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Criminal Appeal No. 1940 of 1980

Kaloo @ Sahadat and Another Appellants.

Versus

State of U.P. Respondent.

Hon'ble Vinod Prasad J.
Hon'ble Surendra Kumar J.

(Delivered By Hon'ble Vinod Prasad J.)

Challenge in this appeal by the two appellants, Kaloo @Sahadat, A-1 and Sadiq Ali, A-2, who are real sibling brothers, are to their convictions and sentences recorded in the impugned judgment dated 27.8.80, by Session's Judge, District Rampur, in S.T.No. 264 of 1978, State versus Kaloo @ Sahadat and another, relating to P.S. Patwai District Rampur. Learned trial court has convicted A-1 u/s 302 and 323/34 I.P.C. and A-2, u/s 302/34 and 323/34 I.P.C. and has sentenced both of them to life imprisonment for the charge of deceased's murder and 6months R.I. for causing simple hurt to the informant.

Unfolded background facts giving rise to this appeal, as are discernible from the written FIR, Ext. ka1, chik FIR, Ext. Ka 4, and statements of fact witnesses during the Session's Trial, were that Informant Sabir, PW-1, was the brother-in-law of deceased Shahid, as his sister Anwari, PW-5, was the wife / widow of the deceased.

Both the appellants, real sibling brothers, are co villagers and next door neighbours having a common boundary wall with the house of the informant and the deceased in village Bhandpura, P.S. Patwai District Rampur. Rs.85/- were advanced by the deceased to A-1, who was not paying it back inspite of repeated demands. A day before the present incident, in the presence of one Nafis Khan, PW7, A-1 had even refused to pay back the advanced money, as he had no money and had told the informant that he was free to take action against him and realise it if he can.

Following day, on 6.12.77 at 11 a.m., deceased again demanded his money back from A-1, in front of his house, which rankled A-1, who returned to his house to reappear at the incident scene wielding a cutlas/dagger. A-2 had accompanied him with a lathi. A-1 accosted that the deceased had affronted him before many people many a times and both, A-1 & A-2, started assaulting the deceased with dagger and lathi. When Shahid Khan raised rescue shrieks, then the informant P.W. 1 armed with a lathi reached at the spot to save him and asked the accused to spare the deceased but A-2 assaulted P.W. 1 with lathi, causing him injuries. Rais Khan, Sharafat Khan, Kaiser ali Khan, Riyasat Ali Khan, all co villagers, arrived at the assault scene, and because of their intervention injured were saved. Shahid, injured had lost his life at the spot.

After the incident, informant dictated FIR, Ext. Ka 1 to Farooq, PW 6, travelled to Rampur, where at police station Kotwali, district

Rampur, he lodged his FIR.HC, Karan Singh, PW 10, registered the offences, prepared chik FIR, Ext. Ka- 4 and GD entry Ext. Ka-5. He had dispatched informant injured for his medical examination and had sent Chik FIR and GD entry to P.S. Patwai, through constable Mahabir Singh, because the crime had occurred with the jurisdiction of that police station.

Room Singh Chauhan, S.O. police station Patwai, PW-11, commenced investigation into the crime, interrogated PW-10, and he thereafter came to the district hospital, where he interrogated the informant. A-1 was also admitted in the hospital and hence he was arrested. From the hospital I.O. came to the murder scene and found corpse of the deceased and hence conducted inquest on it, vide Ext. Ka -6. Simultaneously, I.O. had prepared other relevant documents vide Ext. Ka-7, Ka-8, Ka-9, and Ka-10. Sealing deceased's cadaver, it was handed over to the Const. Karan Singh and Chukidar Gurbachan to be carried to the mortuary for autopsy purposes. PW-11, thereafter conducted spot inspection and prepared site plan, Ext. Ka-11. Plain and blood stained earths, material Ext. 1 & 2, were collected from the spot by the I.O., and it's seizure memo is Ext. Ka-12. Thereafter residue of the witnesses were interrogated by the I.O. and on 10.12.77, A-2 was arrested. Concluding investigation, PW-11, had charge sheeted accused appellants on 15.12.77 vide Ext.-13. Statements of witnesses Kesar and Sharafat given to the investigating officer are Ext. Ka- 14 & 15. Attires of the deceased

sent by the doctor from the hospital are material Ext. 3 & 4.

Injured informant Sabir, PW-1 was medically examined on 6.12.77 at 1.45 p.m. by Dr. U.C. Srivastava, PW-12, who had prepared his medical examination report, Ext. Ka- 16. According to the doctor injured could have sustained injuries at or about the time of the incident and his injuries No. 4 & 5 were simple and all the injuries were caused to him by blunt objects. Following external physical injuries were found by the doctor on the body of the injured informant:-

"Injuries

(1) Lacerated wound 6cm x 0.5cm x bone deep on frontal bone of left side head 5cm above left eye brow. Kept under observation. Ad. X-ray.

(2) Swelling 4cm x 3cm on the middle of head, 4cm above forehead kept under observation. Ad. X-ray.

(3) Lacerated wound 6cm x 0.5cm x through & through on the right upper lip just above moustaches. Kept under observation. Ad. X-ray.

(4) Lacerated wound 1/2cm x 1/2cm x muscle deep on the inner aspect of left upper lip.

(5) Contusion 5cm x 2cm on the back of left forearm 8cm below elbow joint.

All the injuries are simple in nature except injury nos. 1, 2 & 3 Kept under observation. Ad. X-ray. Injury Nos. 1, 2, 3, 4, 5 caused by sharp blunt object. Duration about fresh in origin."

Same day, same doctor, PW 12, at 4.10 p.m., had also medically examined A-1 and had found following external physical

injuries on his person, vide his medical examination report Ext. Ka 17:-

" Injuries

(1) Lacerated wound 5cm x 1/2cm x scalp deep on Rt. side head 7cm above Rt. eye brow, venticle in clavicle. Kept U.O. Ad. X-ray.

(2) Lacerated wound 6cm x 1/2cm x scalp deep on Rt. side head 3cm back to the injury no. 1. Kept under observation. Ad. X-ray.

(3) Lacerated wound 1cm x 1/2cm x 1/4cm deep on Lt. side forehead 6cm above the Lt. eye brow.

(4) Abraded contusion 7cm x 8cm back of Rt. forearm 12cm below Rt. elbow joint.

(5) Contusion 9cm x 9cm on the back of Rt. hand 1cm below Rt. wrist joint below little, Ring & middle finger. Kept under observation. Ad. X-ray.

Injury Nos. 1, 2, 5 are kept under observation. Ad. X-ray. Injury Nos. 3 and 4 are simple in nature. All the injury are caused by some blunt object. Duration about fresh in origin."

Post Mortem examination on the cadaver of the deceased was conducted by medical officer district hospital, Rampur, Dr.O.P. Gupta, PW-8, on 7.12.77 at 11.30 a.m., who had prepared post mortem examination report Ext. Ka-2. Deceased was aged about 49 years and twenty four hours had lapsed since his death. Rigor mortis had passed off from his upper limbs but was present in the lower limbs. Putriscencing of the corpse had set in. Following ante mortem external injuries were found by the doctor on the deceased cadaver:-

ANTE MORTEM INJURIES

"(i) Lacerated wound 6cm x 2cm x bone deep on left side head 9cm above left ear.

(ii) Incised wound 7cm x 3cm x bone cut on right side head near hair line.

(iii) Incised wound 2cm x 0.5cm x skin on left cheek.

(iv) Incised wound 4cm x 2cm x peritoneal cavity deep on right side chest between 6th & 7th ribs 10cm below right nipple.

(v) Incised wound 2cm x 1.5cm x muscle deep on left scapular region back."

Internal examination of the corpse revealed that underneath, injury no. 2, frontal bone of head was slightly cut, and peritoneum was cut underneath injury no. 4, which had also cut liver through and through, and abdominal cavity contained blood. According to the doctor cause of death was injury to the internal vital organ-liver.

On the basis of the charge sheet Ext. Ka-13, Case No. 119 of 1978, State versus Kalloo @ Shahadat and another, was registered in the court of C.J.M. Rampur, u/s 302/307 I.P.C. Committal court finding charge sheeted offences triable by Session's Court and hence case of accused appellants was committed to the Session's Court, vide committal order dated 22.11.78 and the same day it was registered as S.T. No. 264 of 1978, State versus Kalloo and another, in the court of Session's Judge, Rampur, who on 22.2.79, charged A-1, u/s 302, and A-2 u/s 302/34 I.P.C., for committing murder of the deceased, besides additionally charging both of them u/s 307/34 IPC

as well for causing injuries to the informant. Both the charges were read out and explained to the accused, who abjured them and claimed to be tried and hence to establish their guilt, Session's Trial procedure commenced.

Prosecution examined thirteen witnesses during Session's Trial, to establish accused guilt, besides relying upon various documentary evidences, which have already been referred to herein above while inking background facts. Out of examined witnesses informant Sabir PW-1, Sharafat PW-2, Riasat Ali Khan PW-3, Qaiser PW-4, Smt. Anwari PW-5, Nafis Ahmad PW-7 were the fact witnesses. Formal witnesses included scribe of FIR Farooq PW-6, the two doctors Dr. O.N.Gupta PW-8 & Dr. U.C. Srivastava PW-12, HM Saudan Singh PW-9, HC Karan Singh PW-10, I.O. Room Singh Chauhan, S.O. Police Station Patwai, PW-11 and Const. Gyan Singh PW-13.

In their statements u/s 313 Cr.P.C. accused denied prosecution allegations. They admitted most of the facts alleged by the prosecution, but had disputed happening of actual assault, as alleged by the prosecution. They have spelt out their own version about happening of the incident wherein they had pleaded exercise of right of private defence. According to their story, as was suggested to the prosecution witnesses and stated by A-1, in his statement u/s 313 Cr.P.C., because A-1 had refused to repay advanced money, that informant and deceased, on the date and time of the incident, started beating him with *lathis* and had caused him injuries and

therefore, A-1 and A-2, had assaulted them in defence of A-1. Thus accused appellants had put forth a cross version.

Learned trial Court, on analysis of oral and documentary evidences, held that prosecution had successfully anointed accused guilt regarding murder charge and therefore convicted both the appellants of that crime and sentenced them to life imprisonment. It however held that charge u/s 307/34 I.P.C. could not be established beyond doubt and appellants can be held guilty only u/s 323/34 I.P.C., for causing injuries to the informant and hence convicted both the appellants for that offence and sentenced them to 6 months R.I. Challenge in this appeal is to the aforesaid judgement of conviction and sentence by both the appellants.

It is in the background of preceding discernible facts, that we have heard Sri P.C. Srivastava, learned counsel for the appellants and Sri Sangam Lal Kesarwani, learned AGA for the State and have ourselves perused and vetted entire trial court record.

A priory, it was intimated to us that so far as main appellant A-1, Kalloo @ Sahadat, is concerned he had already demised pendente lite final outcome of his instant appeal in this court. In support of the said contention, learned counsel invited out attention on the order sheet dated 30.5.2012, office report dated 7.7.2012, which makes a reference to various communications **Flagged as "C", "D" and "E"** on the record of the appeal. According to "C", which is a communication from CJM, Rampur, appellant Kalloo (A-1) has expired

on 4.2.2008. Supporting the said fact is another document dated 18.6.2012 and a report submitted by police of police station Shahzad Nagar, Rampur dated 4.5.2012. Learned AGA has also not disputed the said communications sent by learned CJM, district Rampur and the police report referred to above and consequently, appeal preferred by appellant Kalloo (A-1) stands abated. This has left us only to consider the case of the second appellant Sadiq Ali (A-2).

Learned appellant counsel assailing the judgment of conviction and sentence, submitted that on the facts and circumstances of the case, it is evident from the record that the prosecution version stated by the fact witnesses is incredible and does not divulge the truth, whereas the defence story, as put forth, as a cross version, is more credible, authentic and believable. It was submitted that at various places, through various witnesses, and their depositions, prosecution had embellished its version time and again only to suite their fabricated story and to secure conviction by any means. It is also submitted that prosecution witnesses had fabricated a story to explain injuries caused to A-1 during the course of the incident, which were quite serious in nature, therefore, no reliance can be placed on witnesses testimonies. In the FIR, there is absolutely no mention about the injuries sustained by A-1. When A-1 was got admitted in the same hospital and was medically examined by the same doctor as that of the informant, that the prosecution witnesses started developing a story that A-1, too was assaulted by the

informant during the incident and had sustained the injuries. The aforesaid spurious story should not be accepted as it is a fib. Motive for the accused to assault the informant and the deceased never existed and contrary to it, informant and deceased along with their relatives, friends, had sufficient reason to implicate the appellants in a false story. Entire prosecution story does not state at all that A-2 had anything to do with the advanced money and, therefore, there was no reason for him to assault the prosecution side. It is urged that the prosecution story itself is that A-1 had emphatically and categorically denied repayment of Rs. 85/- and, therefore, the accused could not have any motive to launch an assault on the prosecution side and in this respect, version given by the prosecution is not correct. Contrary to it, the defence version that after A-1 had denied repayment of the said money, it was the deceased and the informant, who had started belabouring him for such an affronted act is more confidence inspiring. It was further submitted that because of this reason, the informant, in the FIR and in his 161 Cr.P.C. statement had nowhere narrated that he was present in the pond taking out san (creeper). This version was embellished by the informant only during the Session's Trial to cover up actual incident and project a mendacious story. Because the prosecution side were the aggressors therefore presence of Smt. Anwari PW-5, widow of deceased is not mentioned in the FIR and 161 Cr.P.C. Statement nor it was disclosed that she had witnessed the incident. Elaborating the

contention, it is submitted that the place of the incident, is also not fixed as according to the FIR version, incident should have occurred in front of the house of the deceased whereas, actually it had taken place in midway. Anwari, P.W.5 wife of the deceased, is a got up witness and because of that she had stated altogether a different story. Because of being a mendacious story, but for the informant and the widow, rest of the independent witnesses, during the Session's Trial, turned hostile and did not support the prosecution case. In this respect, it was submitted by learned counsel that Sahadat (PW-2) had given a *hearsay* evidence and had totally denied witnessing any such incident. He was declared hostile by the prosecution and was cross examined but he completely denied his earlier 161 Cr.P.C. statement. So is the case with another witness Kaiser (PW-4), who had also completely denied witnessing any such incident. He had stated that he had only heard that it was only A-1, who had assaulted the deceased and the informant. This witness too was declared hostile by the prosecution and was cross examined but he had also denied his 161 Cr.P.C. statement. Inviting attention of the Court at the statement of the widow Smt. Anwari (PW-5), it was urged by appellants' counsel that in her 161 Cr.P.C. statement, she had given altogether a different story regarding a fight taking place because of an agricultural terracotta boundary wall (*medh*). She had also changed the time of the incident and had stated in her examination-in-chief that the incident had occurred at 12 in the

afternoon. Her presence at the scene of the incident is also belied by the fact that neither the informant nor P.W.-3 had stated that she was present during the incident and had seen it. She was not named in the FIR and from her conduct, she does not seem to be a truthful witness. She had made no endeavour at all to save her husband nor after he had sustained any injury, she had made any effort to comfort him. She had not gone to the hospital along with him nor she had played any active role in saving the life of her husband. Her conduct is so unnatural that it does not inspire any confidence in prosecution version of her being a witness to the whole incident. Castigating her evidence further learned counsel argued that her narration that her husband was assaulted when she was having a conversation with him is altogether a nascent version, which had not been stated by any other fact witness. Next, it is submitted that the prosecution story that informant had assaulted A-1 in exercise of right of private defence of his brother-in-law is also a false story because according to the informant, he was being assaulted by Sadiq Ali (A-2). If, this story is correct, it would have been very natural for the informant to assault A-2, which he had not done at all. It is puerile to cogitate that Sadiq Ali (A-2) was beating P.W.-1 with *lathi*, who was not defending himself against the said assault but in defence assaulted appellant Kalloo (A-1). This story has been developed by the prosecution witnesses only to explain the injuries of the accused A-1. Such facetious prosecution version does not inspire

any confidence and seems to be an afterthought. It was urged that actually it was the prosecution side which had launched an assault on A-1 and to save his life, A-1 and A-2 had defended themselves with their respective weapons. Pointing out to the injuries sustained by A-1, it was contended that those injuries were neither superficial nor insignificant and in fact A-1 had sustained three lacerated wounds on his head and prosecution had suppressed causing of these injuries during the investigation. It is, therefore, contended that the version given by the defence seems to be more credible, authentic and confidence inspiring, which is more worthy of credence and, therefore, the defence had succeeded in discharging its burden of establishing its case on preponderance of probability and, therefore, the sole surviving appellant deserves acquittal.

It was further submitted that there was no common intention present at the time of the incident amongst the appellants and, therefore, section 34 I.P.C. has been wrongly applied by the learned Trial Judge. From the evidences on record, it is established that but for an insignificant injury sustained by the deceased, no other *lathi* injury was caused to the deceased. Only a single blow by *lathi* at the deceased is not indicative of commonality of purpose and / or common intention harbingered by both the accused harangued appellants' counsel. It was, therefore, contended that in any view, A-2 could not have been convicted with the aid of section 34 I.P.C. and to that extent, his conviction has been wrongly recorded. None of the

prosecution witnesses are reliable and they had suppressed the real genesis of the incident and no trustworthiness can be attached to their depositions and consequently the appeal filed by the appellant A-2 deserves to be allowed and A-2 be acquitted of all the charges.

Learned AGA argued to the contrary and submitted that it is an incident which had occurred in the day light. Prosecution version of accused being an aggressor is more credible and confidence inspiring because, the day earlier, the demand for return of the money was made in the presence of an independent witness and that must have taken to be an insult by A-1. It is further submitted that on the incident date also deceased had demanded from A-1 to pay back his money and that was an immediate cause and the incident had started because of the aforesaid reason. Learned AGA further submitted that in 161 Cr.P.C. statement, other witnesses, except the informant, had explained the injuries sustained by A-1, their version is consistent with the prosecution evidences stated during the trial and therefore, prosecution has sufficiently explained the injury sustained by A-1. It is further submitted that Smt. Anwari Begum, P.W. 5 though not named in the FIR as a witness, had corroborated the prosecution case in it's entirety and therefore, the prosecution had successfully anointed the guilt of the appellant. In respect of the contention that only a single injury was caused to the deceased by *lathi*, it was contended that initial intention of both the accused was

to annihilate the deceased and it does not matter as to how much assault had been made by each of the accused in the incident and therefore, on this aspect also, prosecution version cannot be castigated and accused cannot be acquitted. Concludingly, it was submitted that the appeal of appellant A-2 lacks merit and deserves to be dismissed and his conviction and sentence requires to be affirmed.

We have considered the rival submissions in the light of documentary and oral evidences existing on the trial Court record.

Right of private defence and law relating to it, is not a nascent aspect and is no longer *res integra*. It is has been subjected to voluminous judicial pronouncements, which has been prolixed from time to time, and the same has now been crystallised in various apex court decisions. This Court also had the occasion to go into in-depth analysis on the said aspect in a full bench decision in **Prabhoo and others Vs. Emperor: AIR 1941 Allahabad 402**. Later on, a larger Bench of our own court had the occasion to reconsider the *ratio decidendi* of the said decision in the case of **Rishi Kesh Singh versus State: AIR 1970 Allahabad 51** and it modified the opinion of Prabhoo's case. After going through various Apex Court decisions Hon'ble Judges of the larger Bench, in separate but concurring opinion, in various paragraphs, enunciating succinctly the law relating to exercise the right of private defence and drew following conclusions:-

"25. This, in our opinion, is precisely what the decision in 1941 All LJ 619 : AIR 1941 All 402 (FB) was meant to convey. The judgments of all the four Judges supporting the majority view in that case lay stress on the overriding need for the prosecution to discharge the burden of proving the accused guilty of the crime. Iqbal Ahmad C. J. remarked :-

"In cases falling within the purview of Section 105, the law placed on the accused the minor burden of bringing his case within the exception or proviso relied upon by him. There is however, nothing in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102."

And Bajpai J. observed :-

"it is open to the Court to consider whether the entire evidence proves to the satisfaction of the Court that the accused is entitled to the benefit of the exception and the charge levelled against him has not been established or that there is a reasonable doubt as to the guilt of the accused, and in both cases the accused would be entitled to an acquittal."

And further :-

"If there is such doubt (i.e. as to the plea of the right of private defence), has not a doubt been cast in connexion with the entire case and if that is so, is not the accused entitled to an acquittal? I think he is, and that is so because of the constant immutable primal

burden resting on the prosecution." Ismail J. also observed :-

"The decision on the question of self defence will be only a decision upon one of the issues in the case. The Court at the end of the trial has still to see whether having regard to the entire evidence and the circumstances of the case, the charge is proved beyond reasonable doubt."

And finally Mulla, J. held :-

"There is nothing in the language of Section 105 to warrant the conclusion that the law intended such a result and for that purpose enacted Section 105, Evidence Act, in order to curtail the fundamental right of the accused to claim an acquittal if there is any reasonable doubt about his guilt."

26. We are fully satisfied, therefore, that although the dictum in Parbhoo's case may be said to be somewhat unhappily worded, it is fundamentally correct and calls for no amendment. When the learned Judges who decided that case stated that "the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of he said general exception), a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception", they had in mind the doubt that may arise, on a consideration of the entire evidence (both prosecution and defence), with regard to the discharge of the primary burden resting on the prosecution to prove the guilt of the accused. That guilt can

only be established if the prosecution is able to prove beyond reasonable doubt all the essentials that go to make up the offence, including the fundamental requirement of mens rea. As already pointed out, a doubt regarding the existence of mens rea must necessarily arise whenever there is a doubt in the mind of the Court as to whether the accused is entitled to the benefit of a general exception such as the right of private defence. Viewed in this light, the dictum of the Full Bench in Parbhoo's case is perfectly sound and requires no modification.

.....

162. The last two preceding paragraphs, which summarise my opinion, would have been enough to answer the question before us if it had not been urged so emphatically, on behalf of the State, that the majority view in Parbhoo's case overlooks important aspects of the question, which were more fully argued before us with the help of Supreme Court decisions, and that trial Courts need detailed guidance on the application of the principle of Benefit of Doubt when exceptions are pleaded. After having anxiously examined every aspect of the question referred to us, I answer the question framed, in complete agreement with the conclusions of my learned brethren Broome, Gupta, Gyanendra Kumar, Yashoda Nandan and Parekh, JJ., as follows:-

The answer of the majority of learned Judges who decided AIR 1941 All 402 (FB) is still good law. It means that in a case in which, in

answer to a prima facie prosecution case, any general exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

.....

176. In the result we answer the question referred to the Full Bench as under:

The dictum of the majority of learned Judges of this Court in 1941 All LJ 619 : AIR 1941 All 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which

he is charged."

After opining as is referred to above Hon'ble Judges finally answered the referred question thus:-

"177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:-

The majority decision in 1941 All LJ 619 : AIR 1941 All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused."

Apex court has also considered the said aspects in innumerable binding precedents some of which are referred to herein under:-

In **Darshan Singh v. State of Punjab and Anr.:****AIR 20101 SC 1212** deliberating on the said question of right of private defence it has been held by the apex court as under:-

"23. It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon

used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

SCOPE AND FOUNDATION OF THE PRIVATE DEFENCE

24. The rule as to the right of private defence has been stated by Russel on Crime (11th Edn., Vol.1, p.491) thus:

"..... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

When enacting sections 96 to 106 of the Indian Penal Code, excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.

25. *Hari Singh Gour in his celebrated book on Penal Law of India (11th Edition 1998-99) aptly observed that self-help is the first rule of criminal law. It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order. According to Bentham, in his book 'Principles of Penal Laws' has observed "the right of defence is absolutely necessary". It is based on the cardinal principle that it is the duty of man to help himself.*

26. *Killing in defence of a person, according to the English law, will amount to either justifiable or excusable homicide or chance medley, as the latter is termed, according to the circumstances of the case.*

27. *But there is another form of homicide which is excusable in self-defence. There are cases where the necessity for self-defence arises in a sudden quarrel in which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life.*

28. *The Indian Penal Code defines homicide in self-defence as a form of substantive right, and therefore, save and except the restrictions imposed on the right of the Code itself, it seems that the special rule of English Law as to the duty of retreating will have no application to this country where there is a real need for defending oneself against deadly assaults.*

29. *The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of*

protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said: "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is noble movement which makes us forget our danger at the first cry of distress.....It concerns the public safety that every honest man should consider himself as the natural protector of every other." But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit of lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property.

30. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-defence is only right to defend oneself and not to retaliate. It is not a right, to take revenge.

31. Right of private defence of person and property is recognized in all free, civilised, democratic societies within certain reasonable limits. Those limits are dictated by two considerations : (1) that the same right is claimed by all other members of the society and (2)

that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences.

32. A legal philosopher Michael Gorr in his article "Private Defense" (published in the Journal "Law and Philosophy" Volume 9, Number 3 / August 1990 at Page 241) observed as under:

"Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in what Glanville Willams has termed "private defence", i.e., to inflict serious (even lethal) harm upon another person in order to protect oneself or some innocent third party from suffering the same".

33. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury

which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. "

After referring to many apex court decision it was held by the apex court as under:-

"58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is comterminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

In conformity with the above expounded law, that in the present appeal prosecution and defence case has to be judged and such an exercise revealed that prosecution and defence are not at variance on most of the facts in issue and hence those facts are established. This list includes happening, date, time, of the incident, weapons used and participation of the deceased & informant from the prosecution side and that of the appellants from defence sides. Motive for the two sides engaging themselves in the incident is also admitted, as both claimed that the incident had started because of non- payment of advanced money by A-1 to the deceased, which

was Rs. Eighty five only. What is also not denied is that both the sides were co-villagers and next door neighbours of each other having common boundary wall. Injuries sustained by the informant, the deceased and the appellant A-1, during the course of same incident is also admitted, so much so that the prosecution itself had got injuries of appellant A-1, proved from the doctor as Ext. Ka- 17. In their statements under section 313 Cr.P.C. , both the accused have not denied correctness of questions 1 to 3 put to them and they only disputed and refuted actual incident, the manner in which it had occurred and claimed that it was the prosecution side which was the aggressor, as informant and deceased had started assaulting A-1 and to save his person that A-1 &2 had caused them injuries. Thus what is to be adjudicated is as to which side was the aggressor and therefore whether the appellants had a right of private defence? Another point of determination by us is contained in the supplementary argument harangued by appellant's counsel, while snipping prosecution case, is when none of the prosecution witnesses are reliable, as they had suppressed real genesis of the incident and whatever they had deposed during the trial was all a mendacious fib what will be it's effect. Another aspect is as to whether a truncated prosecution story, often self- contradictory and oxymoron, narrated by the witnesses can inspires any confidence vis-a vis defence case of the appellants, which is more credible, consistent and confidence inspiring. Yet another aspect required to be delved and adjudicated is

that if the prosecution witnesses does not explain serious injuries sustained by the accused and suppresses it or it furnishes an unacceptable and prevaricated explanation, then whether they can be believed or not? and what will be its effect.

We take up the point of determination in a serialim and first of all deal with the contention as to which sides was the aggressor? According to prosecution case it was the two appellants who had come out of their house and had assaulted the deceased and when informant tried to rescue him , he too was belaboured. Defence story is that informant and deceased had started assaulting A-1 and hence both A-1 &2 had acted in self defence. When both the versions are scrutinized and evidences are summated it becomes evident that defence version is more credible as there are many unplugged loop holes in the prosecution story. First of all there was no immediate motive for the appellants to launch an assault on the deceased. Fact of lending the money and non-payment of it was known to all the witnesses as was deposed by them and hence accused had no reason to start the incident. On the contrary, since money was not being paid and A-1, had flatly denied paying it back and had even challenged the deceased to realise it, if he can, must have affronted the deceased, as he had lost all his advanced money. Thus deceased and informant had graver motive to be the aggressors than the accused and therefore defence story seems to be more probable.

Accused does not seem to be the aggressor is also indicated

from the fact that A-2 had hurled only one blow on the deceased and had not repeated it and so far as A-1 is concerned he had caused only two injuries out of which one was simple and other was only muscle deep. Had accused intended to cause death of the deceased, they would have inflicted much more serious and numerous injuries and would not have been satisfied with causing only one fatal injury, which they had not intended at all, as is culled out from the appreciation of evidences of two fact witnesses. P.W. 1 and P.W. 5 on whom learned Trial Court had placed heavy reliance.

Another unsatisfactory feature of the prosecution case is its unnatural and unconvincing story about the actual incident and a prevaricated version about the injury sustained by A-1, to explain accused injuries. Vetting of testimonies of informant and widow of the deceased P.W. 1 and P.W. 5, indicate that in the first information report, there is significant omission of two very important aspects of the incident, the first is that in the beginning of the incident, informant was present in nearby pond taking out san (creeper) from where he had arrived at the assault scene armed with a lathi, which he had wielded during the incident to assault A-1 and secondly that widow of the deceased was present and had seen the incident. He had not informed the I.O. also about these two significant facts even during his interrogation by him and consequently, he does not seem to have arrived at the assault scene from the pond armed with a lathi. His presence on the spot was in any other manner, for other

reasons but not as has been stated by him. These significant omissions by the informant is of value because he is a related, partisan, inimical and interested witness. Why he had not divulged those facts to the I.O. or mentioned them in his FIR, which probablised his presence at the scene is not understandable. His presence on the spot is not in doubt, but his narrations are certainly uncreditworthy. More over his explanation about the injuries of A-1 is a complete lie and a feigned story, and we have good reasons for such a conclusion. Informant, PW1 had stated that when he had arrived at the incident scene then deceased had already sustained injuries and A-2 was in front and A-1 was behind him and as soon as he arrived there and asked the accused why they were assaulting the deceased, that A-2 had hurled a lathi blow on his head which soon was followed by another blow and, after sustaining two lathi injuries, that he had wielded his lathi in self-defence and had caused injuries to A-1. This version by the informant is totally absured. If informant, PW1, was being assaulted with lathi by A-2, why he did not retaliate in saving himself from such an assault launched by A-2. He had not said a word that although Sadiq Ali, A-2, was beating him he had made any endeavour to save himself from such an assault. His categorical deposition is that he had launched an assault on A-1. Very queeriously it is not his statement that A-1 had also assaulted him , when he had arrived at the incident scene and hence the question of his assaulting A-1 in exercise of right of private defence

does not at all arise, as PW1 was not being assaulted by A-1 at all and hence there was no occasion for the informant to launch a defence assault on A-1. Self-preservation is the most forceful human instinct and, our heuristic experience informs us, that when a person is assaulted his primary resistance shall be from such an assault to save one self and not to assault on any other person who was not beating him. In the present case, the conduct of the first informant in not warding off the assault launched by assailant Sadiq Ali, A-2, indicates that whatever informant had narrated in his statement, is something, which is fabricated, very unnatural and most uncommon, on which, no confidence can be reposed. To reaffirm our conclusions we reproduce transliteration of paragraph 6, at pages 5 and 6 relevant portions, of PW1's testimonies herein under:-

"Accused Kalloo was also admitted in the Hospital. I did not come to know how much injury was sustained by Kalloo. I had wielded lathi three or four times and nobody assaulted accused with danda. Accused Sadik Ali have assaulted him two times with lathi. I had not sustained five injuries but only two injuries. When I reached at the incident spot, accused had already assaulted Sahid. When I reached at the spot then in the front was accused Sadik and behind him was accused Kalloo. Sadiq Ali immediately assaulted me on my head with lathi and second blow all of sudden. Till then accused Kalloo was behind him. After sustaining two blows that I started wielding my lathi. Then Sadiq had not assaulted me at all."

In view of above depositions, which were not casual or insignificant but are indicative of a very important fact as to when and in what manner A-1 had sustained injuries during the incident, there remains no doubt that the explanation of accused injuries offered by the informant and other fact witnesses is false and cooked up, whereas A-1 had sustained injuries in somewhat other manner, which is being suppressed by the prosecution witnesses. In the trial informant P.W.1 has further deposed oxymoron statements on this aspect. On the one hand, he had stated that he had mentioned in the FIR and in his 161 Cr.P.C. statements that he had caused injury to A-1 but when the matter was further probed, he took a somersault by testifying that at the time when the Investigating Officer interrogating him, he did not know that from his defence assault, A-1 had sustained injury. All this contradictory stands are taken by the informant because his story was false and fabricated and absolutely absurd. Repeated blows were sustained by A-1 on his head causing lacerated wounds, which must have bled. If statement of informant is correct then these injuries were caused to A-1 by the informant. It is totally unbelievable and we reject it out right that informant did not know that he had hit A-1 thrice on his head causing him lacerated wounds. Such a statement, is against all canons of natural human conduct, which does not inspire any confidence and, on the contrary, gives an impression that the informant is not divulging the true narration about the incident. It is

further noted that informant could not have eschewed mentioning of the aforesaid fact to the I.O. because at the time when he was admitted in the hospital, at the same time, A-1, was also admitted in the same hospital with sustained bleeding injuries. Medical examination of A-1 was done on the same day at 4.10 pm vide Exhibit Ka.17 and it is categorical statement of the Investigating Officer that when he had gone to interrogated the informant in the hospital, A-1 was also admitted there with sustained injuries and he had arrested him in the hospital itself. More over informant could not have assaulted A-1, during the incident, without causing injuries to A-2, as A-1 was behind A-2 who was assaulting the informant. It will be preposterous for us to believe that informant did not warded off assault by lathi hurled on him by A-2 and instead assaulted A-1 , who was just standing at that time and was not endeavouring to assault the informant and did not cause any injury to A-2. We are also reluctant to believe that even though A-1 was assaulted by P.W. 1 with lathi and he had sustained lacerated wounds on his head but he also did not retaliate and wielded his cutlas against P.W. 1. All this is wierd and wholly untrustworthy and we have no hesitation in rejecting such an explanation of injury of the accused and are of the view that prosecution witnesses had offered a fake explanation of accused injuries, which remains unexplained. Recollected here is the statement of the informant that when he had arrived at the incident scene deceased had already sustained injuries and hence there was

no right of private defence available to the informant to save deceased person.

The gist of our above scrutiny of prosecution and defence cases, compels us to reach an irresistible conclusion that the prosecution version suffers from many pitfalls and is wholly incredible on which no reliance can be placed and the defence story of prosecution side being the aggressor is more creditworthy and truthful and consequently we are of the opinion that appellants were not the aggressors. We have also no hesitation to hold that the prosecution witnesses are not reliable and they have not deposed true and correct version about the incident and consequently no authenticity can be attached to their depositions. We also hold that false explanation offered by the prosecution about the injuries sustained by the accused is no explanation at all and hence prosecution has failed to explain injuries sustained by A-1 in the same incident, which is also admitted. Non explanation of injuries of the accused has got the same result which has been arrived at by the apex court in the case of Lakshmi Singh and others vs State of Bihar: AIR: 1976 SC 2263, wherein the Apex Court has held as under:-

"This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow : (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probalilise the plea taken by the present case has not correctly applied the principles laid down by this Court in the decision

referred to above. In some of the recent cases, the same principle was laid down. In *Puran Singh v. The State of Punjab*, Criminal Appeal No. 266 of 1971 decided on April 25, 1975 = (reported in AIR 1975 SC 1674) which was also a murder case, this Court, while following an earlier case, observed as follows :

"In *State of Gujarat v. Bai Fatima* (Criminal Appeal No. 67 of 1971 decided on March 19, 1975) = (reported in AIR 1975 SC 1478) one of us (Untwalia, J.,) speaking for the Court, observed as follows :

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused depending on the facts of each case, any of the three results may follow :

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgement. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case."

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

*The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in *State of Gujarat v. Bai Fatima*, Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : (Reported in AIR 1975 SC 1478) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing*

premises."

The same view was also expressed in many other cases, which for the sake brevity we eschew to refer. When the prosecution does not come with clean hands their version cannot be accepted. It is the duty of the court to exhume the truth out from an un-fathomable depth to separate the grain from the chaff.

Some other unconvincing features of the prosecution case is that P.W.2 Sharafat and P.W.4 Kaiser, two independent witnesses turned hostile and did not supported the prosecution case. Riasat Ali, P.W.3 has also not seen the genesis of the incident and, his evidence also does not corroborate the prosecution allegations. He has been disbelieved by the learned trial court also. We also find it difficult to accept his testimony for the reason that it is his categorical statement in the trial that he was at his field, when he heard the shrieks. He further deposed in paragraph 2, at page 3, of his deposition that:-

"when I saw the incident for the first time then Sabir was present on the spot with a lathi. When I saw the assault then both the accused Sahid and Sabir were fighting with each other".

In view of such a deposition, it is culled out that both the sides were fighting with each other when this witness had seen the incident and therefore, so far as genesis of the incident, is concerned his evidence is of no value.

Coming to the evidence of the widow Smt. Anwari, P.W.5, we

find that she being widow of the deceased has also not stated the truth nor she is a reliable witness. First of all, she had changed the time of the incident and her conduct does not inspire any confidence. She had not made any effort to save her husband nor comforted her after he had sustained injuries. She had not accompanied him to the hospital. Though she stated that she had full pregnancy but even then she could have done bare minimum to save the life of her own husband. For not placing reliance on her evidence, because of her most unnatural and bizarre conduct, we fortify ourselves with observations of the Apex Court in *Meharaj Singh (L/Nk.) v. State of U.P., (1994) 5 SCC 188* wherein it has been observed by the Apex Court, on somewhat similar facts and circumstances, as under:-

"13. It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case. We may demonstrate this by noticing that though PW 3 Smt Kamlesh the widow of the deceased claimed that she was present with her husband at the time of the occurrence, her conduct was so unnatural that not only she did not try to save her husband by trying to provide a cover but even after her husband fell down and was inflicted repeated injuries with the knife by the appellant Meharaj Singh, she did not even try to go anywhere near her husband and even later on hold his head in her lap and try to provide some comfort to him. This becomes obvious from the absence of any bloodstains on her clothes. She admitted that she had not even received a scratch during the occurrence. In a situation like this, the normal conduct of any wife would be firstly to make an effort to save her husband even by taking the blow on herself and if that is not possible then at least to go so close to his person, at least after the assailants had left that there would be no escape from the blood oozing out of the injuries of the deceased to come on to her clothes. Similar criticism is also available against Balbir PW 2, Shiv Charan PW 4 and Satkari PW 5."

In respect of PW5, we respectfully adopt above reasoning and therefore find ourselves in difficulty to rely upon her. Moreover, PW5 has narrated altogether a different story in her 161 Cr.P.C. statement regarding the incident taking place because of a dispute of *Medh* and she further had embellished prosecution case by deposing that even after the deceased had fallen down he was assaulted.

Turning towards another contention that section 34 does not apply on the facts of the present case, we don't think that it will be worthwhile for us to deliberate on that question as we are of the opinion that it was the prosecution side which was the aggressor and the version given by the accused that they had defended themselves in exercise of right of private defence seems to be more credible version. Once the accused had no intention of committing any offence, there was no occasion for the common intention to pervade among themselves.

Appellant A-1 has already died and according to doctor's evidence, it was first injury caused by him which had proved fatal.

On an overall of assessment of evidences we find that the version given by the accused appellant is more credible, creditworthy and confidence inspiring and the prosecution witnesses had deliberately suppressed real genesis of the incident and therefore, no credence can be attached to the prosecution story.

Turning towards the reasoning of the learned trial court we are of the view the same is faulty and learned trial court had misdirected

itself both in appreciation of evidences and applying law. First of all we note that learned trial court itself had disbelieved PWs 2, 3 and 4. Therefore all the independent witnesses were disbelieved by it. It mainly relied upon testimony of PW1 & 5. So far as PW1 is concerned the finding that he is a reliable witness is contradicted by the facts noted by learned trial judge himself at page 8/ 9 of the judgement. When PW 1 tried to suppress significant aspect of the incident and when he furnished a fabricated story about the injury sustained by the accused, how can he be relied upon? Learned trial court has eschewed from consideration those evidences which were favourable to the accused and created doubt in the mind regarding genuineness of the prosecution story. It also failed to appreciate that though FIR is not an encyclopaedia but if it does not contain vital aspects it loses it's corroborative value. Learned trial court itself has observed that FIR was not dictated in the village as claimed by the informant and the scribe , but even then it failed to attach significance to such a false case stated by the witnesses. If the FIR was not prepared as alleged by the prosecution, entire prosecution version becomes doubtful and shrouded in mystery. The finding regarding FIR is contained at page 10 of impugned judgement. Regarding non lodging of FIR by the accused, learned trial court has aggrandized it to an unacceptable limits. There cannot be different parameters to test prosecution and defence witnesses. If prosecution witness can ignore mentioning of accused injury in the FIR because of their own

implication, so is the accused, who can eschew lodging of FIR because of fear of being punished for murder in a case like the present. More over right of private defence does not require the accused to register an FIR and only then claim benefit of such a right. Apex court has held that no document is required by the accused to claim such a benefit. We, on this aspect, rely upon apex court decisions in Ragbir Singh and Ors. vs State of Haryana:AIR2009 SC 1223 wherein it has been held by the apex court as under:-

“The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.”

In yet another decision Dinesh Singh versus State of U.P.:AIR

2009 SC (Suppl) 711, apex court has expressed the same view as under:-

“Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and Ors. v. Delhi Administration (AIR 1968

SC 702); State of Gujarat v. Bai Fatima (AIR 1975 SC 1478); State of U.P. v. Mohd. Musheer Khan (AIR 1977 SC 2226) and Mohinder Pal Jolly v. State of Punjab (AIR 1979 SC 577). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. (AIR 1979 SC 391), runs as follows :

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

4. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

In respect of explanation offered by the prosecution about the injuries of the accused A-1, the finding of the trial court is also against the merits of evidence on record.

Wrapping up the discussion we conclude that the prosecution has not been able to substantiate its case beyond all reasonable doubt and defence of the appellant is quite possible and hence A-2 is entitled to benefit of exercise of right of private defence, which we confer on him. Genesis of the incident is shrouded in mystery and hence we are unable to accept the prosecution case and therefore, are of the opinion that the charges against the appellant, A-2 have not been established beyond all reasonable doubts.

Resultantly, the **appeal is allowed**. Conviction of sole surviving appellant A-2 Sadiq Ali is hereby set aside and he is acquitted of all the charges and set at liberty. Appellant Sadiq Ali is on bail, he need not surrender and his personal and surety bonds are hereby discharged.

Let a copy of the judgment be certified to the trial court for its intimation.

Dt.19.7.2012
Arvind/Tamang/-