, who informed the Complainant that the Complainant's brother Shital Patil who had come to attend the marriage, parked his motorcycle opposite house of Ugale, whilst he was walking, Santosh Koge was standing there

and the said Santosh Koge asked Shital Patil as to why he is staring at him and also asked him as “Masti Aali Kay” thereafter slapped Shital Patil. Upon which, Shital Patil pushed him and Santosh Koge lifted Shital Patil and threw him on the tar road, caught hold of his face and banged him on the tar road and also gave kicks and fist blows on his chest. He has further stated that one Pradeep Magdum, Anil Londhe and Maruti rescued Shital Patil. It is further stated by him that one car which had come for the marriage, was used for shifting Shital Patil to the C.P.R. Hospital, Kolhapur. However, the doctor examined Shital Patil and declared him dead and accordingly he has registered the FIR at Gandhinagar Police Station at 15.05 hours under Section 302 of the IPC vide Crime No.38 of 2009.

3 The Investigating Officer was one Rajkumar Vishnu Kotmire who after carrying out investigation and completing the same filed charge-sheet. Since the case was triable by the Sessions Court, the Learned JMFC by order dated 29.10.2009 committed the case to the Sessions Court.

4 The prosecution has led the evidence of 16 witnesses. The said evidence has to be compartmentalized into three sections, namely the evidence of the incident in which the death of the deceased Shital

Patil occurred, the cause of his death and the evidence in respect of the mental condition of the accused at the time of commission of the offence. The said evidence would therefore have to be taken one by one.

EVIDENCE IN RESPECT OF THE INCIDENT

5 In respect of the incident, the evidence of the complainant i.e. Ajit Patil and the four eye witnesses is required to be seen. The complainant Ajit Patil deposed as PW-2. He has stated in his evidence that on 06.05.2009 he and his brother Shital Patil were in the house and thereafter Shital Patil went to attend the marriage of one Rajendra Sahadev Jadhav who was from their village at Renuka Mata Temple. It is his deposition that around 12.30 p.m. Subhash Patil came and informed him that his brother Shital Patil is unconscious and asked him to accompany him. It is his evidence that they both rushed to the spot of the incident which is just opposite to the house of Ashok Shinde on the tar road and there Shital Patil was lying in an unconscious condition. PW-2 claims to have asked Ashok Shinde as to how and what had happened and he was informed by Ashok that Santosh Koge got hold of Shital Patil by his face and banged his head on the tar road. PW-2 claims to have seen Shital Patil bleeding through his mouth, nose and there was blood clotting in the left eye of Shital Patil. It has further come in his deposition

that at that time, Ashok Shinde, Pradip Magdum, Subhash Patil and Anil Patil together took Shital Patil to C.P.R. Hospital. However, on examination there he was declared to be dead. He has further deposed that he personally went to Gandhi Nagar, Police Station and registered a complaint against the accused Santosh Koge which was taken as narrated by him. The said witness has also given description of the clothes on the person of the deceased Shital Patil to be the same shown to him in the Court.

6 The next witness is PW-3 Ashok Maruti Shinde who has deposed about the marriage in the village on 06.05.2009 and the fact that Shital Patil had come to attend the marriage. It has come in his evidence that Shital Patil met Santosh Koge near his house and saw Shital Patil calling Santosh Koge as “Kay Chotu” and thereafter Santosh Koge slapped Shital Patil Patil. He has further deposed that there was quarrel between Santosh Koge and Shital Patil. Upon which, Santosh Koge caught the face of Shital Patil and banged his head on the tar road. Thereafter on account of the same, Shital Patil felt unconscious. He has further deposed that Pradip Magdum, Subhash Patil and Anil Patil and this witness rushed to the rescue of Shital Patil and tried to separate Santosh Koge. He has further deposed that at that time accused Santosh Koge freed himself and started dancing on the chest of Shital Patil. Seeing Shital Patil bleeding

from the mouth and nose, he sent Subhash Patil to call for the brother of Shital Patil who came there in a short time and the information about the incident was passed on to him. The said witness further deposed that one vehicle which had come for the marriage was used for shifting Shital Patil to the C.P.R. Hospital, Kolhapur. The witness has deposed that he accompanied others to the hospital and that the doctor examined Shital Patil and declared him to be dead on arrival. The said witness has identified the accused who was present in the Court.

7 The next witness is Pradeep Shripati Magdu – PW-4. He has stated that he saw Shital Patil parking his motorcycle near the house of Ugale and thereafter proceeding towards the venue of marriage and he heard Shital Patil calling Santosh Koge as “Kay Chotu” and thereafter Santosh Koge slapped Shital Patil upon which Shital Patil pushed Santosh Koge. He has further deposed that Santosh Koge caught hold of Shital Patil and said “Masti Aali Kay” and banged him on the tar road. He banged his head on the road twice thrice and give kick blows on the chest of Shital Patil. He has further deposed that others tried to rescue both of them and at that time Shital Patil was lying on the road bleeding through his mouth, nose and lying in an unconscious condition. He has further deposed that Shital Patil was shifted to C.P.R. Hospital, Kolhapur. The said witness has stated that even Ashok Shinde was standing at the door of his

house at the time of incident. He has further deposed that doctor examined Shital Patil and declared him to be dead after which the brother of Shital Patil filed complaint to the Police. The said witness has also identified the accused who was present in the Court as Santosh Koge.

8 The next witness is PW-5 - Subhash Appa Patil. He has deposed that near the house of Ashok Shinde, the accused Santosh Koge was sitting and he heard Shital Patil calling the accused as “Kay Chotu Baslas Kay”. The accused got annoyed and caught hold of Shital Patil thereafter Shital Patil pushed him and that he saw Santosh Koge making Shital Patil fall on the ground holding his face and banging his head on the tar road. The said witness has further deposed that Santosh Koge gave Shital Patil fist and kick blows. It has further come in his deposition that Pradip Magdum, Anil Patil and and Ashok Shinde tried to separate Santosh Koge and at that time Shital Patil was unconscious. He has further deposed that Ashok Shinde was asked to call the brother of Shital Patil, Ajit Patil who came there immediately and the entire incidence was narrated to him by the said witness and also shifted Shital Patil to C.P.R. Hospital, Kolhapur, where he was examined by the doctor and the doctor declared him dead on arrival. The said witness also identifies the accused as Santosh Koge who is present in the Court.

9 The next witness in respect of the incident is PW-7 – Sharad Annaso Patil. He has deposed that he knows both accused and deceased as they are from his village. That on 06.05.2009, the said witness was coming to attend the marriage of Rajendra Jadhav at around 12.30 p.m. and whilst he was proceeding towards the marriage venue, the witness claims to have seen Santosh Koge beating Shital Patil in front of the house of Sandeep Ugale. This witness also claims to have rushed to the spot and he found Shital Patil unconscious. He has further deposed to have seen Pradeep Magdum, Anil Patil, Subhash Patil and Ashok Shinde separating Santosh Koge and thereafter Santosh Koge went to his house and Subhash Patil went to call Shital's brother Ajit Patil who was informed about the incident. The said witness also deposed that Shital Patil was shifted to C.P.R. Hospital and he has further deposed that he later on learnt that Shital Patil has expired.

10 In so far as the spot of the incident is concerned, the evidence of PW-10 – Suresh Malgonda Patil is relevant. The said witness was panch to the Spot Panchanama which was drawn by the Gandhi Nagar Police Station which spot was shown by Ashok Shinde whose house is opposite to the house of Sandeep Ugale at village Chinchwad. He has deposed that on the spot there was blood on the tar road and thereby the Police claimed to collect the sample of tar and rubble with

and without blood and thereafter Panchanama was drawn which is at Exh.37. In so far as the recovery of the clothes of the accused Santosh Koge are concerned, the witness Sanjay Nemgonda Patil has deposed to the same. He has deposed that it is in his presence the accused made disclosure, of which Panchanama came to be drawn and in pursuance thereto the accused took the Police and the witnesses to his house which is to the eastern side of the Gram Panchayat of village Chinchwad. It has come in his deposition that the house was locked and the keys of the same were obtained from the sister of the accused. After entering the house, the shirt which was hanged to the almira was pointed out by the accused and the same came to be seized by drawing Panchanama which is at Exh.34. The said witness has identified the shirt shown to him in the Court.

11 The next witness is PW-8 – Sharad Jingonda Patil. He has deposed that the constable handed over the clothes which were seized and labled by drawing Panchanama at Exh.31. In the said connection, the PW-12 and 13 who are the carriers of Muddemal properties have deposed. The next witness on behalf of the prosecution in respect of the incident is PW-16 the Investigating Officer who has carried out the investigation after registration of the crime and has filed the charge-sheet against the accused in the Sessions Court.

EVIDENCE IN RESPECT OF CAUSE OF DEATH :-

12 Now, coming to the evidence in respect of the cause of death of Shital Patil. The evidence of PW-14 – Dr. Reshma Paygonda Patil is relevant. She is the doctor who has carried out the autopsy i.e. postmortem of the dead body of Shital Patil. She has deposed that the cause of death was due to rupture of liver and head injury. She has further deposed that injuries mentioned in the postmortem report in column Nos.17, 18, 20 and 21 are capable of causing the death of a person. She has deposed that injuries are possible by banging the head on the road or dancing over the abdomen and chest. The said witness has deposed that because of such beating ribs could get fractured and would further lead to injury to liver, which may be lacerated wound. The next witness is the Assistant Police Inspector of Gandhi Nagar, Police Station, who at the relevant time claims to have received telephonic message of the doctor from C.P.R. Hospital, Kolhapur regarding admission and expiry of Shital Patil and accordingly he has recorded Vardi which is at Exh.50.

EVIDENCE IN RESPECT OF THE MENTAL CONDITION OF THE ACCUSED :-

13 The evidence adduced by the defence is principally to

support its case of the unsoundness of mind of the accused Santosh Koge at the time of the incident. The defence has examined three witnesses. The first is Dr. Parshwanath Monappa Chougule who is DW-1. He claims to be MD Psychiatrist by profession. He has stated in his evidence that the accused was working as receptionist in his clinic under learning and earning scheme. It has further come in his evidence that two to three years later the accused was brought by his relative to him with a complaint of abnormal behaviour during the period 1999 to 2000. The complaint was of Santosh Koge i.e. accused being disorganized, sleeplessness, irrelevant talks, armless wandering. He has further stated that he prescribed the accused psychotropic drugs and electro convulsive therapy and as such he was under his treatment for 13 days. He has further stated that the said illness of the accused was under control on account of the drugs. He has further stated that the period of illness may vary from patient to patient and may be at times periodic and even life long. The said witness has in terms stated that abnormality in such patients arises on account of provocation.

14 The next witness is Dr. Shivajirao Ramchandra Patil – DW-2. He is medical officer who was posted at Kalamba Jail since 2006. He has stated that in his capacity as medical officer he has treated the under trial accused Santosh Koge on account of bullet injury which was caused on

09.07.2009. The said witness has stated that the under trial accused on being shifted to the Central Jail i.e. while at Sub Jail he was treated at CPR Hospital, Kolhapur on account of psychological stress and was under medication by way of pills which were continued to be prescribed to him. The said witness has further stated that the patient is now normal and he is also under medication. It has further come in his evidence that the under trial accused was prescribed pills for his said illness by the previous doctor who has treated him namely Dr. Kavita Jain. Through the said witness the medical case papers were placed on record.

15 The last witness on behalf of the defence was Dr. Sumitra Vijaykumar Debsikdar – DW-3. The said witness stated that she has acquired MD qualification and is working as consultant Psychiatrist for the last one year. She has stated that she has her hospital by the name of “Krupamai Health Institute, Miraj”. She has further stated that the patient by name of Santosh Koge was treated there on being brought by his relatives to her hospital. She has further stated that the patient was supposed to have violent behaviour and was initially treated by Dr. Chougule at Kolhapur. She has further stated that the said treatment was discontinued and the said behaviour i.e. violent in nature was being exhibited since last four days prior to him being brought to her hospital. The said witness claims to have examined the accused Santosh Koge and

found him to be acutely disturbed and was suffering from Chronic Schizophrenia in acute exacerbation. She has further stated that the accused was treated from 14th October to 27th October and was given anti psychotropic drugs. She has further stated that after discharge from the hospital, the patient was given follow up from 2005 to 2006 upto November 2007. It has further come in her evidence that the patient did not come thereafter, but his sister had paid a visit in May, July 2008 and informed her that the patient had again became irritable, argumentative and aggressive, but in spite of asking the patient to be brought to the hospital, he was not brought. She has further stated that if the patient does not take continuous treatment, there is possibility of a relapse in the patient's condition. The aforesaid evidence as indicated above has been adduced by the defence in support of its case that the accused was in a state of unsound mind at the time of the said incident.

16 The Learned Counsel appearing on behalf of the Appellant, Shri. Uday Warunjikar would make two fold submissions. It was the submission of Shri. Uday Warunjikar that the evidence on behalf of the prosecution and more especially evidence of the eye witnesses make it absolutely clear that it was on account of the words uttered by the deceased Shital Patil to the accused that the accused was provoked and as a result he assaulted Shital Patil in the manner depicted by the said eye

witnesses. It was the submission of the Learned Counsel that the said provocation was on account of the deceased making personal remarks against the accused that the accused was provoked and resultantly assaulted the said Shital Patil. The Learned Counsel would submit that the reaction of the accused was on the spur of the moment and was not a premeditated action to murder the deceased. Hence, the instant case is a case which is covered by Section 304 part II of the IPC and the Learned Sessions Judge had therefore erred in convicting the accused under Section 302 of the IPC. Reliance is sought to be placed on the judgments of the Apex Court reported in (2012) 5 SCC 703 in the matter of Sukhlal Sarkar Vs. Union of India and others and (2015) 1 SCC 286 in the matter of B. D. Khunte Vs. Union of India and others.

17 The next submission of the Learned Counsel was that the evidence adduced on behalf of the defence amply proves the case of the defence that the accused was not in a proper frame of mind at the time of the said incident. The Learned Counsel would place reliance on the evidence of the three defence witnesses to submit that the accused was suffering from Chronic Schizophrenia and therefore indulged in the acts which resulted in the death of the deceased without realizing the consequences of his such acts. It was the submission of the Learned Counsel that the ailment of Schizophrenia has potential to erupt when

the circumstances are such which are not conducive to the person suffering from the said ailment. The Learned Counsel would submit that in the instant case, on account of the remarks made by the said Shital Patil, which were personal in nature, the accused behaved in a violent manner, which patients suffering from Schizophrenia are prone to do. It was therefore the submission of the Learned Counsel that leniency is required to be shown to the accused on the said ground and therefore his conviction under Section 302 of the IPC would have to be set aside.

18 Per contra, the Learned APP Mrs. P. P. Shinde would support the conviction of the accused under Section 302 of the IPC. It was the submission of the Learned Counsel that the instant case is a case, where there are four eye witnesses to the said incident and whose testimony has stood the test of cross-examination.

19 It was the submission of the Learned APP that the involvement of the accused, death having been caused on account of the injury suffered by the deceased on account of the assault by the accused, in the teeth of the evidence on record cannot be disputed. The Learned APP would further submit that the Trial Court i.e. the Learned Sessions Judge has rightly rejected the case of the defence that the benefit of Section 84 of the IPC should be extended to the accused on the ground

that the accused was not in a proper frame of mind at the time of the said incident.

20 Having heard the Learned Counsel for the Appellant and the Learned APP, we have given our anxious consideration to their contentions. In the instant case, as indicated above, the prosecution has examined as many as 16 witnesses in support of its case. It is required to be noted that the incident which took place on 06.05.2009 was witnessed by four witnesses. Their testimonies can be said to be consistent and corroborating which establish the fact that the death of the deceased Shital Patil was a homicidal one. Apart from the evidence of the said four eye witnesses, the evidence of the witness to the Inquest Panchanama i.e. PW-1, the evidence of the autopsy doctor who has given evidence of the injuries on the person of the deceased which prove that the death of the deceased was homicidal. Then there is evidence of PW-6, in whose presence the personal search of the accused Santosh Koge was taken. The said evidence goes to show that there is injury even to the accused which he had sustained while indulging in the act of assaulting the deceased which has resulted in his homicidal death. The involvement of the accused is also proved by the evidence of PW-9 who is the Panch witness to the recovery of the blood stained shirt of none other than the accused who after the incident went back to his house and hanged the shirt in the

almira and the same was shown to the Police by the accused himself which was then seized by the Police. Then there is evidence of PW-10, who was a witness to the Spot Panchanama who has given elaborate account of the Panchanama drawn in his presence, the real state of affairs which existed at the time of the incident are reflected in the panchanama which throws light on the incident. It is required to be noted that in the instant case, the first informant is the brother of the deceased who has lodged the complaint immediately after the incident had occurred, then as indicated herein above, there is the version of the eye witnesses i.e. PW-2, PW-3, PW-5 and PW-7 who were very much present on the spot. They have deposed about seeing the accused, make the deceased fall on the road, hold his face and head and further claim seeing the accused bang the head of the deceased on the tar road and jumping on his chest and stomach. The said witnesses are the residents of the vicinity who were at the door or on the spot and who tried to separate the accused from the deceased. Their evidence could not be shaken in the cross-examination. Hence, there is direct evidence as well as medical evidence in respect of the homicidal death caused by the accused Santosh Koge of the deceased Shital Patil.

21 The said witnesses being persons from the locality, their presence at the spot of the incident becomes natural. It is also required to

be noted that the time being the day time and there being marriage in the vicinity, the presence of the people at the spot also cannot be ruled out.

22 In so far as the issue of unsoundness of mind of the accused at the time of the incident is concerned, it is required to be noted that in order to attract Section 84 of the IPC, it is for the defence to prove that the accused was incapacitated to realize the consequences of his acts due to the unsoundness of his mind and such unsoundness existed when the actual act was done. In the said context, the evidence of the defence witnesses is required to be evaluated. In so far as the DW-1 - Dr. Parshwanath Monappa Chougule, who has treated the accused long back. The said witness is a Psychiatrist and claims to have acquired expertise and knowledge in Psychiatry. Though the said witness stated that the accused is not a patient of Schizophrenia, his evidence goes to show that the accused was reported to be disorganized complaining of sleeplessness and had become aggressive.

23 In so far as the evidence of DW-2 is concerned, his evidence is not of much use in so far as the theory of the unsoundness of mind of the accused is concerned, as he is neither a qualified Psychiatrist nor treated the accused for such ailment. The next witness is DW-3, in whose evidence she has stated that she has treated the accused in her hospital. It

has come in her evidence that she is practicing as Psychiatrist for last one year and that she had occasion to treat the accused upto the year 2007 and not thereafter. She has further stated that the accused had Chronic Schizophrenia when he was under her treatment way back in the year 2005 and 2007. The Trial Court has rejected the theory of unsoundness of mind of the accused on the ground that there was no incident of abnormality immediately prior to the incident or at the time of the incident except that of aggressiveness or irritability. The Trial Court has also rejected the case that the accused was suffering from Schizophrenia by adverting to the various types of Schizophrenia that the person may suffer. The Trial Court observed that in the instant case, it was not brought on record by the defence as to which of the types of Schizophrenia the accused was suffering from. The Trial Court also did not accept the case of the defence on the ground that the accused was very well aware of the consequences of his acts which can be seen from the fact that the Police went to arrest him he is heard to have said that he had just now finished one person and would do the same again. The Trial Court also did not accept the case of the defence on the basis of the conduct of the accused at the time of recording of his statement under Section 313 of the Cr.P.C., at which time, according to the Trial Court the accused had answered the questions comfortably by understanding the

same. The Trial Court has observed that to the queries raised by it, the accused had answered properly after understanding the same. The Trial Court also took into consideration the fact that at the time of explaining the charge it had occasion to interact with the accused and that the Trial Court did not find any abnormality of the mental state of the accused. The Trial Court also took into consideration the circumstance of the accused appearing for the Union Public Service Commission Examination in the year 2008 as also having acquired the NCC certificate. The Trial Court observed that in view of the evidence, it would be unsafe to presume that the accused was reported to have some mental abnormality way back in the year 1999 and 2005 and was also in the same state of mind on 06.05.2009.

24 In so far as the aspect of provocation to the accused Santosh Koge is concerned, it is required to be noted that three witnesses i.e. PW-3, PW-4 and PW-5 have in their evidence stated that Shital Patil i.e. deceased on seeing the accused on the fateful day addressed him in the following manner :-

“Kay Chotu, since your marriage is not taking place, you wear a Saree and spend your days.” (English translation)

Though the aforesaid statement was not appearing in the statement of

the said witnesses as recorded by the Police, in view of the fact that all the three witnesses deposed to the same effect, it would have to be said that there is no inconsistency in the said statement of the witnesses though not appearing in the statements recorded by the Police. Hence, the manner in which the deceased Shital Patil addressed the accused, whereby he asked the deceased to wear a Saree snapped a cord in the accused who had a history of suffering from Schizophrenia. In our view therefore the manner in which the deceased Shital Patil addressed the accused Santosh Koge was a provocation for the accused Santosh Koge to act in the manner he did on the said fateful day. Nothing has come on record that there was any previous enmity between the accused and the deceased or that the accused was just waiting for an opportunity to get even with the deceased. The act of the accused of slapping Shital Patil and on his falling down banging his head on the tar road and thereafter jumping on his body cannot be said to be a premeditated act and it is only on account of the provocation that made the accused to act in the manner he did on the said fateful day. Hence, the instant case can be said to be a case where on account of the statement made by Shital Patil on seeing the accused that the accused who had a history of suffering from Schizophrenia was deprived of self control and acted in the manner he did.

25 In so far as the judgments of the Apex Court in ***Sukhlal Sarkar***'s case (*supra*) and ***B. D. Khunte***'s case (*supra*) are concerned, the said judgments are an exposition of the Apex Court on what is meant by “grave and sudden provocation” so as to fulfill the requirements of Section 300 Exception I of the IPC so as to convert the conviction from one under Section 302 to Section 304 part I of the IPC.

 In ***Sukhlal Sarkar***'s case (*supra*), the Appellant/original accused was working in the Border Security Force. He was charged with the murder of his colleague one Sanjay Kumar Dubey. The deceased Sanjay Kumar Dubey was trying to wake up the accused so as to do patrolling duty. The deceased it seems had slapped and pushed the accused upon which the accused had fired from his rifle resulting in the death of the said Sanjay Kumar Dubey. The accused was convicted of the offences punishable under Sections 302 and 307 of the IPC. On the said conviction being challenged, a Learned Single Judge of the Gauhati High Court converted the conviction from Section 302 to Section 304 part I of the IPC. The said judgment of the Learned Single Judge was challenged before a Division Bench of the High Court. The Division Bench set aside the judgment of the Learned Single Judge and confirmed the initial conviction under Sections 302 and 307 of the IPC. On Appeal to the Apex Court, the Apex Court confirmed the judgment of the Division Bench by

holding that the action of the deceased could not be characterised as grave and sudden so as to provoke the Appellant to fire at the deceased killing him on the spot. The relevant paragraphs of the judgment are paragraphs 9 to 11 which are reproduced herein under :-

- “9. The meaning of the expressions “grave” and “sudden” provocation has come up for consideration before this Court in several cases and it is unnecessary to refer to the judgments in those cases. The expression “grave” indicate that provocation be of such a nature so as to give cause for alarm to the appellant. “Sudden” means an action which must be quick and unexpected so far as to provoke the appellant. The question whether provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts.
10. Under Exception 1 of Section 300, provocation must be grave and sudden and must have by gravity and suddenness deprived the appellant of the power of self-control, and not merely to set up provocation as a defence. It is not enough to show that the appellant was provoked into losing his control, it must be shown that the provocation was such as would in the circumstances have caused the reasonable man to lose his self-control. A person who claims the benefit of provocation has to show that the provocation was grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind.
11. We have critically gone through the evidence of PW 1, the eyewitnesses, and we are of the considered view that the deceased had not provoked the appellant in inviting him to fire from his rifle so as to kill him. The deceased, it may be noted was unarmed. PW 1 was only trying to wake up the appellant so as to do

patrolling duty. Assuming that the deceased had slapped and pushed the appellant, such an action of the deceased could not be characterised as grave and sudden, so as to provoke the appellant to fire at the deceased killing him at the spot.”

In **B. D. Khunte's** case (*supra*), the facts were that the deceased Army Subedar had tried to sodomise the accused Army Jawan in a storeroom at Noon. On the Appellant's/accused denial, he was beaten up by deceased. The Appellant had shot the deceased dead after seven hours of the incident whilst being on picket guard duty at night, when he saw deceased approaching him on account of which he was gravely and suddenly provoked. There was no evidence nor was the Appellant's case that the deceased had actually sodomised him. Evidence only proved that after the said incident, Appellant was seen crying and depressed and when asked by his colleagues he narrated his tale of humiliation at the hands of the deceased. There was no evidence to prove that after the incident the Appellant had continued to suffer a prolonged spell of grave provocation. The Apex Court held that by its very nature such provocation even when sudden and grave, cools off with passage of time often lapsing into a motive for taking revenge whenever an opportunity arises which was the case. The Apex Court in the facts of the said case wherein accused/Appellant had settled for a lesser act of retaliation like beating up of the deceased in the evening with his

colleagues as also the accused having performed his natural duties during day time and evening, held that any such memory of a past event does not qualify as a grave and sudden provocation for mitigating the offence. And therefore upheld the conviction. The Apex Court laid down the ingredients for the exception I to Section 300 being satisfied in paragraph 12 which is reproduced hereunder :-

“12. What is critical for a case to fall under Exception 1 to Section 300 IPC is that the provocation must not only be grave but sudden as well. It is only where the following ingredients of Exception 1 are satisfied that an accused can claim mitigation of the offence committed by him from murder to culpable homicide not amounting to murder :

- (1) The deceased must have given provocation to the accused.
- (2) The provocation so given must have been grave.
- (3) The provocation given by the deceased must have been sudden.
- (4) The offender by reason of such grave and sudden provocation must have been deprived of his power of self-control; and
- (5) The offender must have killed the deceased or an other person by mistake or accident during the continuance of the deprivation of the power of self-control.”

26 Having regard to the tests laid down by the Apex Court in

the judgments (*supra*), the Appellant can draw support from the said judgments for conversion of his conviction under Section 302 to one falling under Section 304 part II of the IPC.

27 In so far as the medical evidence is concerned, the same is as regards whether the accused was of unsound mind at the time of commission of the said offence so as to attract Section 84 of the IPC. In our view, having regard to the evidence of DW-1 to DW-3, it cannot be said that at the time of the incident, the accused was suffering from any mental disability. However, the fact remains that the accused had a history of suffering from Schizophrenia for which he was treated by DW-1 and DW-3 during the years mentioned in their deposition. Hence, there can be no escape from the fact that the accused was suffering from Schizophrenia in the past. Having regard to the totality of the circumstances, in our view, the instant case is covered by Section 304 part II of the IPC and therefore the conviction of the accused under Section 302 would have to be set aside. Hence, the following order :-

ORDER

- (i) The Appeal is partly allowed.
- (ii) The Judgment and order dated 19.11.2010 passed by

the learned Sessions Judge-4, Kolhapur convicting the accused under Section 302 of the IPC is quashed and set aside.

(iii) The Appellant is convicted for the offence punishable under Section 304 part II of the IPC and is sentenced to the period already undergone.

(iv) The fine amount of Rs.5,000/- imposed by the learned Sessions Judge is modified to Rs.1,000/-, in default ten days' simple imprisonment.

(v) The Appellant-accused be released forthwith, if not required in any other offence.

The Appeal stands disposed of accordingly.

[SMT. SADHANA S. JADHAV, J]

[R.M.SAVANT, J]