

CASE NO.:
Appeal (crl.) 835 of 2007

PETITIONER:
Krishna & Anr.

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 21/06/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 835 OF 2007
(Arising out of SLP (Crl.) NO. 3403 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court dismissing the appeal filed by the appellants. The trial Court i.e. learned Additional Judge, Banda by his judgment dated 25.3.1981 found the appellant Krishna guilty of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and Section 307 and sentenced him to undergo RI for life and seven years respectively for the aforesaid offences. Though he was found guilty of offence punishable under Section 323 IPC read with Section 34 IPC no separate sentence was awarded to him. Accused Sumera who was convicted for offences punishable under Section 302, 307, 323 read with Section 34 IPC has died. Appellant Kaira was similarly convicted. Sentence of imprisonment for life, three years and six months were respectively imposed for the above said offences. All the three accused persons preferred an appeal but since the appellant Sumera died during the pendency of the appeal, appeal was held to have abated so far as he is concerned.

3. Background facts as projected by prosecution in a nutshell are as follows:

Appellants Krishna and Kaira are real brothers and are the sons of Sumera. Ram Manohar (PW-1) complainant and Chunua Chamar (hereinafter referred to as the 'deceased') were real brothers. Both the parties are residents of the same village Piprenda, P.S. Tindwari, District Banda and are neighbours. Appellant Kaira borrowed Rs.350/- from deceased about 5 month prior to the occurrence, i.e. 8th July, 1980, about 7.15 a.m. Two days prior to the occurrence deceased demanded his money from Kaira, who not only refused to return the money but also denied to have borrowed any money from the deceased. On the following day again deceased demanded his money from Kaira and being enraged by this, accused Sumera, Krishna and Kaira quarrelled with deceased and Ram Manohar and chased to beat them. The deceased and Ram Manohar somehow managed to escape themselves by

running away. On the fateful day i.e. 8.7.1980, deceased alongwith Ram Manohar (PW-1) in the morning after attending the call of nature went to Shripal Kori for seeking his advice as what should be done in the matter. Shripal advised him not to fight, but to lodge a complaint with the police. From the house of Shripal, deceased and Ram Manohar came to their house and without taking breakfast both of them proceeded to police outpost Chilla. Smt. Ram Pyari (PW-3), wife of deceased also followed them. It was about 7.15 a.m. when deceased and Ram Manohar reached near the field of Chunua Kanchi, which was in the west of rasta, accused Krishna armed with "Barchi", Sumera and Kaira armed with lathis came there from the eastern side. Accused persons started abusing deceased and his brother Ram Manohar. Deceased and Ram Manohar retaliated by abusing them. Shiv Baran Singh (PW-2) reached there. Sumera gave lathi blow to deceased. When Shiv Baran Singh (PW-2) tried to intervene, appellant-Kaira gave lathi blow which hit him causing injury to his hand. When Ram Manohar (PW-1) tried to save and intervene Krishna gave Barchhi blow causing injury to him. Appellant-Krishna exhorted to eliminate Chunua. Thereupon Sumera gave lathi blow to deceased and Kaira also gave lathi blow. Krishna gave barchhi blow causing injury to deceased who fell down and died then and there in the field of Chunua Kanchi. On the hue and cry Surajpal, Arjun and many other villagers collected there. These persons chased the accused who run away towards the west. Leaving Smt. Rampyari near the dead body, after getting report drafted from Dasharath, Ram Manohar (P.W.1) accompanied by Shiv Baran Singh (PW-2) injured and, other village persons, proceeded to the police out post Chilla, P. S. Tindwari, District Banda which was about 18 or 20 kms. from the village Piprendha. There Ram Manohar (PW-1) handed-over the written report. On the basis of written report a case crime no. 123 of 1980 was registered at 8.45 am. on 8.7.1980, under Sections 302, 307, 504 IPC against all the three accused i.e. Sumera, Krishna and Kaira. Om Shankar Shukla (PW-6), I.O. of the case who was Incharge of the police out post, took up investigation, recorded the statements of injured Ram Manohar (P.W.1) and injured Shiv Baran Singh (PW-2) and sent them for medical examination to district hospital Banda.

4. After the investigation was completed, charge sheet was filed. Charges were framed and the accused persons faced trial. Placing reliance on the evidence of the witnesses, the trial Court recorded the conviction and imposed sentence. Before the High Court a plea was taken that the accused had exercised the right of private defence; therefore, the conviction as done was not maintainable. High Court did not accept this plea and observed that since the accused persons were aggressors and in fact attacked the deceased first the question of exercise of right of private defence did not arise. Accordingly, the appeal was dismissed.

5. In support of the appeal, learned counsel for the appellants submitted that the High Court has erroneously held that the right of private defence was not exercised by the appellants.

6. Learned counsel for the State on the other hand submitted that the courts below have categorically found that the appellants were aggressors and attacked the deceased first.

7. 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 often 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."

8. 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.

9. 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.

10. 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.

11. 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).

12. 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.

13. 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.

14. 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."

15. 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.

16. In view of the factual findings recorded by the courts below we find no reason to differ from the conclusion that the appellants were the aggressors and attacked the deceased first. The prosecution version is that death of the deceased took place in course of the said incident. The question of exercising any right of private defence as claimed by the appellants is without any substance.

17. The appeal is sans merit, deserves dismissal which we direct. We record our appreciation for the able assistance rendered by Mr. Rakesh Garg, learned Amicus Curiae.