REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 181 OF 2001

Ram Pyare Mishra ...Appellant

Versus

Prem Shanker and Ors. ...Respondents

WITH

CRIMINAL APPEAL NO.182 OF 2001

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the judgment of a Division Bench of the Allahabad High Court accepting the appeal filed by the respondents who were found guilty of offences punishable under Section 302 read with Section 34

of the Indian Penal Code, 1860 (in short the 'IPC'). The High Court held that if on taking overall view of the case right of self defence is made out or looks probable from the evidence on record, that right should not be construed narrowly because the right of self defence is a very valuable right and it has a social purpose.

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

The incident occurred on 12.7.1978 at about 5.30 a.m. The respondents 1 and 2 are brothers and sons of Sheo Balak Misra. On the aforesaid date and time the accused respondents armed with knife and lathi respectively arrived at the 'Gotha' of the Mohan Mishra (hereinafter referred to as the 'deceased') and accused Hari Shanker started beating the deceased with lathi and also asked his brother Prem Shanker to kill him, whereupon Prem Shanker assaulted the deceased with knife. On hearing the cries of deceased, his brother R.P.

Mishra (PW-1) who was washing his hands at the Hand Pump installed in the east of 'Gotha' of Ramakant Mishra, rushed to the scene of occurrence. The cries also attracted Ramakant Mishra (P.W.2), Suresh Mishra (P.W.4), Shiv Sahai and Vibhuti Mishra. Ramakant Mishra tried to rescue the deceased but he too was assaulted by Prem Shanker with knife. Deceased fell down on the ground. The witnesses succeeded in apprehending Prem Shanker along with the knife with which he had assaulted the deceased and Ramakant. However, accused Hari Shanker succeeded in making good his escape. Thereafter Ram Pyare Mishra and other witnesses proceeded to Police Station Kotwali along with Mohan Mishra and accused Prem Shanker on tractor trolley of Gangotri Mishra. Before they could reach police station, Mohan Mishra died on the way. R.P. Mishra (P.W.1) prepared F.I.R. (Ex. Ka. I) in his own handwriting and presented the same at Police Station Kotwali at 6.30 a.m. on the same day. Prem Shanker and blood stained knife, (Ex.1) recovered from him were handed over to police at the police station, in respect of which memo Ex. Ka. 2 were prepared by Moharrir (PW-6) who also

prepared Check report and registered the case in general diary. S.I. Harsh Nath Singh (PW-5) was present at the police station when the F.I.R. was lodged. He took up investigation and recorded the statement of first information at the police station. S.I. Radhey Shyam Tewari conducted inquest on the dead body of Mohan Mishra, which had been brought to the police station by first informant and others. The dead body was then sent for postmortem examination with constable Ram Asrey and Rang Nath. After recording the statements of Shiv Sahai and Suresh Mishra (P.W.4), the Investigating Officer reached the place of occurrence along with first informant and witness Shiv Sahai. He made inspection of the scene of occurrence and prepared site plan Ex. Ka.13. The place where blood was found has been shown by letter `A' in the site plan. Hari Shanker was arrested on the same day. Injured Ramakant Mishra was, however, interrogated on 13.7.1978 and after completing the investigation charge sheet Ex. Ka 15 was submitted against both the accused persons.

Dr. Vermpal conducted autopsy on the dead body of Mohan Mishra on 12-7-78 at 12 noon and following ante mortem injuries were found.

1. Incised wound 2" 1/4" x skin deep on right side forehead 1" above the right eye brow and 1-1/2" away from right ear margins clean cut, gaping present, blood clots present and wound was horizontally placed.

2. Incised wound 1" x 1/4" x muscle deep on middle of left arm margins clean gaping present, blood clots present.

3. Punctured wound 1-1/4" x 1/2" x chest cavity deep on right side chest 1" outer to mid line chest and 4" away and above to right nipple, lying vertically, margins clean cut gaping present, blood clots present.

In the internal examination pleura was found congested and cut underneath injury No.3, Right lung had also a cut Mark 3/4" x 1/2" pulmonary vessels had also been cut. The chest cavity

contained fresh blood about 520 ml. Stomach was empty while large intestines contained gases and faecal matter. In the opinion of the doctor death was due to shock and hemorrhage as a result of ante mortem injuries. The postmortem report is Ex.Ka.4.

The motive for assaulting Mohan Mishra as alleged in the first information report was that on 10-7-78 Prem Shanker had made an attempt to have carnal intercourse with Rakesh, son of deceased and Rakesh told this fact to his father. Deceased accosted accused Prem Shanker whereupon the latter threatened him with dire consequences.

Since the accused persons pleaded innocence, trial was held. In order to substantiate the accusations six witnesses were produced. R.P. Mishra (PW-1) is the first informant and younger brother of the deceased. Ramakant Mishra (PW-2) is an eye witness. It is to be noted that PW-1 was the injured witness. The accused persons took the stand that on the date

of occurrence accused Prem Shanker went to throw cow dung in the field in the morning and he was assaulted by Mohan Mishra with lathi. On hearing his cries his younger brother Hari Shanker came there with spear in his hand to save Prem Shanker. He assaulted the deceased.

As noted above, the trial Court found the evidence of eye witnesses to be credible, cogent and recorded conviction. In appeal, the High Court found substance in the plea of exercise of right of private defence and directed acquittal.

Criminal Appeal No.181 of 2001 has been filed by the complainant while State of U.P. has filed other Criminal Appeal No.182 of 2001.

3. In support of the appeals, learned counsel for the appellants submitted that the High Court has acted on surmises and conjectures and has accepted the plea of exercise of right of private defence. The High Court's conclusion as regards non-mention in the FIR that the witness

managed to evade the lathi blow or about the injury on the accused are legally untenable. The High Court has not examined the question as to whether the right of private defence as claimed to have been exercised has been exceeded. It was pointed out that the witness stated about the assault by lathi but in the instant case the deceased does not appear to have received any lathi blow. Since lathi was found at the spot as claimed the defence version, the High Court probabilised that deceased had made an assault on accused Prem Shanker by lathi. The genesis and origin of the occurrence has been suppressed and true facts have not been presented. The High Court, it is submitted, accepted the plea of right of private defence but without any material to substantiate the plea, the High Court came to an abrupt conclusion that the right has been exercised and the accused persons were acting in self defence. The High Court also came to a conclusion that the injuries on accused Prem Shanker were not satisfactorily explained. It was pointed out that those injuries were superficial in nature. To similar effect is the stand taken by the State.

4. Learned counsel for the accused respondents submitted that in the case of acquittal if two views are possible, the view in favour of the accused has to be accepted. The High Court on analyzing the evidence came to a conclusion that the accused persons were exercising the right of private defence.

5. 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.

6. 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.

7. 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.

8. 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).

9. 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.

10. 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.

11. 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."

12. 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.

13. The above position was highlighted in V. Subramani and Anr. vs. State of Tamil Nadu (2005 (10) SCC 358).

14. In the instant case the High Court held that the lathi injuries were there but came to erroneous conclusion that the injuries appear to have been inflicted in a different manner. The High Court also came to a conclusion that if the spear was used blunt injury could not have been caused.

15. Unfortunately, the High Court overlooked that the categorical finding recorded by the trial Court was that one side of the weapon was blunt and other side was sharp and one blunt injury was explained. The High Court appears to have wrongly interpreted the opinion of the doctor. The genesis according to the High Court has not been established. If that be so, there was no question of exercise of right of private defence. The High Court's conclusion as regards shifting the onus on the prosecution is also without any legal foundation. It is to be noted that nothing was found in the field as was pleaded by the defence to substantiate the right of private defence. The FIR was promptly lodged. The doctor had opined that the injury was possible with knife but the High Court without any discussion held otherwise. So far as the

alleged non-explanation of injuries on the accused aspect is concerned, the High Court clearly overlooked the relevant materials. From the evidence it is clear that after the accused persons assaulted the deceased and the injured witnesses they were beaten by the villagers. In the FIR also there is mention about the beating given by villagers. The High Court held that the details of the assaults were not given in the FIR. In this context, the view expressed by this Court in Chacko @ Aniyan Kunju and Ors. v. State of Kerala (2004 (12) SCC 269) needs to be noted. In paras 7 and 8 it was observed as follows:

> "7. Coming to the question whether on the basis of a solitary evidence conviction can be maintained. A bare reference of Section 134 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') would suffice. The provision clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained. Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That

per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful, as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable.

8. Other plea emphasized related to alleged exercise of right of private defence. Merely because there was a quarrel and two accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused persons have been rightly discarded."

16. So far as non-explanation of superficial injuries on the accused persons is concerned, in Anil Kumar v. State of U.P. (2004 (13) SCC 257), it was held as follows:

"Non-explanation of injuries by the prosecution will not affect 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 defence 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, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case. (See Surendra Paswan v. State of Jharkhand (2003) 8 Supreme 476)."

17. The basic question which was to be considered by the High Court was that even if the right of private defence was exercised, whether that was exceeded. In the instant case, the evidence clearly shows that though there may be at some point of time the exercise of right of private defence by the respondents existed, the same has been exceeded. The respondents are therefore convicted of offence punishable under Section 304 Part I IPC. Custodial sentence of 8 years would meet the ends of justice. The appeals are allowed to the aforesaid extent. The respondents who are on bail shall surrender to custody forthwith to serve the remainder of sentence.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.

(P. SATHASIVAM)

.....J.
(AFTAB ALAM)

New Delhi,
August 22, 2008