

CASE NO.:
Appeal (crl.) 632 of 2008

PETITIONER:
Narain Singh & Ors

RESPONDENT:
State of Haryana

DATE OF JUDGMENT: 09/04/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T
REPORTABLE

CRIMINAL APPEAL NO. 632 OF 2008
(Arising out of SLP (Crl.) No.5071 of 2007)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Punjab and Haryana High Court partly allowing the appeal filed by the appellants. Learned Additional Sessions Judge, Sonapat by judgment dated 8.8.1997 had convicted appellants Narain Singh, Ramesh, Naresh and one Suresh Kumar for offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC'). They were sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- each with default stipulation. They were also convicted under Section 323 read with Section 34 IPC and sentenced to undergo three months RI. Accused-appellant Narain Singh was convicted for offence punishable under Section 27 of the Arms Act, 1959 (in short 'Arms Act') and sentenced to undergo one year RI. It is to be noted that the appellant-Narain Singh is the father of the other accused persons.

3. Prosecution version in a nutshell is as follows: One Smt. Raj Bala (PW.3) set the law into motion. Smt. Bala lodged report with police stating that her husband Balbir (hereinafter referred to as the 'deceased') was employed as a driver in the Department of Electricity at Sonapat. She along with her husband and children lived in Mohalla Sham Nagar, Sonapat. Her husband had three brothers and five sisters. Her father-in-law Charan Dass had 10 acres of land. Out of this, four acres were given to them, while four acres were given to her brother-in-law Raghbir Singh. Charan Dass kept two acres for himself. No share of land was given to Narain, because he did not have good relation with his brothers and sisters, Narain filed a Civil Suit against them. On 28.5.1995 Om Parkash son of Raghbir Singh came to their house at Sonapat. He told them that his uncle Narain Singh had gone to their field along with his son Ramesh, Suresh and Naresh in a tractor, to sow Jawar. Smt. Bala along with Om Parkash and her husband Balbir Singh went to the field. They reached there at about 11/11 = a.m. They found Naresh ploughing the field with his tractor and sowing Jawar. Narain Singh standing there having a bandolier around his neck. He was holding his licensed gun in his hands. His both sons Ramesh

and Suresh were armed with Jailies. When they tried to prevail them not to sow Jawar in their field, Naresh stopped the tractor and picked up a Jaily. All of them raised a "lalkara" not to spare them. Narain then fired a shot at her husband Balbir Singh, which hit him on his chest. Ramesh gave a Jaily blow lathiwise on Smt. Bala's head. Two or three more Jaily blows were given by Suresh. Naresh gave 3-4 Jaily blows to Om Parkash. On the basis of this statement, FIR Ex PA/1 was recorded on 28.5.1995 at 1.00 p.m. The special report reached the Illaqa Magistrate, Sonapat on the same day at 4.30 p.m. After completion of investigation, charge sheet was filed. Since they pleaded innocence, trial was held. The prosecution to prove its case brought into the witness box ASI Mahinder Singh (PW1), Virender Singh (PW2), Raj Bala (PW3), Om Parkash (PW4), ASI Pirthi Singh (PW5), Ramesh Kumar (PW6), C. Rajinder Singh (PW7), Dr. O.P. Gujaria (PW8), Dr. Subhash Mathur (PW 9), HC Anil Kumar (PW10), Rajbir (PW11) and ASI Rameshwar Dutt (PW12). PWs. 3 & 4 were stated to be eye witnesses. Trial Court recorded conviction and imposed sentences as noted above. All the accused persons filed appeal before the High Court.

4. Appellants took the plea of right of private defence. The High Court held that the appellant Narain fired a shot from his gun. He certainly exceeded the right of private defence, as the deceased and the witnesses were only armed with lathies. Therefore, it was held that the appropriate conviction would be under Section 304 Part II IPC. Appellant Narain Singh was sentenced to undergo imprisonment for ten years for offence punishable under Section 304 Part II read with Section 34 IPC. Though other accused persons were similarly convicted they were each sentenced to undergo RI for five years. For the offence punishable under Section 323 IPC appellant Narain Singh was sentenced to undergo imprisonment for three months. The fine awarded by the Trial Court was maintained with default stipulation. Appeal by Suresh Kumar was held to have abated because he died during the pendency of the appeal.

5. In support of the appeal learned counsel for the appellant submitted that the Trial Court and the High Court erroneously held that the right of private defence was not available. In any event, it was submitted that the sentence as imposed is high.

6. Learned counsel for the State on the other hand supported the judgment of the Trial Court and the High Court.

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 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."

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 probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about

the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See *Lakshmi Singh v. State of Bihar* (AIR 1976 SC 2263)]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

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. The Trial Court and the High Court rightly held that the appellants are not protected by the right of private defence.

17. Other question is that of sentence. Considering the factual scenario, the sentence of appellant Narain is reduced to seven years. In respect of others no interference is called for. Amount of fine imposed remain and default stipulation needs no interference.

18. The appeal by appellant Narain Singh is allowed to the aforesaid extent, while the appeal by the others stands dismissed.