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SALIM AND ORS.

v.

STATE OF HARYANA

(Criminal Appeal No. 1254 of 2008)

AUGUST 11, 2008

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[DR. ARIJIT PASAYAT AND HARJIT SINGH BEDI, JJ.]

Penal Code, 1860:

C *ss.96 to 106 – Right of private defence – Exercise of –*
Held: Question as to whether in a particular situation a person
acted reasonably in exercise of right of private defence is a
question of fact – Court to take surrounding circumstances for
determining such question – On facts, evidence on record
does not establish that the accused persons were exercising
D *right of private defence – Appropriate conviction would be un-*
der s.304 (Part I) r.w. s.149 and not under s.302.

Evidence Act, 1872:

E *s.105 – Burden to prove right of private defence – Held:*
Is on accused who sets up such plea – Burden stands dis-
charged by showing preponderance of probabilities in favour
of the plea on the basis of material on record – On facts, there
is no evidence to support the plea.

F **Prosecution case was that there was land dispute**
between the parties. On the fateful day, when complain-
ant and others were ploughing the land, the accused per-
sons reached the spot armed with guns, lathis and pharsa
and gave exhortation that the persons belonging to com-
plainant party be killed. Appellant ‘S’ fired from his double
G **barrel gun which hit the forehead of deceased. Another**
accused person fired which hit the right side of deceased.
When the complainant tried to intervene one of the ac-
cused persons gave pharsa blow on his head and an-
other inflicted lathi blow on his head. The remaining ac-

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cused with their lathis caused injuries on others. The deceased died on the way to the hospital.

The Trial Court convicted appellant 'S' under ss.302, 203/149, 307/149, 323/149, 325/149 IPC and s.27 of Arms Act and the other accused persons under ss.148, 307/149, 323/149 and 325/149 IPC. The appeals filed by the accused as also the State were dismissed by the High Court.

In the instant appeal, the issue for consideration was the alleged exercise of right of private defence.

Disposing of the appeal, the Court

HELD: 1.1. 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. [Para 7] [1162 F,G,H 1163-A]

1.2 Under Section 105 of the 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. 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. The question in such a case would be a question of assessing the true

A effect of the prosecution evidence, and not a question of
the accused discharging any burden. [Para 7] [1162 F,G,H
1163 A,B,C,D]

B 1.3. Where the right of private defence is pleaded, the
defence must be a reasonable and probable version sat-
isfying the Court that the harm caused by the accused
was necessary for either warding off the attack or for fore-
stalling 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
C discharged by showing preponderance of probabilities
in favour of that plea on the basis of the material on
record. [Para 7] [1163 D E]

D *Salim Zia v. State of U.P.* AIR (1979) SC 391; *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 – relied on.

E 1.4. 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 right commences, as
soon as a reasonable apprehension of danger to the body
F 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 dan-
ger to the body continues. In adjudging the question as
G to whether more force than was necessary was used in
the prevailing circumstances on the spot it would be in-
appropriate 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.
H 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. [Paras 8, 9, 12] [1164 F G] [1165 A B] [1166 D,E,F]

Jai Dev. v. State of Punjab AIR (1963) SC 612; *Vidhya Singh v. State of M.P.* AIR (1971) SC 1857 – relied on.

Russel (Russel on Crime) 11th Edition Volume I – referred to.

1.5. 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. [Para 10] [1165 D]

Biran Singh v. State of Bihar AIR (1975) SC 87; *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; *Butta Singh v. The State of Punjab* AIR (1991) SC 1316 – relied on.

1.6. 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 pre-
tence 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 14] [1167 B,C,D]

V. Subramani and Anr. v. State of Tamil Nadu (2005) 10

A SCC 358 – relied on.

2. In the instant case, there is no material to establish that the accused were exercising the right of private defence. On the date of occurrence i.e. 25.11.2000 the land in question was lying vacant and the matter regarding possession was pending adjudication before the revenue authorities. After the order of remand passed by the Commissioner on 17.2.2000, there is no material to show who was in possession over the land in question. Therefore, the plea that the accused persons were exercising right of private defence cannot be accepted. Though the material on record shows that initially the accused were exercising right of private defence, however, same was exceeded. [Paras 16, 17] [1167-E,F,H 1168-A]

3. In the factual background appropriate conviction of 'S' would be under s.304 (Part I) read with s.149 IPC and not under s.302. The conviction is accordingly altered. In case of other accused persons the conviction would be under s.304 Part I read with s.149 IPC. The conviction and sentence imposed for the other offences remain unaltered. It is stated that accused 'S' was in custody for more than 8 years. In the background facts the sentence is fixed at the period already undergone. He shall be released forthwith unless required to be in custody in any other case. The sentence in case of others would be nine years. [Para 17] [1168 A,B,C]

Case Law Reference

	AIR (1968) SC 702	relied on	Para 7
	AIR (1975) SC 1478	relied on	Para 7
G	AIR (1977) SC 2226	relied on	Para 7
	AIR (1979) SC 391	relied on	Para 7
	AIR (1979) SC 577	relied on	Para 7
H	AIR (1963) SC 612	relied on	Para 9

AIR (1975) SC 87	relied on	Para 10	A
(1996) 1 SCC 458	relied on	Para 10	
(2002) 8 SCC 354	relied on	Para 10	
AIR (1991) SC 1316	relied on	Para 11	
AIR (1971) SC 1857	relied on	Para 12	B
(2005) 10 SCC 358	relied on	Para 15	

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 1254 of 2008

From the final Judgment and Order dated 13.2.2007 of
the High Court of Punjab and Haryana at Chandigarh in Crimi-
nal Appeal No. 665-DB of 2004

Anoop G. Choudhary, June Choudhary, R.D. Rathore and
Goodwill Indeevar for the Appellants.

Manjit Singh and T.V. George for the Respondent.

The Judgment of the Court was delivered by

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

2. Challenge in this appeal is to the judgment of a Division
Bench of the Punjab and Haryana High Court, disposing of two
appeals i.e. Criminal appeals No.665-DB of 2004 and Crimi-
nal appeal No.376-DBA of 2005. The first was filed by the
present appellant while the second was filed by the State of
Haryana. Both the appeals had their factual matrix on a judg-
ment of conviction and sentence dated 26/29.7.2004 passed
by learned Additional Sessions Judge (Fast Track Court),
Gurgaon. 14 persons faced trial for alleged commission of of-
fences punishable under Sections 148, 149, 302, 307, 325 and
323 of the Indian Penal Code, 1860 (in short 'IPC') and under
Section 25 of Arms Act, 1959, (in short 'Arms Act'). The Trial
Court convicted appellant Salim for offences punishable under
Sections 302, 203/149, 307/149, 323/149, 325/149 IPC and
Section 27 of the Arms Act, whereas other accused persons

A were held guilty of the offences punishable under Sections 148, 307/149, 323/149 and 325/149 IPC and various sentences were imposed. As noted above, both the accused person and the State filed the appeals.

B 3. Factual facts in a nutshell are as follows:

C On 25.11.2000 a medical ruqa was received from CHC Nuh regarding death of Abdul Gafar by the police and where upon SI/SHO Ram Niwas along with other police officials reached CHC Nuh and after obtaining the opinion of the doctor qua fitness, recorded statement of Alim Son of Yakub one of the injured persons. The complainant stated before the police that one killa of land in "Dehri Wali Jungle" in the name of Zakir son of Fauj Khan was being cultivated by Rasul Khan, his cousin, for the last 3-4 months on batai. Complainant further stated before the police that at about 9.00 a.m. Hasan Mohammad son of Ibrahim and other ploughed the said field, and when they came to know about this, at about 12.30 p.m., he himself, Kalam, Irfan, Mursalin, Abdul Gafar, Lukman, Abdul Rashid, Salim s/o Abdul Rasid reached the spot in a tractor. When the complainant alongwith said persons started ploughing the field, Issa armed with double barrel gun, Salim S/o Ummar Mohd. also having double barrel gun, Aslam armed with country made pistol, Habib armed with Pharsa, Hasan Mohd., Roshan, Liia, Iqbal, Nasim, Din Mohd., Sohrab, Hanif and Nayyum armed with lathies came there together in prosecution of their common object and immediately they gave lalkara that the persons belonging to complainant party should be killed, and in the meanwhile Salim fired from his double barrel gun which hit forehead and face of Abdul Gafar. Issa fired from his double barrel gun and the pallets hit Gafar on his right side, Aslam fired from the country made pistol which hit fore-head of Kalam. The complainant further reported that he alongwith Mursalin, Salim, Abdul Rashid, Lukman, Irfan intervened and tried to save the said persons. Habib gave a pharsa blow on his head, Lila inflicted lathi blow on his head whereas remaining accused with their lathis caused injuries on H Irfan, Lukman, Abdul Rashid, Mursalin. Meanwhile Abdul Latif

and Younus came to the spot, witnessed the occurrence, inter-
vened and saved the injured persons from the hands of accused
persons. The injured were taken in a jeep to Nuh hospital. Abdul
Gafar died on the way due to the injuries suffered by him. On
the basis of the complaint, formal FIR was recorded by ASI Ram
Dayal. SI/SHO Ram Niwas completed the inquest proceedings
regarding deceased Gafar. He also prepared the rough site
plan and collected from the spot, one empty cartridge with one
plastic giddi. These were taken into possession after convert-
ing them into sealed parcel by preparing a memo. SI/SHO Ram
Niwas also collected from the spot blood stained earth from
two places and prepared separate memos after converting them
into separate parcels. The post mortem examination qua the
dead body of Abdul Gafar was conducted by the doctors.
Bijender Singh, ASI, after post mortem examination brought from
the doctor two parcels duly sealed which were taken into pos-
session by SI Ram Niwas by preparing a memo on 25.11.2000.
On 27.11.2000 Osab son of Issa produced one licenced gun
with licence of his father alongwith 24 live cartridges which were
taken into possession by SI/SHO Ram Niwas by preparing nec-
essary memo. On 28.11.2000 SI/SHO Ram Niwas arrested
eleven accused persons. He also took the weapon used for
committing the murder. The gun was then recovered. Akhakha
was prepared and then the same was sealed into a separate
sealed parcel. The investigating officer also prepared the rough
site plan regarding the place of recovery. On 1.12.2000 SI/SHO
Ram Niwas arrested accused Hanif who too produced one lathi
at that time, which was taken into possession by preparing a
memo. On 29.1.2000 SI/SHO Ram, arrested Habib-accused
who produced pharsa, which was taken into possession by pre-
paring memo. Scaled site plan was got prepared. Statements
of witnesses were recorded. The injured persons were exam-
ined. The FSL report was obtained. Sohrab was later on ar-
rested whose supplementary challan was prepared by SI/SHO
Ram Niwas. After completion of necessary investigation, the
challan was submitted before the Court for trial of the accused.

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A On the basis of police reports and other evidence on file,
all the accused were charge sheeted for offences punishable
under Sections 148, 302, /149, 307/149, 447/149, 323/149, 325/
149 of IPC. Salim was also charge sheeted under section 27 of
B Arms Act. All the accused persons pleaded not guilty to the
charges and claimed trial of their case.

4. Prosecution to further the accusations examined 23 wit-
nesses. Four witnesses were examined by the accused per-
sons. The Trial Court found that the prosecution has established
its accusations and directed conviction and imposed sentences
C as noted above.

5. In appeal, primary stand taken was that the accused
persons were exercising right of private defence. The Trial Court
found that a case right of private defence was not made out.
D Accordingly, the appeal was dismissed. The State's appeal was
also dismissed.

6. The stand taken before the High Court was reiterated
by learned counsel for the appellant. The learned counsel for
the respondent-State, on the other hand, supported the judg-
E ment of the Trial Court and the High Court.

7. Only question which needs to be considered is the al-
leged exercise of right of private defence. Section 96, IPC pro-
vides that nothing is an offence which is done in the exercise of
the right of private defence. The Section does not define the
F expression 'right of private defence'. It merely indicates that noth-
ing is an offence which is done in the exercise of such right.
Whether in a particular set of circumstances, a person legiti-
mately acted in the exercise of the right of private defence is a
question of fact to be determined on the facts and circumstances
G 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
H 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:

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A "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,
B 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 probabili-
ties is in favour of his plea.

D 8. 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
E 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 tres-
F pass, and attempts at such offences in relation to property. Section
99 lays down the limits of the right of private defence. Sec-
tions 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 pri-
G vate 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 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
H causing of death. Sections 100 and 101, IPC define the limit

and extent of right of private defence.

9. 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.

10. 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).

11. 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

A 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
B 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
C 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.

12. The right of self-defence is a very valuable right, serving
a social purpose and should not be construed narrowly. (See
D *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
E 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
F 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.

G 13. 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.”

14. 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.

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

16. On considering the evidence it is held that existence of the material to show that the accused were exercising the right of private defence, was not established. On the date of occurrence i.e. 25.11.2000 the land in question was lying vacant and the matter regarding possession was pending adjudication before the revenue authorities. After the order of remand passed by the Commissioner on 17.2.2000, there is no material to show who was in possession over the land in question. Learned counsel for the appellant has brought to our notice the evidence of Patwari to show about the possession about the date of occurrence. It is true that the Patwari has taken that during the investigation he found that actual physical possession of the accused persons over the disputed property. It is also similarly stated by PW 22 SHO. The Trial Court observed that one of the parties used force to take possession of the land in question.

A 17. Above being the position the plea that the accused persons were exercising right of private defence cannot be accepted. Though the material on record shows that though initially the accused were exercising right of private defence, same was exceeded. In the factual background appropriate conviction of Salim would be under Section 304 Part I read with Section 149 IPC. The conviction is accordingly altered. In case of other accused persons the conviction would be under Section 304 Part I read with Section 149 IPC. The conviction and sentence imposed for the other offences remain unaltered. It is stated that accused-Salim was in custody for more than 8 years. In the background facts the sentence is fixed at the period already undergone. He shall be released forthwith unless required to be in custody in any other case. The conviction and sentence in case of others are maintained.

D 18. The appeal is disposed of accordingly.

D.G.

Appeal disposed of.