

CASE NO.:
Appeal (crl.) 1023 of 1999

PETITIONER:
State of Madhya Pradesh

RESPONDENT:
Ramesh

DATE OF JUDGMENT: 18/11/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

State of Madhya Pradesh calls in question legality of the judgment rendered by the Division Bench of the Madhya Pradesh High Court. The respondent faced trial for alleged commission of offences punishable under Sections 302 and 338 of the Indian Penal Code, 1860 (in short the 'IPC'). Originally his father Ram Kirpal, brother Rakesh and mother Nonibai also faced trial with him. They were acquitted by the trial Court, while respondent was convicted for causing the homicidal death of one Rajendra (hereinafter referred to as the 'deceased') by gun shot on 20.5.1986. He was sentenced to life imprisonment for the offence relatable to Section 302 IPC. He was also convicted in terms of Section 338 IPC for causing grievous injury to Krishna (PW-6) who was injured by the same bullet which after passing through the body of deceased Rajendra struck Krishan and caused grievous injury to him. For this offence he was sentenced to undergo RI for one year and fine of Rs.1000/- with default stipulation.

Prosecution version in nutshell is as follows:

On 20.5.1986 deceased Rajendra and Kuldeep (PW 1) were returning after their examination. They were passing in front of the house of Ram Kripal (acquitted accused) who was a municipal councilor those days. Ram Kirpal knowing that these boys were friendly with Dinesh (PW-2), who was a press reporter of that area, advised them to abjure company of Dinesh. Finding them non-responsive Ram Kirpal, his two sons Ramesh and Rakesh and his wife Nonibai started pelting stones on deceased Rajendra and Kuldeep (PW 1). Thereafter, Ram Kirpal asked his son Ramesh to get his gun from the house. Ram Kirpal asked Ramesh to shoot these boys, Ramesh then brought out a 12 bore gun and fired a shot at deceased Rajendra from a distance of about 5 paces. At that time Dinesh (PW 2) reached there while the shot was fired. This shot struck Rajendra in the left iliac crest passing through the stomach region and damaged various internal organs. It emerged from the right side of the body and struck Krishna (PW 6) who also happened to reach by that time. The bullet struck him in the left arm and passed through fleshy portion and then struck the back region and got embedded on the spinal cord, ultimately resulting in paralysis. Rajendra died at the spot.

The prosecution case based on the testimony of Kuldeep (PW-1), Krishna (PW-6), Dinesh (PW-2), Sureshwar Pandey, ASI (PW-8), who also

happened to be present there and had witnessed the incident. Further reliance was placed on the medical report of autopsy surgeon and medical opinion regarding injuries of Krishna. Medical report showed that deceased Rajendra had been struck with the gun shot which entered into left iliac crest and emerged in the right side and injured some vital organs such as Kidney, Spleen and Liver. The FIR was lodged by Kuldeep (PW-1) on the same day within 10 minutes after this incident.

The accused's case was that Rajendra had approached Ram Kirpal in his capacity as Municipal Councillor to obtain his residential certificate. He had gone with the other boy. Ram Kirpal knew that Rajendra was in fact resident of Uttar Pradesh and not resident of Chhatarpur, so he declined. This resulted in exchange of hot words. Rajendra had been persuaded by Dinesh (PW 2) who was a press reporter and whose writings were used to be against Ram Kirpal in respect of developments of various areas of municipality. Dinesh (PW 2) had also tried to put his influence on Ram Kirpal for issuing certificate to Rajendra but Ram Kirpal did not oblige. He was attacked by these boys and he suffered 5 injuries. He was medically examined next day after the incident and 5 injuries caused by blunt object were found on his person. So his case was that since he was attacked by these boys, he called for help from his sons. Ramesh brought out a gun and that gave rise to the firing.

The story of the first attack on Ram Kirpal did not find favour with the trial Court and the story of the prosecution was accepted, although presence of Sureshwar Pandey was not accepted by the trial Court and his testimony was found to be false. But the trial Court held that the firing was deliberate and, therefore, the finding of guilt under Section 302 was returned regarding death of Rajendra.

Co- accused persons were however acquitted.

Accused filed appeal before the High Court and contended that it was clearly a case where right of self defence was available. Even if it is held that while acting for protecting the private defence of his father he had exceeded limit, Section 302 IPC would not be attracted. It was pleaded that while Ram Kirpal and his family were at their home deceased and Kuldeep (PW-1) were returning after examination. In the ordinary course of conduct Ram Kirpal would not have advised them to keep away from PW 2.

There was no reason for him and his family members to start pelting stones. If such incident would have happened, there certainly was possibility of reaction from the side of the deceased and his friends that has not been disclosed. The story of pelting stones has been disbelieved by the trial Court. Five injuries which were there on the body were not explained by the prosecution. On the other hand, the plea of defence is more acceptable. The deceased was attacked and certainly he became violent and attacked accused-respondent Ramesh and caused injuries and Ramesh emerged from his house. Ramesh was acting in self defence of his father.

Prosecutions' stand was that it is clearly a case of deliberate killing and there was no basis for inferring any right of self defence. The trial Court accepted the plea of self defence and altered the conviction to Section 304 Part I IPC and awarded custodial sentence of 12 years. Such alteration is subject matter of challenge in this appeal.

In support of the appeal, learned counsel for the State submitted that the approach of the High Court is clearly erroneous. The conclusions are based on surmises, conjectures and guess work. Clear and cogent evidence has been lightly brushed aside and acting on presumption and surmises and guess work, it has been held that the accused was acting in self defence. The High Court was not itself

clear whether it is a case of grave and sudden provocation to be covered by Exception I or exceeding of limit of right of self defence in terms of Exception II of Section 300.

In response, learned counsel for the respondent submitted that the High Court has analysed the evidence in detail and come to a definite finding that the right of private defence was available to the accused though he had exceeded the same. In view of the matter no interference is called for.

Only question which needs to be considered, is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. 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. 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."

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.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies 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. [See Lakshmi Singh v. State of Bihar (AIR 1976 SC 2263)]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In *Jai Dev. v. State of Punjab* (AIR 1963 SC 612), it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by

this Court in Biran Singh v. State of Bihar (AIR 1975 SC 87). (See: Wassan Singh v. State of Punjab (1996) 1 SCC 458, Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N. (2002 (8) SCC 354).

As noted in Butta Singh v. The State of Punjab (AIR 1991 SC 1316), a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (See Vidhya Singh v. State of M.P. (AIR 1971 SC 1857). Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

In the illuminating words of Russel (Russel on Crime, 11th Edition Volume I at page 49):

"....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."

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of

retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

We find that the High Court has acted on surmises and conjectures to conclude certain aspects. Firstly, it has come to conclude that the boys including the deceased attacked Ramesh "may be with fists, may be with some blunt weapon". There was no evidence in this regard. It was further held that there was no reason for Ram Kirpal and his family members to pelt stones. The deceased and his friends attacked Ram Kirpal though weapon used by them are not known. Reference was made to the injuries on Ram Kirpal. It was further held that probably some heat was generated either because of the advise of Ram Kirpal was not accepted or because request of the boys to issue certificate was not accepted by him. Because of the heat generated between the boys and Ram Kirpal, the boys started hitting Ram Kirpal causing injuries. In this condition "probably" he asked his sons to shoot the assailants and Ramesh fired a gun shot resulting in fatal injury to deceased and grievous injury to Krishna. It was further held that when there was some exchange of hot words between the deceased and his friends, on one hand and Ram Kishan on the other the boys started attacking on his father and this was grave and sudden provocation to the sons. In the aforesaid background it was held that when Ram Kirpal asked his sons to kill. Exception I to Section 300 would be attracted. The conclusions are not based on evidence and are based on surmises, conjectures and guess work. As aforesaid noted, it was first concluded that right of private defence was exceeded. It was further held that the case is covered by either Exception I or Exception II to Section 300, as injuries on the accused not explained. The findings are vague, unclear and indefensible. As noted above, for some conclusions the High Court acted without any evidence and frequently used the expression 'Probably'. A new case which was not even pleaded by the parties was introduced on its own by the High Court. Undue importance was attached to some superficial injuries of very minor nature on Ram Kirpal. It is trite that there are some minor or superficial injuries suffered by the accused that shall not affect a credible and cogent prosecution version even if the prosecution has not explained the injuries. The vacillating nature of the conclusions is apparent because the High Court was not very sure as to whether Exception I or Exception II to Section 300 I.P.C. applied. They operate in entirely different fields. One relates to grave and sudden provocation and the other to exercise of right of private defence.

The High Court was not justified, therefore, to alter the conviction to Section 304 Part I IPC. The trial Court had rightly convicted the accused in terms of Section 302 IPC.

Accordingly the judgment of the High Court is set aside and that of the trial Court is restored.

Appeal is allowed.