REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1490 OF 2007

Arun ..Appellant

Versus

State of Maharashtra ..Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court, Aurangabad Bench upholding the conviction of the appellant for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of imprisonment for life and a fine of Rs.500/- with default stipulation. He was also convicted for offence punishable under Section 324 IPC and sentenced to undergo rigorous

imprisonment for a period of one year and a fine of Rs.250/- with default stipulation. He was also convicted for offence punishable under Section 342 IPC and sentenced to undergo RI for three months and fine of Rs.100/- with default stipulation. Additionally, he was charged for offence punishable under Section 454 IPC and he was separately sentenced to suffer RI for a period of one year and to pay a fine of Rs.250/- with default stipulation. Two others co-accused persons were acquitted by the trial Court of all charges. Both the appellant and the State filed appeals. The State's appeal was directed against the acquittal of accused Nos.2 and 3 and the same was dismissed at the admission stage.

3. Background facts giving rise to the trial as projected by the prosecution are as follows:

Appellant and the deceased Sampatrao Gopal Khandekar were real brothers. They had two other brothers by name Haribhau and Indakar. The deceased Sampatrao was an educated person and was a professor at Balbhim College in Beed. He was also managing an educational trust by name "Bade Baba Shikshan Sanstha" at village Lahuri, Taluka Kaij, in district Beed. Deceased and his brothers were separate in residence and there was a

partition effected between the brothers. Deceased Sampatrao was in possession of his share of the ancestral lands and also had some self acquired land at village Kolhewadi. As regards the educational trust mentioned herein above, deceased Sampatrao was a founder member and the Secretary. The family of Sampatrao was residing at Beed since Sampatrao was serving as a professor in the town. Sampatrao used to get his lands, in village Kolhewadi, cultivated with the help of labourers. His two brothers i.e. the present appellant and Indakar (A-3) who were residents of village Kolhewadi, had a dispute with the deceased Sampatrao as the partition and its terms were not acceptable to them. Sampatrao and wife Mangalabai had filed Regular Suit No.285 of 1996 in the Court of the Civil Judge, Junior Division at Kaij for a declaration of title and injunction in respect of five lands which were the suit property in that suit. The suit was filed against two brothers i.e. the present appellant and A-3 Indakar as well as some other members of their family. In the suit, the deceased and his wife filed an application for grant of interim injunction, on 31st October 1996, and the interim injunction application was allowed by the Civil Judge, Junior Division, Kaij 4th November, 1996. Even after the grant of injunction, the disputes remained, because the cotton crops were allegedly stolen by accused No.1 Arun, acquitted accused No.3 Indakar and their family

members and in this regard a police complaint was filed by PW-13 Mangalabai, wife of deceased against the present appellant and A-3 and their family members. She had prayed for strict police action against the persons named in the complaint. All these facts indicate that the relations between family of deceased Sampatrao and the families of his two real brothers were strained and inimical.

The incident in question took place on 22nd November 1996. Prior to incident, PW-11 Bhairu Anna Khose had been engaged by deceased Sampatrao to work in his fields for period of three months in lieu of payment of Rs.5,000/--. PW-11 Bhairu Khose had executed a Naukarnama to this effect. He had agreed to work on the field of Sampatrao on 21st December, 1996 and Sampatrao had asked him to meet him at village Neknoor. Accordingly, they had met at Neknoor and from there had gone to village Kolhewadi. On 22nd December, 1996, in the morning, deceased Sampatrao took PW-11 Bhairu to his field. Adjoining to the field of deceased Sampatrao, was the field of accused No.2. This field had an electric motor and a pipeline fitted therein. At the spot, there was some discussion between deceased Sampatrao and accused No.2 pertaining to the supply of water to his field and to the field of accused No.1. Accused No.3

Indakar was also present at the spot, at that time. After this incident, the deceased Sampatrao and PW-11 Bhairu came walking through the fields to Shri Bade Baba Vidyalaya Mandir i.e. the school situated at village Lahuri. They reached the Lahuri school at about 11.45 a.m. got the office room opened through a Peon and were sitting in the office. At that time, accused Nos.1 and 3 came running towards the school. A-1 Arun, who was also working as a peon in the said school, latched the door of the office room from outside and from the window he told PW-11 Bhairu that if he wanted to save himself, he should come out. Sampatrao told his brother Arun that Bhairu was his servant and that he would not leave. Sampatrao then locked the door of the office from inside, shutting out accused No.1 Arun. Accused No.1 Arun then climbed on to the roof of the office, which was a tin shed. He bent a sheet of tin on the roof of the said office and from the opening so created, he jumped into the office room. After jumping into the office room he took out chilly powder from his right pocket and threw it into the eyes of deceased Sampatrao. He then picked up an iron hammer and with this iron hammer as well as a brick which had been stored in the room along with other bricks kept for construction purposes, he hit the deceased Sampatrao pressed his neck and inflicted eight blows on the head of the deceased. PW-11 Bhairu was requesting accused No.1 Arun not to beat Sampatrao. At that

time, accused No.2 informed Bhairu from the window that he should not interfere in the quarrel between the brothers. Accused No.2 caught hold of the hands of PW-11 Bhairu near the window. Accused No.1 was also carrying a wire on his waist and he used this wire also to beat Sampatrao. Accused No.1 threw a brick which struck the forehead of Bhairu and also beat Bhairu with the wire. Bhairu fell down and pretended to be dead. Accused No.1 Arun, however, asked Bhairu to shift the table to the place in the room where the tin sheet of the roof had been bent. He made Bhairu keep a chair on the table and both, he and Bhairu got out of that room through the damaged tin roof. The accused Nos.1 to 3, thereafter, left the place and went together to the side of Lahuri village. There were some other persons who went behind them. This entire incident was over by about 1.00 p.m. PW-11 Bhairu then went in a jeep to Police Station, Kaij. He narrated the entire incident to the police and the police recorded his FIR on the same day.

Sudarshan Mundhe, API (PW-17) who was then attached to the Kaij Police Station, registered the crime under CR. No.257 of 1996, for offences punishable under Sections 302, 342 read with Section 34 IPC. He found that the clothes of the complainant were blood stained. He first seized the

clothes of the complainant under Panchnama (Exhibit-31). Since the complainant was injured the investigating officer referred him for medical treatment to the Government Hospital at Kaij. PW-17 API Sudarshan then summoned a photographer and together with the photographer, he went to the spot of the incident. He found the room of the office to be locked. The police managed to open the lock of the office but even after opening the lock and unlatching the door they found that they could not enter the office because it was latched from inside. One police constable was then made to climb to the roof and he entered the office from the opening in the roof and unlatched the office door from inside. The photographer then entered and took several photographs of the dead body of deceased and all the other articles found inside the room. It was found that a chair had been kept on a table under the spot and the tin roof had been bent and the photograph of this was also taken. After photographing the room, the investigating officer prepared the panchnama and seized several articles which were found in the room. On the same day, the investigating officer arrested accused No.1 Arun and seized his bloodstained clothes under Panchnama. The arrest cum-seizure panchnama was produced at the trial and marked Exhibit-32. The investigating officer referred accused No.1 Arun for medical examination as he found some injuries on his person. The investigating officer then

collected the medical certificates of the complainant and the present appellant. As per the medical certificates, the injuries that were found on the person of the complainant, (PW-11) Bhairu and A-1 were simple injuries caused by a hard and blunt substance.

After completion of investigation, charge sheet was filed. As the accused persons pleaded innocence trial was held and 19 witnesses were examined to further the prosecution version. PWs 8 and 11 were stated to be eye witnesses to the occurrence. They were two students who were staying in the hostel of the school. The trial Court found the evidence to be cogent, credible and recorded the conviction so far as the present appellant is concerned. In appeal, it was stated that the appellant had gone unarmed and alone to the school to persuade the deceased to put an end to the dispute between them. When the appellant made his request to the deceased, he abused him in filthy language and made obscene suggestion. He also started pushing the appellant outside the room. When he saw that the appellant was not going out of the room, the deceased picked up a hammer which was lying in the room and gave blows on the head of the appellant who tried to save himself. The deceased gave two more blows on the head and when the appellant apprehended that he was likely to be killed he gave some more blows. Appellant tried to save himself and when he was trying to save himself and when he was in a fit of uncontrollable anger, in that process the

deceased and the appellant might have been injured. It is also stated that the stand regarding throwing of chilly powder was false and the chilly powder was subsequently planted at the scene of the offence. The State's stand was that in view of accepted position regarding the presence of the accused and the role described by PWs 8, 10 and 11 there is no scope for interference with the well reasoned judgment of the trial Court. The High Court accepted the stand and dismissed the appeal.

4. In support of the appeal, learned counsel for the appellant submitted that there was an earlier FIR which was suppressed and after deliberation report was lodged which was treated as a FIR. It was the deceased who was the aggressor and the appellant was exercising his right of private defence. According to him, the deceased gave four blows on his head and, therefore, the judgment of the High Court is clearly unsustainable.

11. In response, learned counsel for the respondent-State submitted that the FIR was promptly lodged. The injuries stated to have been sustained by the accused are simple in nature. The evidence of PWs 8, 10 and 11 is clear, cogent and credible and, therefore, there is no scope for any interference.

12. 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.

13. 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 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.

14. 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, to 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.

15. 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).

16. 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.

17. 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.

18. 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."

19. 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 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.

20. The above position was highlighted in James Martin v. State of Kerala (2004 (2) SCC 203).

21. When the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct.

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….J.

(Dr. ARIJIT PASAYAT)

…….J.

(ASOK KUMAR GANGULY)

New Delhi,
March 16, 2009