

CASE NO.:
Appeal (crl.) 262 of 2007

PETITIONER:
Shahjahan and Ors.

RESPONDENT:
State of Kerala and Anr.

DATE OF JUDGMENT: 26/02/2007

BENCH:
Dr. Arijit Pasayat & R.V. Raveendran

JUDGMENT:
JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. The appellants call into question the legality of the judgment rendered by a Division Bench of the Kerala High Court while partially altering the conviction of Nujum (Appellant no.2) who is, hereinafter referred to for the sake of convenience as A2 and maintaining the conviction of Shajahan (appellant no.1 for short A1), Manzoor (A3) and Musthafa (Appellant No.4 for short A-4) under Section 323 read with Section 34 IPC. A-2 was convicted in terms of Section 304 Part II of the Indian Penal Code, 1860 (in short the 'IPC') instead of Section the conviction under Section 302 IPC by the trial Court, and sentenced to undergo rigorous imprisonment for five years. The conviction of A2 and the sentence for offence, punishable under Section 324 Part I IPC, was not interfered with.

3. The prosecution version as unfolded during trial was as follows:

4. The accused who are closely related to each other were harbouring extreme enmity towards Ashraf (PW-5) and his younger brother Abdul Samad (hereinafter referred to as 'deceased'). On 18.9.1994 at or about 1.50 P.M. at Kulasekharapuram in Adinadu Village, Punnakulam Muri and to the South of Puthenthervu junction near the eastern boundary of the paramba of Laila, (the sister of PW5 and the deceased) accused in furtherance of their common intension to voluntarily cause hurt to the aforesaid brothers with dangerous weapons attacked them. A1 pulled the deceased by catching hold of his legs, Nujum-A2 stabbed him with M.O.1 knife, A4 cut him with M.O.2 chopper. When PW5 intervended to rescue the deceased, Musthafa-A4 inflicted a cut injury on PW5 with M.O.2 chopper, A2 inflicted a stab injury on Shuhra Beevi (PW1) with M.O.1 knife and Manzoor-A3 assaulted PW5 using his hands. The deceased succumbed to the injuries and injured PW5 was admitted in the hospital. The accused thereby committed offences punishable under Sections 302 and 324 read with Section 34 IPC.

5. The allegations against them were as follows:-

6. Shajahan-A1 had caught hold the legs of the deceased facilitating A2 for stabbing him. A2 not only stabbed the deceased but also inflicted injuries on PW1. Manzoor-A3 assaulted the deceased. Musthafa-A4 assaulted the deceased with the chopper and also caused injury on PW-5.

7. On considering the evidence of the witnesses more particularly the evidence of PW-1 and PW-5 the accused persons were found guilty as follows:

8. A2 was guilty of offence punishable under section 302 and section 324 IPC. A1, A3 and A4 were guilty for offences punishable under Section 323 read with Section 34 IPC. A3 was a student and was released on probation

for the conviction under Section 323 IPC.

9. In appeal, the High Court held that the accusations were established so far as A1, A3 and A4 are concerned. It further held that it would be appropriate to convict A2 for offence punishable under Section 304 Part II IPC instead of Section 302 IPC and custodial sentence of five years was awarded. The sentence awarded to A2 in respect of Section 324 IPC was maintained.

10. In support of the appeal, learned counsel for the appellant submitted that the injuries on the accused were not explained. The investigating officer accepted that there were injuries but he did not focus the investigation on that aspect. Once the exercise of right of private defence was partially accepted, the conviction as recorded cannot be maintained.

11. Learned counsel for the appellants submitted that the incident took place in the property of the accused and the High Court accepted that up to a certain extent the right of private defence was exercised. But the High Court wrongly observed that the appellants continued the attack. Same is wrong as according to the factual position only one blow was given.

12. Learned counsel for the respondent-State on the other hand supported the impugned judgment.

13. It is to be noted that during the pendency of the appeal appellant No.1 has expired. So the appeal stands abated so far as he is concerned. Appellant No. 3 i.e. Musthafa has already suffered the sentence and the appeal is not pressed so far as he is concerned.

14. We shall first deal with the question regarding non-explanation of injuries on the accused. The issue is if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In Mohar Rai and Bharath Rai v. The State of Bihar, [1968] 3 SCR 525, it was observed:

"...In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabalise the plea taken by the appellants."

In another important case Lakshmi Singh and Ors. v. State of Bihar, [1976] 4 SCC 394, after referring to the ratio laid down in Mohar Rai's case (supra), this court appeal:

"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 probabalise the plea taken by the appellants."

It was further observed 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 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."

But non-explanation of the injuries sustained by the accused may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in *Vijayee Singh and Ors. v. State of U.P.*, AIR (1990) SC 1459.

15. Non-explanation of injuries by the prosecution will not affect the prosecution case where 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 creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in *Ramlagan Singh v. State of Bihar*, AIR (1972) SC 2593 prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the deference to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh and Ors. v. State of Bihar*, AIR (1988) SC 863, it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trivial and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of the prosecution case. (See *Surendra Paswan v. State of Jharkhand*, (2003) 8 Supreme 476) and *Anil Kumar v. State of U.P.*, JT (2004) 8 SC 355).

16. A bare perusal of the injury report shows that injuries were of very minor nature. The stand of the accused was that he was attacked by an iron rod but the injuries ruled out that stand. It is fairly conceded that there was no case instituted against the deceased or prosecution witnesses.

17. The only other 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 burden 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 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 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 and 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 then 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.

18. 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 probabilise 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 limit 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.

19. 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.

20. 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).

21. As noted in *Buta 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 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 negated. 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.

22. 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.

23. 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."

24. 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.

25. The above position was highlighted in State of M.P. v. Ramesh, [2005] 9 SCC 705.

26. Above being the position, the judgment of the High Court does not suffer from any infirmity to warrant interference. Therefore, the appeal is dismissed.