

CASE NO.:
Appeal (crl.) 887 of 1997
Special Leave Petition (crl.) 47-49 of 1998

PETITIONER:
James Martin

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 16/12/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Self-preservation is the prime instinct of every human being. The right of private defence is a recognized right in the criminal law. Therefore, Section 96 of Indian Penal Code, 1860 (in short 'the IPC') provides that nothing is an offence which is done in the exercise of the right of private defence. The question is, as happens in many cases, where exercise of such rights is claimed, whether the "Lakshman Rekha", applicable to its exercise has been exceeded. Section 99 IPC delineates the extent to which the right may be exercised.

The claim was made by the accused in the following background:

Appellant-James Martin faced trial along with his father\026Xavier for alleged commission of offences punishable under Sections 302, 307, 326 read with Section 34 and Section 326 read with Section 114 IPC and Sections 25(B)(1) of the of the Arms Act, 1959 (in short 'the Act') and Sections 27 and 30 thereof. Learned Sessions Judge, N. Paravur, found the present appellant (A-1) guilty of offences punishable under Section 304 Part I, 326 and 324 IPC, while the other accused was found guilty of the offences punishable under Section 304 Part I read with Section 34, 302 read with Sections 24, 324 IPC. Both the accused persons were sentenced to undergo imprisonment for 7 years and for the second offence, 2 years RI and fine of Rs.20,000/- with default stipulation of 1 year sentence. It was directed that in case fine was realized it was to be paid to (PW-3). Each of the accused was also to undergo sentence RI for 1 year for the offence punishable under Section 324 IPC and to pay a fine of Rs.5,000/- with default stipulation of 6 months sentence. The fine, if any on realisation, was directed to be paid to PW-7 and PW-8. The fine was directed to be paid to (PW-8). The sentences were directed to run concurrently.

A-2 also filed a complaint against 24 persons, which was tried as S.C. no.74 of 1991. In the said case some of the PWs and their supporters were the accused. State had launched prosecution against 12 of the said 24 persons. The same as tried as S.C. no. 57 of 1990.

Several appeals and revisions were filed by the appellants, the prosecution witnesses and the State. Appeal filed by the accused persons was numbered as criminal appeal no.4 of 1994. As complaint was lodged by the accused alleging various offences by the prosecution witnesses, a separate case (S.C. 74 of 1991) was registered in which there was an acquittal. Against such acquittal also appeal was filed by A-2 which was numbered as criminal appeal no. 471 of 1994. Criminal

appeal no. 784 of 1994 was filed by the State questioning acquittal in S.C. 57 of 1990. Father of one of the victims filed CrI. Revision Cr.RP 820 of 1994. The propriety of conviction under Section 304 Part I instead of Section 302 IPC was questioned by the State in CrI. Appeal no. 312 of 1994. By a common judgment all matters were disposed of.

The matrix of the litigation related to a Bharat Bandh on 15.3.1998 sponsored by some political parties. Prosecution version as unfolded during trial is as follows:

Most of the shops and offices were closed and vehicles were off the road. There were isolated instances of defiance to the bundh call and some incidents had taken place that, however, did not escalate to uncontrolled dimensions. Cheranelloor, where the concerned incidents took place, is a politically sensitive suburb of Kochi where accused-appellant James and his father Xavier had their residence, besides a bread factory and a flour mill in the same compound. It was not anybody's case that they belonged to any political party or had credentials, which were unwholesome. By normal reckoning, their business activities flourished well. They owned a tempo van and other vehicles which were parked inside the compound itself. It was, however, said that their success in business was a matter of envy for Thomas Francis, their neighbour, particularly who filed complaints to the local authorities against the conduct of the mill and the factory and also filed a writ petition to get them closed down, but without success. He was one of the accused in S.C.No.74 of 1991 and according to the accused appellant-James was the kingpin and that the incident was wrought by him out of hatred and deep animosity towards James and Xavier.

The incident involved in this case took place at about 2.30 p.m. on 15.3.1988 when five young men, the two deceased in this case, namely, Mohan and Basheer (hereinafter referred to as 'deceased' by their respective name), and PW-1, PW-2 and PW-4, who were activists of the bundh, as followers of the political parties which organized that bundh on that day, got into the flour mill of the A-2 through the unlocked gate leading access to that mill situate in a property comprising the residential building, a bread factory and other structures belonging to that accused. This group of five men on passing beside the mill of A-2 while they were perambulating the streets of Cheranelloor to have a first hand information as to the observance of the bundh on coming to know of the operation of the flour mill by A-2 proceeded to that place and made demands to PW-15, the employee of A-2 who was operating the mill to close down. An altercation took place between them and on hearing the commotion the accused, A-1 and A-2 who were inside their residential building, situate to the west of that mill, rushed to the place and directed the bundh activists to go out of the mill. As the activists of the bundh persisted in their demands for closing the mill, according to the prosecution, A-2 got out of the mill and on the instruction given by A-2, A-1 locked the gate of the compound from inside. Then both of them rushed back to the house with A-2 directing A-1 to take out the gun and shoot down the bundh activists by declaring that all of them should be finished off. On getting into the house and after closing the outer door of that building, both the accused rushed to the southern room of that building which faced the gate with a window opening to that side. The 1st accused on the instigation of the 2nd accused, his father, and having that accused beside him, fired at the bundh activists, who by that time had approached near the locked gate, by using an S.B.B.L. Gun through the window. The first shot fired from the gun hit against one of the bundh activists, who had got into the compound, namely Basheer, and he fell down beside the gate. The other four bundh activists on requesting the 1st accused not to open fire rushed towards Basheer and, according to the prosecution, the first accused fired again with the gun indiscriminately causing injuries to all of them. Even when the first shot was fired from the gun passersby in the road situate in front of that property also sustained injuries.

When the firing continued as stated above some of the residents of the area who were standing beside the road also received gun shot injuries. On hearing the gun shots people of the locality rushed to the scene of occurrence and some of them by scaling over the locked gate broke opened the lock and removed the injured to the road, from where they were rushed to the hospital in a tempo van along with the other injured who had also sustained gun shot injuries while they were standing beside the road. One among the injured, namely, Mohanan breathed his last while he was transported in the tempo to the hospital and another, namely, Basheer, succumbed to his injuries after being admitted at City Hospital, Ernakulam. All the other injured were admitted in that hospital to provide them treatment for the injuries sustained. After the removal of the injured to the hospital in the tempo as aforesaid a violent mob which collected at the scene of occurrence set fire to the residential building, flour mill, bread factory, household articles, cycles, a tempo and scooter, parked in front of the residential building of the accused, infuriated by the heinous act of the accused in firing at the bundh activists and other innocent people as aforesaid. Soon after the firing both the accused and PW-15 escaped from the scene of occurrence and took shelter in a nearby house.

The information as to the occurrence of a skirmish and altercation between bundh activists and the accused and of an incident involving firing at Cheranelloor was received by the police at Kalamassery Police Station from the Fire Station at Gandhi Nagar, Ernakulam, which was informed of such an incident over phone by a resident living close to the place of occurrence.

The accused on the other hand, took the stand that the firing resulting in the death of two bundh activists and sustaining of grievous injuries to several others occurred when their house and other buildings, situated in a common compound bounded with well protected boundary walls, and movable properties kept therein were set on fire by an angry mob of bundh activists when the accused failed to heed their unlawful demand to close down the flour mill which was operated on that day.

The trial Court discarded the prosecution version that the deceased and PWs who had sustained injuries had gone through the gate as claimed. On analysing the evidence it was concluded that they had scaled the walls. Their entry into premises of the accused was not lawful. It was also held that PW-15 was roughed up by the bandh activists, making him runaway. A significant conclusion was arrived at that they were prepared and in fact used muscle power to achieve their ends in making the bandh a success. It was categorically held that the bandh activists on getting into the mill threatened, intimidated and assaulted PW-15 so as to compel him to close down the mill. He sustained injuries, and bandh activists indulged in violence before the firing took place at the place of occurrence. Accused asked PW-1, PW-2 and PW-4 to leave the place. It was noticed by the trial Court that the activists were in a foul and violent mood and had beaten up one Jossy, and this indicated their aggressive mood. They were armed with sharp edged weapons. Finally, it was concluded that the right of private defence was exceeded in its exercise.

On consideration of the evidence on record as noted above, the conviction was made by the trial Court and sentence was imposed. The trial Court came to hold that though the accused persons claimed alleged exercise of right of private defence same was exceeded. The view was endorsed by the High Court by the impugned judgment so far as the present appellant is concerned. But benefit of doubt was given to A-2, father of the present appellant.

Mr. Sushil Kumar, learned senior counsel for the appellant submitted that the factual scenario clearly shows as to how the

appellant was faced with the violent acts of the prosecution witnesses. Admittedly, all of them had forcibly entered into the premises of the appellant. PW-15 one of employees was inflicted severe injuries. In this background, the accused acted in exercise of right of private defence and there was no question of exceeding such right, as held by the trial Court and the High Court.

In response, learned counsel for the State submitted that after analyzing the factual position the trial Court and the High Court have rightly held that the accused exceeded the right of private defence and when two persons have lost lives, it cannot be said that the act done by the accused was within the permissible limits. He also pressed for accepting prayer in the connected SLPs relating to acquittal of A-2 and conviction of the accused-appellant under Section 304 Part I.

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 defense, 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.

The background facts as noted by the trial Court and the High Court clearly show that the threat to life and property of the accused was not only imminent but did not cease, and it continued unabated. Not only there were acts of vandalism, but also destruction of property. The High Court noticed that explosive substances were used to destroy the properties of the accused, but did not specifically answer the question as to whether destruction was prior or subsequent to the shooting by the accused. The High Court did not find the prosecution evidence sufficient to decide the question. In such an event the evidence of PW-15 who was also a victim assumes importance. The High Court without indicating any acceptable reason held on mere assumptions that his sympathy lies with the accused. The conclusion was unwarranted, because the testimony was acted upon by the Courts below as a truthful version of the incident. The trial Court found that an unruly situation prevailed in the compound of the accused as a result of the violence perpetrated by the bandh activists who got into the place by scaling over the locked gate and that their entry was unlawful too, besides intimidating and assaulting PW-15 and making him flee without shutting down the machines. The circumstances were also found to have necessitated a right of private defence. Even the High Court, candidly found that tense situation was caused by the deceased and his friends, that PW-15 suffered violence and obviously there was the threat of more violence to the person and properties, that the events taking place generated a sort of frenzy and excitement rendering the situation explosive and beyond compromise. Despite all these to expect the accused to remain calm or to observe greater restraint in the teeth of the further facts found that the accused had only PW-15 who was already manhandled though they were outnumbered by their opponents (the bandh activists) and whose attitude was anything but peaceful would be not only too much to be desired but being unreasonably harsh and uncharitable, merely carried away only by considerations of sympathy for the lives lost, on taking a final account of what happened ultimately after everything was over. In the circumstances, the inevitable conclusion is that the acts done by the accused were in the reasonable limits of exercise of his right of private defence and he was entitled to the protection afforded in law under Section 96 IPC.

Accordingly we set aside the conviction and sentence imposed. The appeal is allowed. The bail bonds shall stand discharged so far as the present accused is concerned.

In view of the order passed in criminal appeal no. 887 of 1997, and conclusions arrived at therein no further orders are necessary to be passed in SLP (Criminal) Nos. 47-49 of 1998 filed by the State of Kerala.

Before we part with the case it needs to be noted that in the name of Hartal or Bandh or strike no person has any right to cause inconvenience to any other person or to cause in any manner a threat or apprehension of risk to life, liberty, property of any citizen or destruction of life and property, and the least any government or public property. It is high time that the authorities concerned take serious note of this requirement while dealing with those who destroy public property in the name of strike, hartal or bandh. Those who at times may

have even genuine demands to make should not lose sight of the overall situation eluding control and reaching unmanageable bounds endangering life, liberty and property of citizens and public, enabling anti-social forces to gain control resulting in all around destruction with counter productive results at the expense of public order and public peace. No person has any right to destroy another's property in the guise of bandh or hartal or strike, irrespective of the proclaimed reasonableness of the cause or the question whether there is or was any legal sanction for the same. The case at hand is one which led to the destruction of property and loss of lives, because of irresponsible and illegal acts of some in the name of bandh or hartal or strike. Unless those who organize can be confident of enforcing effective control over any possible turn of events, they should think twice to hazard themselves into such risk prone ventures endangering public peace and public order. The question whether bandh or hartal or strike has any legal sanctity is of little consequence in such matters. All the more so when the days are such where even law-enforcing authorities/those in power also precipitate to gain political advantage at the risk and cost of their opponents. Unless such acts are controlled with iron hands, innocent citizens are bound to suffer and they shall be the victims of the highhanded acts of some fanatics with queer notions of democracy and freedom of speech or association. That provides for no license to take law into their own hands. Any soft or lenient approach for such offenders would be an affront to rule of law and challenge to public order and peace.