

GENDA SINGH AND ORS.

v.

STATE OF U.P.

(Criminal Appeal No. 1036 of 2008)

JULY 9, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Penal Code, 1860: ss.96 – 106, s302 r/w s.34, s.304 Part I and s.323 r/w s 34:

Right of private defence - Use of force by accused in exercise of right of private defence - Accused armed with weapons allegedly attacked father and uncle of complainant causing injuries – Victims succumbed to injuries – Trial Court found accused persons guilty of committing offences under s.302 r/w s.34 IPC and 323 r/w s.34 IPC and sentenced them to undergo life imprisonment – Affirmed by High Court — Held: In the facts and circumstances of the case, accused exceeded the right of private defence, hence, the protection for exercising the said right cannot be extended to them –However, appropriate conviction would be under s.304 Part I IPC – Accordingly, custodial sentence altered to 10 years instead of life imprisonment – Sentence/Sentencing.

Right of private defence – Scope and ambit of – Discussed.

According to the prosecution, on the fateful day when the complainant along with his father and uncle was repairing the boundary of the field, which was allegedly damaged by the accused persons, accused appellants armed with weapons came to the spot. They started giving blows to the uncle and father of the Complainant. On hearing the hue and cry, some persons from nearby area came to their rescue and taken the father and uncle of the complainant in injured condition to police station.

A An F.I.R. was registered against accused persons for committing offences under ss.323, 324 and 308 I.P.C. Later both the victims succumbed to injuries. The Police investigated the matter and submitted the charge sheet. Trial Court found the appellants guilty of committing the offences u/s.302 r/w s.34 and s.323 r/w s.34 IPC and sentenced them to undergo rigorous imprisonment for life. Appeal filed thereagainst by the appellants was dismissed by the High Court. Hence, the present appeal.

C Appellants contended that the High Court should have given the benefit available for exercising right of private defence as the evidence clearly established that they used the force against the deceased in exercise of their right of private defence.

D Partly allowing the appeal, the Court,

E HELD 1.1. 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. [Para 6] [560 F-G]

F 1.2. No test in the abstract for determining such a question can be laid down. In determining the 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. [Para 6] [560

H G- 561 B]

2.1. Under Section 105 of the Indian Evidence Act, 1872, 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. [Para 6] [561 B-D]

2.2. 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. [Para 6] [561-D-E]

2.3. 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. [561 E-F]

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, *Mohinder Pal Jolly v. State of Punjab* AIR 1979 SC 577 and *Salim Zia v. State of U.P.* AIR 1979 SC 391 relied on.

2.4. 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. [Para 7] [562 D-E]

A **2.5. Sections 96 to 98, IPC and 100 to 106 IPC are**
controlled by Section 99, IPC. To claim a right of private
defence extending to voluntary causing of death, the ac-
cused must show that there were circumstances giving
rise to reasonable grounds for apprehending that either
B **death or grievous hurt would be caused to him. The bur-**
den is on the accused to show that he had a right of pri-
vate defence which extended to causing of death. Sec-
tions 100 and 101, IPC define the limit and extent of right
of private defence. [Para 7] [562 G- 563 A]

C **2.6. The right of private defence 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. [Para 8] [563 B-C]

D *Jai Dev. v. State of Punjab* AIR 1963 SC 612 relied on.

E **2.7. 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 ac-
cused had time to have recourse to public authorities are
all relevant factors to be considered. [Para 9] [563 D-E]

F *Biran Singh v. State of Bihar* AIR 1975 SC 87 *Wassan*
Singh v. State of Punjab (1996) 1 SCC 458 and *Sekar alias*
Raja Sekharan v. State represented by Inspector of Police,
T.N. 2002 (8) SCC 354 relied on.

G **2.8. Due weightage has to be given to, and hyper tech-**
nical approach has to be avoided in considering what
happens on the spur of the moment on the spot and keep-
ing 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-preserva-
tion, what really has been done is to assault the original
H aggressor, even after the cause of reasonable apprehen-

sion has disappeared, the plea of right of private-defence can legitimately be negated. [Para 10] [564 B-C] A

Butta Singh v. The State of Punjab AIR 1991 SC 1316 relied on.

2.9. The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. [Para 11] [564-D] B

2.10. 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.[Para 11] [564 F-G] C

Vidhya Singh v. State of M.P. AIR 1971 SC 1857 relied on. D

Russel on Crime, 11th Edition Volume I P.49 referred to.

2.11. The right of private defence is essentially a defensive right circumscribed by the governing statute, 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. [Para 13] [565 B-E] E F

V. Subramani and Anr. vs. State of Tamil Nadu 2005 (10) SCC 358 relied on. G

2.12. In the facts and circumstances of the instant case, though the appellants claimed to be exercising the right of private defence, it was exceeded. That being so, H

A the protection for exercising the right of private defence cannot be extended to the appellants. But the appropriate conviction would be under Section 304 Part I IPC and custodial sentence of 10 years in case of each appellant and fine imposed by the trial Court would meet the ends of justice. [Para 15] [565 E-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1036 of 2008

C From the Judgment and final Order dated 28.10.2006 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2917 of 1980

Sushil Kumar, Manoj Prasad for the Appellants.

D R.K. Gupta, Rajiv Kumar Dubey, Kamendra Mishra and Irshad Ahmad for the Respondent.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Leave granted.

E 2. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court upholding the conviction of the appellants for offences punishable under Section 302 read with Section 34 and Section 323 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). The learned Additional Sessions Judge, Bijnor had found the accused appellants guilty and had sentenced each to undergo RI for life for the first offence and six months' RI for the second offence. The sentences were directed to run concurrently. One Leela Singh who faced trial alongwith the appellants was given the benefit of doubt and was acquitted of the charges.

G 3. Background facts in a nutshell are as follows:

H The incident is alleged to have taken place on 17th June, 1980 at about 6.00 p.m. at Village Bilai, which is also 4 Kms. at a distance from the Police Station Haldaur, District Bijnor. The report of the incident was lodged at Police Station Haldaur

on that very day at 8.30 p.m. The allegations of the prosecution as would appear from the written report (Exhibit Ka-8) are that a day before the incident sometime in the evening boundary of the fields of the complainant was damaged by accused Genda Singh and Mahavir Singh and for it some altercations had also taken place. On the fateful day (17th June 1980) in the morning hours, the complainant Kendra Pal Singh alongwith his father Virendra Singh and uncle Hari Raj Singh went to plough their fields. They were just repairing the boundary at that place where it was damaged by accused Genda Singh and others. It was about 7.00 a.m. Genda Singh armed with Tabal, Mahavir Singh armed with axe, Thamman Singh armed with Lathi and Leela Singh armed with iron pipe came at that place and exhorted that the boundary wall would not be disturbed from the place where it was set up. Some quarrel had taken place on it and they gave blows with their weapons to Hari Raj Singh and Virendra Singh. On hearing the hue and cry made by the complainant, Surendra Singh, Prakash Singh, Balbeer Singh, Naubahar Singh and other persons turned up at the site and rescued the complainant and other persons. Father of the complainant Virendra Singh in unconscious state and Hari Raj Singh in a precarious condition were brought to the Police Station where report was lodged. The report was registered at Crime No.130 of 1980 at the Police Station Haldaur for the offences under Sections 323, 324 and 308 IPC and its entry was also made in the G.D. (Exhibit Ka-12). Sub Inspector Vipin Pal Singh and other Police Constables namely Anwar Khan, Mahendra Singh and, Shaukat Khan were sent from the Police Station to the hospital with necessary papers for drawing inquest report vide exhibit ka-12 P.W. B.S.Rana S.I., (P.W.8) took up the investigation of the case and prepared the inquest report. Dr. Gurcharan Singh (P.W.2) conducted the autopsy at the dead body of Hari Raj Singh on that very day at 4.30 P.M. and prepared the report (Exhibit Ka-6). Virendra Singh was brought to the Primary Health Centre at 8.00 a.m. on 17th June, 1980 by Constable Tej Pal Singh He died on the same very day. It was opined by the doctor who conducted the autopsy of Hari Raj

A

B

C

D

E

F

G

H

A Singh and Virendra Singh that their deaths had taken place on account of shock and hemorrhage. It was also opined that the ante mortem injuries sustained by the victims might have been caused on that very day i.e. 17th June, 1980.

B Injuries of PW-5 Kendra Pal Singh were also medically examined at Primary Health Centre, Haldaur on 18th June, 1980 at 9.15 a.m. (Exh. Ka-2) by PW-1 (Dr. Chaod Kumar Singh).

Charge sheet was filed after investigation. Since accused persons abjured their guilt, trial was held.

C Placing reliance on the evidence of the witnesses, more particularly, the injured witness the trial Court found the accused persons guilty and convicted and sentenced as aforementioned. The judgment of the trial Court was questioned before the High Court in Criminal Appeal No. 2917 of 1980. As noted above, the High
D Court dismissed the appeal.

4. Primary stand of learned counsel for the appellants was that the High Court should have given the benefit available for exercising right of private defence. It was submitted that the evidence clearly established that the accused persons were
E exercising their right of private defence.

5. Learned counsel for the State on the other hand supported the judgment of trial Court and the High Court.

F 6. 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.

G 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,
H 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

A

B

C

D

E

F

G

H

A assault. The oft quoted observation of this Court in *Salim Zia v. State of U.P.* (AIR 1979 SC 391), runs as follows:

B "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."

C 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.

D 7. 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 griev-

ous 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. A

8. 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. B
C
D

9. 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). E
F

10. 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 G
H

A 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 pragmati-
cally viewed and not with high-powered spectacles or micro-
scopes to detect slight or even marginal overstepping. Due
B 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 re-
action and conduct, where self-preservation is the paramount
consideration. But, if the fact situation shows that in the guise
C of self-preservation, what really has been done is to assault the
original aggressor, even after the cause of reasonable appre-
hension 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 ac-
ceptable. It is essentially, as noted above, a finding of fact.
D

11. The right of self-defence is a very valuable right, serv-
ing 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 ac-
E cused 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 ques-
tion as to whether more force than was necessary was used in
the prevailing circumstances on the spot it would be inappro-
F priate, as held by this Court, to adopt tests by detached objec-
tivity 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 him-
self cannot be expected to modulate his defence step by step
G with any arithmetical exactitude of only that much which is re-
quired in the thinking of a man in ordinary times or under normal
circumstances.

12. In the illuminating words of Russel (*Russel on Crime*,
11th Edition Volume I at page 49):
H

"....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."

13. 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.

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

15. Factual scenario as noted above clearly goes to show that though the appellants claimed to be exercising the right of private defence, it was exceeded. That being so, the protection for exercising the right of private defence cannot be extended to the appellants. But the appropriate conviction would be under Section 304 Part I IPC and custodial sentence of 10 years in case of each appellant and fine imposed by the trial Court would meet the ends of justice.

16. The appeal is allowed to the aforesaid extent.

S.K.S.

Appeal partly allowed.