

AFR
IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW BENCH, LUCKNOW

Reserved on 04.02.2022

Delivered on 28.3.2022

Court No. - 1

Case :- CRIMINAL APPEAL No. - 1003 of 1982

Appellants :- 1. Raj Kumar

2. Raj Kishore.

Respondent :- The State

Counsel for Appellants :-

1. Sri Jai Pal Singh, *Amicus Curiae* for the appellant no.1.
2. Sri Sheikh Wali-Uz Zaman, counsel for the appellant no.2.

Counsel for Respondent:- Sri Vishwash Shukla (A.G.A.)

Hon'ble Ramesh Sinha,J.

Hon'ble Mrs. Saroj Yadav,J.

(Per Saroj Yadav, J for the Bench)

1. This Criminal Appeal has been filed by the appellants/convicts Raj Kumar and Raj Kishore against the judgment and order dated 18.12.1982 passed by Sri I.N. Thakral VIIth Additional Sessions Judge, Hardoi in Sessions Trial No.144 of 1982 arising out of Crime No.926 of 1981, Police Station Kotwali, District Hardoi, wherein the appellants were held guilty and convicted under Section 302 read with Section 34 of Indian Penal Code, 1860 (in short I.P.C.) with imprisonment for life and a

fine of Rs.1,000/- (one thousand). The appellants were also convicted under Section 325 read with Section 34 of I.P.C. with imprisonment of two years and a fine of Rs.500/-(five hundred).

2. Heard Sri Jai Pal Singh, learned *Amicus Curiae* for the appellant no.1- Raj Kumar, Sri Sheikh Wali-Uz Zaman, learned counsel for the appellant no.2-Raj Kishore and Sri Vishwash Shukla, learned A.G.A for the State respondent.

3. The facts necessary for disposal of this appeal as culled out are as under:-

i. A First Information Report (in short *F.I.R.*) was registered at Crime No.926 of 1981 on the basis of written report presented by Ramesh Chand son of Ram Saran at Police Station Kotwali Hardoi on 22.11.1981 at about 4:45 P.M.. In the written report it was alleged that on 22.11.1981 at about 3:00 P.M. the uncle of the complainant went to his paddy-field and found that the cattle of Raj Kumar were grazing and destroying the paddy-crop. His uncle after ousting the cattle from the field went to house of Raj Kumar at about 3:30 P.M. to make a complaint about the same, there Raj Kumar and Raj Kishore met and when his uncle complained about the cattle, they said that he was accusing them falsely.

After that Raj Kumar brought a gun and Raj Kishore a stick (lathi) from their houses and said just wait they will tell. Upon it his uncle raised a hue and cry, hearing a noise the complainant, his father Ram Saran and Nigendra Nath, Munshi, Ram Pal and many other people reached there. Thereafter Raj Kishore assaulted his uncle Prabhu Dayal with stick and Raj Kumar fired with gun on his father (the father of the complainant) which hit him and he died on the platform (Chabutara) in front of the house of appellants. Upon challenge made by all present there, both Raj Kumar and Raj Kishore ran away towards south.

ii. After investigation chargesheet was submitted in the Court, the concerned Magistrate after taking cognizance committed the case to the Sessions Court for trial. The trial court framed charges against accused persons on 03.09.1982 under Section 302 read with Section 34 of I.P.C. and Section 323 of I.P.C.. Subsequently the trial court amended the charges framed under Section 323 of I.P.C. and framed charge under Section 325 read with Section 34 of I.P.C. on 06.12.1982. The appellants denied the charges and claimed to be tried.

iii. The prosecution in order to prove its case examined nine witnesses in all. P.W. 1 Dr. S.N. Singh, Medical Officer, District Hospital Hardoi, P.W. 2 Ramesh Chandra, complainant, P.W. 3 Dr. U.D. Kapoor, District Hospital Hardoi, P.W. 4 Yashpal Singh Girewal, Senior Sub Inspector, P.W. 5 Prabhu Dayal uncle of the complainant and injured, P.W. 6 Head Constable Rajendra Kumar, and P.W. 7 Constable Sunil Kumar, P.W. 8 Munshi an independent eye witness and P.W. 9 Sri R.S. Verma, Sub Inspector. Apart from the oral evidence the documents Exhibit Ka-1 to Exhibit Ka-18 were proved and exhibited. These are:-

Injury report of injured Prabhu Dayal Exhibit Ka-1, written report Exhibit Ka-2, postmortem report of deceased Ram Saran Exhibit Ka-3, charge-sheet Exhibit Ka-4, chick report Exhibit Ka-5, general diary (G.D.) Exhibit Ka-6, inquest report Exhibit Ka-7, Form No.379 Exhibit Ka-8, Police Form No.13 Exhibit Ka-9, report to C.M.O. for conducting postmortem Exhibit Ka- 10, specimen of seal Exhibit Ka-11, site plan of spot where incident took place Exhibit Ka-12, site plan of the place where fields were damaged by cattle Exhibit Ka-13, memo of blood stained and plain soil Exhibit Ka-14, search-memo of accused Raj Kumar

regarding weapon of offence, Exhibit Ka-15, search memo of accused Raj Kishore regarding weapon of offence Exhibit Ka-16, report of Forensic Science Laboratory regarding soil collected from the spot Exhibit Ka-17 and report of Forensic Science Laboratory regarding blood stains found on the clothes of the deceased Exhibit Ka-18.

iv. Thereafter the statement of the appellants were recorded under Section 313 of the Code of Criminal Procedure (in short Cr.P.C.), wherein they denied the incident and stated that report has been lodged falsely. Appellant Raj Kishore further stated that witnesses have deposed being relatives of the deceased and he has been implicated in the crime due to the enmity of village party-bandi. Appellant Raj Kumar has also stated that Prabhu Dayal is the brother and Ramesh Chand is the son of the deceased. Witness Munshi is Bataidar (share-cropper) of Prabhu Dayal and supervise all his work. He has further stated that he and his brother were going towards field, at the same place his orchard is also there. He, after looking the field went towards the orchard and found that Prabhu Dayal was collecting woods from his orchard, he objected,

then Prabhu Dayal abused him. On this he assaulted Prabhu Dayal with stick. Prabhu Dayal ran away towards his house abusing the appellant and said that he (Prabhu Dayal) will see him. Thereafter the appellant went to his house. About after one hour Ram Saran, Satish and six to seven other persons of the village came there. Ram Saran was armed with (tamancha) country made pistol. He (appellant Raj Kumar) was collecting the paddy which was drying in front of his house. They (persons of complainant side) challenged him (Raj Kumar) to kill and set ablaze his house. Upon it he entered his house and closed the door. He also raised noise to save himself. Then Satish asked his companions to enter into the house and kill him, upon it he brought the gun of his father from the house. Ram Saran climbed over the wall and loaded the cartridge in tamancha (country made pistol). His (Raj Kumar) gun was already loaded, as soon as Ram Saran aimed towards him he fired upon him with the gun to save himself. After being injured Ram Saran fell down from the wall. On noise raised by him, Ram Sewak, Lakhan and other people of the village came there and challenged Ram Saran, thereafter he (Raj Kumar) ran away and hid in the village.

v. The trial court after hearing the arguments of both the parties and analyzing the evidence available on record came to the conclusion that prosecution has proved the motive, place of occurrence and the commission of crime by the accused/appellants, by the testimony of all the three witness of facts i.e. Ramesh Chand, the complainant, Prabhu Dayal the injured brother of deceased and Munshi Lal an independent witness. The First Information Report of the case was lodged promptly at the police station at about 4:45 P.M. and investigation also started immediately in the matter. The trial court did not convince with the arguments raised by the defence that the factum of injuries of Prabhu Dayal was not mentioned in the inquest report, as the witness Munshi Lal has signed Panchnama as Panch, but he did not tell about the fact that Raj Kishore inflicted lathi blow on Prabhu Dayal giving reasons that the inquest report is about the dead body of Ram Saran, the deceased. Trial Court has further concluded that the evidence of three eye-witnesses of facts has further been corroborated with medical evidence of P.W.1 Dr. S.N. Singh who has proved injury report of Prabhu Dayal and has stated that he (Prabhu Dayal) received grievous injury which could be caused on 22.11.1981 at about 3:30 PM with lathi. P.W.3 Dr.

U.D. Kapoor conducted the postmortem on the cadaver of deceased Ram Saran and found following ante-mortem injuries:-

"(i) One fire arm wound of entry 3 cm x 2 cm x chest cavity deep on right side of front of chest at third intercostal space just below the right border of sternum. Margins inverted and lacerated. No blackening no charring. This wound is surrounded by multiple fire arm/wounds of entry in the area of 15 cm x 8 cm from right nipple to mid clavicular line on left side each of the size 0.2 cm x 0.25 cm x skin to chest cavity deep.

(ii) Lacerated wound 8 cm x 3.5. cm on lateral side of right fore arm 3 cm above wrist joint. Radius bone is fractured under-neath."

On internal examination the doctor found that second, third and fourth right ribs were broken and right side lung badly lacerated and left lung lacerated at some places. In his opinion the death was caused due to shock and hemorrhage caused by ante-mortem injuries. He has also opined that death would have been caused on 22.11.1981 and these injuries were sufficient in the ordinary course of nature to cause death. In the opinion of trial court the medical evidence is in corroboration of ocular account given by the eye-witnesses of the case. The learned trial court did not accept the theory of exercise of right of private defence put forward by the appellant Raj Kumar. The accused Raj

Kumar took a defence that he fired upon the deceased in order to save his life, as the deceased was trying to kill him with country made pistol. To support his theory of private defence, accused Raj Kumar examined D.W.1, who was disbelieved by the trial court. The trial court has found his conduct suspicious, prior enmity with Prabhu Dayal was also established and some contradictions were also found.

vi. The trial court also concluded that evidence on record establishes that accused Raj Kumar entered in his own house, closed the doors when the deceased and his companions challenged him. He was behind the closed doors inside the house. According to the site plan exhibit Ka-12, there were many rooms inside the house, he would have entered in any of the rooms to save his life, there was no chance of his being shot at from the wall as is stated by Raj Kumar. Further there was another main gate opening towards northern side of his house, he had full opportunity of exit from that gate, to have recourse of law for his safety. Section 99 of I.P.C. provides certain circumstances in which there is no right of private defence and one of such provision is that there is no right of private defence in the cases where there is time to have recourse of the

public authorities for protection. In the given circumstances, accused Raj Kumar had full opportunity to save himself and to have the recourse of law. Further there was no eminent danger to his life or property. In the given circumstances, he has no right of private defence. Giving these main reasons, the learned trial court rejected the defence of the accused Raj Kumar i.e. right of private defence. It has further been observed by the trial court that as per the version of Raj Kumar, pistol has been shown in the hands of Ram Saran who had fallen from the wall after being shot at Chabutara, but there is no mention of it, where that tamancha had gone. Suggestion was made to P.W. 9 that pistol was lying near the dead body, but was not shown in the inquest report which was denied by him. In this regard D.W. 2 says nothing about that pistol was being seen by him at Chabutara near the dead body, instead he says that one Satish ran away with his pistol in hand. This theory of two pistols with the prosecution side is a new story developed by Lakhan D.W.2.

vii. Analyzing and concluding as aforesaid, the learned trial court came to the conclusion that prosecution has established that Raj Kishore inflicted lathi blow on Prabhu

Dayal causing him grievous hurt and accused Raj Kumar fired with his gun at Ram Saran killing him at his Chabutara. Prosecution has proved the place, date and time of occurrence and also that the offence was committed by the accused persons/appellants. The trial court further concluded that Raj Kishore and Raj Kumar have common intention to kill the deceased so Raj Kishore was also held guilty under Section 302 read with Section 34 of I.P.C. Both the accused/appellants were also held guilty under Section 325 read with section 34 of I.P.C. for causing grievous hurt to Prabhu Dayal and convicted accordingly.

4. Being aggrieved of this conviction this appeal has been filed by the appellants/convicts.

5. Learned *Amicus Curiae* appearing for Raj Kumar argued that initially F.I.R. was registered under Sections 307/323 of I.P.C., but after investigation chargesheet submitted under Section 302/323/34 IPC against both the appellants. The charges were framed against the appellant No.1 Raj Kumar under Sections 302 & 323 read with section 34 of I.P.C and later on charge under section 323 of I.P.C. was converted to Section 325/34 I.P.C. Against appellant No.2-Raj Kishore also charges were framed

under Sections 302 & 323 read with section 34 of I.P.C. later on charge under Section 323/34 of I.P.C. was converted to Section 325/34 I.P.C. The conviction is against the evidence on record and the findings of the trial court are perverse. The witnesses are related witnesses P.W.2 is the son of the deceased Ram Saran and P.W. 5 Prabhu Dayal is the real brother of the deceased. P.W.8 Munshi Lal is the share-cropper (Bataidar) of Prabhu Dayal. They have deposed falsely. He further argued that in the F.I.R. it has been alleged that cattle of appellant Raj Kumar were grazing the paddy crop of Pabhu Dayal, but in the inquest report and also in statements under Section 161 of Cr.P.C. of Smt. Raj Rani and Ramesh Chandra, there is mention of sugarcane crop. The witnesses have deposed that appellant Raj Kumar fired upon Ram Saran from a close distance of about 2 paces/5ft., but in the post-mortem report no blackening and charring was found. There is no proper explanation of injury No.2 found in the post-mortem report on the person of deceased. In fact the appellant Raj Kumar had acted in exercise of right of private defence as the deceased alongwith six to seven persons armed with deadly weapons, reached at the house of appellant and appellant had eminent danger to life and property, as they threatened to kill the appellant Raj Kumar and also to set ablaze his house. He further argued that deceased aimed at appellant Raj Kumar with a country made pistol

after climbing on the wall of the house of the appellant, then appellant fired upon the deceased and he died. He further argued that learned trial court did not appreciate the evidence in right perspective and did not accept the theory of private defence, while there was evidence and circumstances pointing out sufficiently that appellant Raj Kumar acted in exercise of right of private defence and nothing is offence which is done in the exercise of right of private defence. Hence accused Raj Kumar should be acquitted.

6. Learned *Amicus Curiae* for the appellant Raj Kumar relied upon the following case laws:-

a. Madan Mohan Pandey Vs. State of U.P. 1991 CRI. L.J. 467 (SC)

b. Rasikbhai Ram Singh Rana and another Vs. State of Gujarat and others 1999 CRI. L.J. 1975 (Gujarat High Court)

c. Rizan and another Vs. States of Chhatisgarh, through the Chief Secretary, Govt. of Chhatisgarh, Raipur AIR 2003 (SC) 976.

d. Ranjitham Vs. Basavaraj and others 2012 CRI. L.J. 2135.

e. Arjun Vs. State of Maharashtra AIR 2012 SC 2181

f. Reena Hazarika Vs. State of Assam AIR 2018 (SC) 5361.

7. Learned counsel for the appellant Raj Kishore submitted that he is challenging the judgment on one single point i.e. his offence travels only up to the limit of Section 325 of I.P.C. for causing injury to Prabhu Dayal, P.W.5, he has no concern with the death of

Ram Saran. He did not participate in the offence with prior meeting of mind with appellant Raj Kumar. He further submitted that as per version of the prosecution, appellant Raj Kishore went inside his own house and appellant Raj Kumar went inside his own house and they both came out afterwards with their respective weapons in their hands and acted accordingly, so there remains no space for prior meeting of minds and any common object or intention to commit murder of deceased Ram Saran. He further submitted that appellant is liable to the offence committed under Section 325 of I.P.C. only.

8. Contrary to the submissions made on behalf of appellant - Raj Kumar and appellant Raj Kishore, learned A.G.A. argued that the contention of the learned *Amicus Curiae* for appellant Raj Kumar alleging the right of private defence is not worthy of credence because as per the version of the appellant Raj Kumar and his witness DW (2), five to six persons reached the house of the appellant Raj Kumar to kill him armed with deadly weapons like country made pistol, Bhala (Spear), Lathi (stick) etc., but no injury of any type was sustained by either of the appellants or any of their family members or any damage to their property. Appellant Raj Kumar has stated in her statement under section 313 Cr.P.C. that deceased Ram Saran climbed on the wall of his house armed

with country made pistol and aimed towards him with intention to kill him (Raj Kumar), so he fired upon deceased and he fell down from the wall and died, but no such weapon was recovered near the body of the deceased. There is nothing on record that after the death of the deceased somebody took away the weapon of the deceased. Enmity of D.W.2 with the family of complainant was also admitted. Learned A.G.A. further argued that even if there was any danger to appellant Raj Kumar to his life and property, that danger was not eminent and there was time to take recourse of the public authorities. Hence the theory put forward, of exercise of right of private defence is not worthy of acceptance.

9. Learned A.G.A., about the submission of the appellant Raj Kishore argued that both the appellants are cousins and they both came out of house with common object/intention to kill the deceased and to injure the persons of complainant side. Hence the appeal should be dismissed.

10. Considered the submissions made by the learned counsel for both the appellants as well as learned A.G.A., also perused the record including the impugned judgment and referred case laws.

11. The incident of firing upon the deceased Ram Saran by Raj Kumar is admitted at the date time and place, qualified with a

claim that he fired upon the deceased Ram Saran in exercise of right of private defence of person and property, as the deceased alongwith other five to six persons reached the house of Raj Kumar, and he closed himself inside the house then deceased Ram Saran climbed on the wall of his house armed with country made pistol and aimed on him with an intention to kill, so he took out the licensed gun of his father and as soon as Ram Saran loaded his country made pistol and aimed at him (Raj Kumar), he (Raj Kumar) fired upon Ram Saran and he (Ram Saran) fell down from the wall after getting injured and died. Now only question remains whether the appellant Raj Kumar acted in exercise of right of private defence or he committed the murder of the deceased Ram Saran, as he went there to complain about the destruction of paddy-field by the cattle of Raj Kumar.

12. The contention made by the counsel for Raj Kumar that in the inquest report there is mention of sugarcane and not of paddy-field, while the witnesses have mentioned about the paddy-field, makes no difference because inquest report is prepared about the condition of the dead-body and to ascertain the *prima facie* cause of the death. P.W.1 and P.W.2 have clearly stated in their evidence that they told to the Investigating Officer about the destruction of

paddy-field and not of sugarcane-field. In the site-plan also there is no mention of sugarcane-field by the Investigating Officer.

13. As far as right of private defence is concerned, the law as contained in Section 96 to 106 of I.P.C. relevant sections are quoted herein below:-

96. Things done in private defence- *Nothing is an offence which is done in the exercise of the right of private defence.*

97. Right of private defence of the body and of Property:- *Every person has a right, subject to the restrictions contained in Section 99, to defend-*

First- His own body, and the body of any other person, against any offence affecting the human body;

Secondly- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

99. Act against which there is no right of private defence:- *There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised:-- *The right to Private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.*

Explanation 1: - A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2: - A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority if demanded.

100. When the right of private defence of the body extends to causing death: *The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--*

First-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly-An assault with the intention of committing rape;

Fourthly- An assault with the intention of gratifying unnatural lust;

Fifthly- An assault with the intention of kidnapping or abducting;

Sixthly- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Section 102. Commencement and continuance of the right of private defence of the body:- *The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.*

103. When the right of private defence of property extends to causing death:- *The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary*

causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions herein after enumerated, namely;

First-Robbery;

Secondly-House-breaking by night;

Thirdly-Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly- Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

105. Commencement and continuance of the right of private defence of property:- *The Right of private defence of property commences when a reasonable apprehension of danger to the property commences.*

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint of as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

14. The plain reading of section 99 quoted above shows that there is no right of private defence against an act which does not reasonably cause the apprehension of death or a grievous hurt.

There is also no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

15. In the present matter the appellant Raj Kumar has stated that he and his cousin reached in their orchard then they found that Prabhu Dayal was collecting woods from his orchard, he objected then Prabhu Dayal started abusing him, on it he (Raj Kumar) assaulted Prabhu Dayal with stick, thereafter Prabhu Dayal ran away towards his house abusing him. Appellant also went to his house. Thereafter deceased Ram Saran, Satish and six to seven other persons about after one hour reached his (Raj Kumar's) house. Ram Saran was armed with country made pistol. He (Raj Kumar) was collecting the paddy which were drying outside the house. They all challenged him and also said that set his house at ablaze. He entered into his house and closed the door. He also raised noise in order to save himself at the same time Satish instigated Ram Saran to enter his (Raj Kumar's) house and kill him. On it he picked up his father's licensed gun and as soon as Ram Saran aimed upon him with country made pistol, he (Raj Kumar) fired upon Ram Saran.

16. As per version of appellant Raj Kumar the persons of complainant side who reached there were six to seven in number.

Among them Ram Saran was armed with country made pistol. D.W.2 who has been examined as defence witness to prove the theory of private defence has stated that on the date of incident at about 04:00 - 04:30 hours Ram Saran was killed and he witnessed the incident as he was coming back from his shop at that time. He was about 40 paces away from the house of the appellant Raj Kumar, on the way he heard a noise coming from the house of Raj Kumar. Raj Kumar was crying for the help and saying that they would kill him. When he reached at the house of Raj Kumar, he heard that Satish was asking, to enter into the house of Raj Kumar and kill him. He has further stated that he saw that Ram Saran was standing on the eastern wall of the house of Raj Kumar. Ram Saran was standing on the Kachcha wall (made of soil). He has further stated that Ram Saran took aim towards eastern side, thereafter he heard the sound of fire and saw that Ram Saran fell down on the ground. He reached there, then Ram Sewak asked not to go there as Ram Saran had died. He has further stated that he saw Satish and six to seven other people accompanying Satish while running. He has further stated that he saw a country made pistol in the hands of Satish and rest six to seven persons were armed with Lathis (sticks) and bhalas (spears). In his cross examination this witness has stated that he neither saw Prabhu Dayal nor Ramesh at the spot. When he was asked why he did not stop Ram Saran from

firing with country made pistol, he said he was at a great distance so he could not say anything. Further when he was asked in the cross examination by the prosecution why you have not told all these facts to the Investigating Officer or any other person, then he could not give any satisfactory answer. He has also stated that the dead-body of Ram Saran remained lying there at the platform up to the time when police came. He further stated that he did not know when police came there. He came back to his house after six to seven minutes of the incident. He has also stated in his cross-examination that he did not tell anybody about the incident except one constable who came to his house to take '*Bidi*'. He has also stated in the cross-examination that he did not met Raj Kumar after the incident till date i.e. the date of recording of evidence. He has also stated that he did not tell about the manner of commission of incident even to the family members of the appellant. From the reading of statement of this witness it appears that he was not present at the spot and he did not see anything because he has stated that he saw a country made pistol in the hands of Satish and lathis and spear in the hands of other six to seven persons, but there is no mention about fire arm in the hands of Satish and lathis and Bhalas (spears) in the hands of six to seven other persons by the appellant Raj Kumar in his statement made under Section 313 of Cr.P.C.

17. Further more another appellant Raj Kishore, who is the real cousin of appellant Raj Kumar has not stated anything about the exercise of right of private defence or to say he has stated nothing about the exercise of right of private defence by the appellant Raj Kumar. No country made pistol was recovered from the dead body or near the dead body of the deceased. The appellant did not receive any kind of injury to his person and no damage was caused to his property. In the site-plan Exhibit Ka-12 another main gate opening towards northern side of the house of appellant Raj Kumar has been shown and there were number of rooms inside his house. The appellant Raj Kumar had full opportunity to escape from that gate to take recourse of law for saving himself and his property, if there was any danger. Without receiving any bruise on person of himself or the near or dear one or any damage to property he fired upon the deceased. The evidence and circumstances narrated and the evidence available on record does not establish or point out that appellant Raj Kumar acted in exercise of right of private defence.

18. The case law *Rasikbhai Ram Singh Rana and another Vs. State of Gujarat and others* (Supra) is of no help to the appellant Raj Kumar because in that case accused suffered injuries, but in the present matter there no injury has been alleged or found on the person of the appellant.

19. The case law *Madan Mohan Pandey Vs. State of U.P.* (supra) is also of no help to the appellant because in this matter the Hon'ble Apex Court held that "where the accused has not received any injuries and the injuries received by some of defence witness were simple, the accused must be said to have exceeded his right of private defence when he had fired six shots indiscriminately, killing one and injuring six injuries on the others". In the present matter no injury of any kind was sustained by appellant or any other family member or any damage caused to the property.

20. In the case of **Rizan and another Vs. State of Chhatisgarh (supra)** the Hon'ble Apex Court has held that "*it is true that the burden of 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 witness 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.*"

21. Learned *Amicus Curiae* for the appellant Raj Kumar citing this case law argued that appellant Raj Kumar has to create a doubt and he has not to establish the circumstances relating to right of private defence beyond reasonable doubt. Hence the theory of right of private defence should be believed. The contention of learned *Amicus Curiae* is not acceptable because the appellant was not even able to prove the circumstances leading to exercise of right of private defence upto the level of preponderance of probabilities in his favour. Rest of the case laws cited for the appellant are also not in support of the appellant because the circumstances on the record does not establish even by preponderance of probabilities that the appellant Raj Kumar acted in exercise of right of private defence.

22. Hon'ble the Apex Court in the case of **Jangir Singh Vs. State of Punjab 2019(1) CCSC 185 (SC)** has held as under:-

"10. Before proceeding any further, it is essential to putforth things that are to be considered by the Courts, while giving benefit of right to private defence to the accused, as per Exception II to Section 300 of IPC, to determine the quantum of this right. This Court in the case of Vidhya Singh v. State of Madhya Pradesh, observed that—

"7. The right of self–defence is a very valuable right. It has a social purpose. That right should not be construed narrowly."

Further, in the case of James Martin v. State of Kerala, following observations were made by this Court:-

"18. Situations have to be judged from the subjective point of view of the accused concerned (1971) 3 SCC 244 2 (2004) 2 SCC 203 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."

Similarly, in the case of *Darshan Singh v. State of Punjab*, this Court went further and gave few parameters to adjudge the exercise of right to private defence in following terms:-

" 56. In order to find out whether the 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."

11. Further, it is a settled law that the right to private defence cannot be claimed by the accused, if disproportionate harm has been caused, while defending himself or any other person. However, if the accused has not caused disproportionate harm, then the benefit of Exception II to Section 300 of IPC can be given to the accused. This proposition has been well explained in the case of *Bhanwar Singh v. State of Madhya Pradesh, (2008) 16 SCC 657 : 2008 (3) CCSC 1394 (SC)*, wherein this Court made the following observations:-

"50. The plea of private defence has been brought up by the appellants. For this plea to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not

extend to causing death. Such a ruling may result in the application of Section 300, Exception 2, which states that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all. (emphasis supplied)"

12. Now, to consider the question as to whether the exercise of right of private defence by the appellant–accused was legitimate or not, it is undisputed that the fateful incident at the hands of appellant was pursuant to an altercation with the deceased for around 15 minutes, in the presence of other colleagues. Both the deceased and the appellant–accused were altercating face–to–face and standing at a distance of 10 feet from each other. This shows that they could see the facial expressions of each other clearly and comprehend the apprehending circumstances accordingly. Taking note of the fact that owing to the imminent danger perceived by the appellant from the aiming of rifle at him by the deceased, he fired at the deceased and killed him. This, in our opinion comes within the ambit of right to private defence, however, it clearly traverses beyond the legitimate exercise of the same. The appellant–accused chose to shoot on a vital part of the body i.e., chest to safeguard himself from the imminent threat. However, the accused could have avoided the vital part of the deceased. But, we do not find absence of good faith in exercise of right of private defence. However, having regard to the situs of the injury (i.e. the chest of the deceased), it is clear that the accused has exceeded the power given to him in law and has caused the death of the deceased against whom he exercised right of private defence without

premeditation. Thus, offence committed by the accused–appellant will fall under Section 304 Part I of the IPC.

13. The law on this aspect of causing disproportionate harm and exceeding right to private defence is amply clear. In cases of disproportionate harm leading to death of the aggressor, sentence under Section 304 Part I is the appropriate sentence. This has been done by this Court in catena of cases.

14. In the case of Udaikumar Pandharinath Jadhav Alias Munna v. State of Maharashtra, this Court acquitted the accused from charges under Section 302 IPC and modified the conviction to Section 304 Part I of IPC, as per the following observations:-

"5. We observe from the evidence that the deceased was not only a karate expert but also armed with a knife and it is not surprising that the appellant apprehended injury at his hands. We are therefore of the opinion that the best that can be said for the prosecution at this stage is that the appellant had exceeded the right of private defence. We therefore partly allow the appeal, acquit the appellant of the charge under Section 302 IPC and modify his conviction to one under Section 304(1) IPC in the background that the fatal injury caused on the chest had penetrated deep into the body. We also impose a sentence of 7 years' rigorous imprisonment on the appellant; the other part of the sentence to remain as it is."

15. Further, in the case of Trilok Singh v. State (Delhi Administration), this Court made observations regarding modification of conviction from Section 302 IPC to Section 304 Part I IPC and the same is as follows:-

"6. We have gone through the entire evidence of PW 24 and PW 25. The evidence of PW 24 is to the effect that he saw the accused and the deceased were quarreling and he went to the house and informed PW 25. But the question is whether he could go to the extent of causing the death. No doubt in a situation like this it cannot be expected that the accused has to modulate his right of self–defence. But when he went to his house and brought a knife and caused the death it cannot be said that he did not exceed the right of private defence. We cannot give the benefit to the appellant under Section 100 IPC and the act committed by him only attracts exception to Section 300 IPC. Therefore the offence committed by him could be one under Section 304 Part I IPC. (emphasis supplied)".

16. Similar view was taken by this Court in *Pathubha Govindji Rathod v. State of Gujarat*, (2015) 4 SCC 363 at Para 15, 17-18: 2015 92) CCSC 836 (SC), wherein it was ruled that the accused exceeded his right to private defence. Thus, appeal was partly allowed, conviction under Section 302 was set aside and the accused was convicted under Section 304 Part I of the IPC."

To sum up in the present matter appellant Raj Kumar has not alleged that any injury was caused to his person or any other member of his family or damage to his property by the complainant side. No country made pistol was recovered from the spot or near the dead body of the deceased Ram Saran as it was alleged that he was armed with country made pistol and tried to kill the appellant. There is major contradiction on the point that six to seven persons came at his house and exhorted Ram Saran to kill Raj Kumar. Raj Kumar did not say that these six to seven people were armed with deadly-weapons like sticks (lathis) and spears (Bhalas), except country made pistol in the hand of Ram Saran. The DW 2 examined as defence witness has stated that six to seven persons were armed with weapons, he has indicated that Satish was armed with country made pistol and other six to seven people were armed with spears (Bhalas) and lathis (sticks). The evidence of D.W.2 is not worthy of credence. Hence the theory of right of private defence is not acceptable the prosecution witness specially P.W.1, 5 and 8 have proved the facts and no major contradictions have been found in their testimony. It makes no difference that

P.W.2 & 5 are relatives of the deceased. Medical evidence is in corroboration what has been stated by the prosecution witness. Much emphasis has been given by the *Amicus Curiae* on the point that injury No.2 of the deceased has not been explained by the prosecution and medical witness has stated that this injury would come only after fall from a height, so this should be considered in the light of right of private defence that deceased was standing on the wall and he fell down from that place and suffered injury No.2. This contention of *Amicus Curiae* has no force in our opinion because some times the bone is fractured even by the weight of his own body, if a person fell down from a certain angle. Hence it is established that appellant fired upon the deceased with intention to kill him and he died, so he has rightly been held guilty and punished under Section 302 of I.P.C.

23. Now comes the case of appellant No.2-Raj Kishore. His learned counsel has challenged the judgment only to the extent that his act travels only up to the offence defined under Section 325 of I.P.C. and not under Section 302 of I.P.C.. He has further submitted that no prior meeting of minds between the appellants was there, so he should be punished only under Section 325 of I.P.C. and not under Section 302 of I.P.C.

24. In the case of **Jaspal Vs. State of Uttar Pradesh 2020 (110) ACC 119** the Hon'ble Supreme Court has held that *"to establish a case under Section 34 of I.P.C. prosecution has to prove prior meeting of minds which may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack and it can also be developed at the spur of the moment, but there must be pre-arrangement or premeditation concert."*

25. In **Jasdeep Singh alias Jassu Vs. State of Punjab 2022 Live Law (SC) 19** dated 07.01.2012 the Hon'ble Apex Court held as under:-

"28. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

26. In the present matter it has been stated in the F.I.R. that when the complainant side reached their (appellants) house to make a complaint about the destruction of paddy-crop by their cattle both the appellants got enraged and went inside their houses and came back with their respective weapons and appellant Ram Kishore assaulted Prabhu Dayal with lathi (stick) and appellant Raj Kumar fired upon Ram Saran, deceased. Admittedly both the appellants are cousins and they live in separate houses which are adjacent. As per the evidence available on record they both went inside their houses and came out armed with their respective weapons from their houses. There is nothing on record to suggest that they planned with each other to kill the deceased Ram Saran, meaning to say that no meeting of minds between appellant Raj Kumar and Raj Kishore has been established. In these circumstances both the appellants would be liable for their individual act and appellant Raj Kishore cannot be held guilty and convicted under Section 302 of I.P.C. with the help of section 34 of I.P.C. Raj Kishore assaulted Prabhu Dayal with lathi (stick) causing injury which amount to an offence under Section 325 of I.P.C. and he is liable to that extent only.

27. Hence to sum up the conviction of appellant No.1 Raj Kumar under Section 302 of I.P.C. only, for life imprisonment is

hereby confirmed. However the grievous injury to Prabhu Dayal is concerned that was caused by Raj Kishore-appellant No.2, hence Raj Kumar-appellant No.1 is not liable for conviction under Section 325 of I.P.C. Hence his conviction under Section 325 read with section 34 of I.P.C. is set-aside.

28. The appellant No.1 Raj Kumar is in jail, hence he shall serve the sentence awarded by the trial court and modified by this Court under Section 302 I.P.C. only.

29. The gunshot injury causing death of the deceased Ram Saran was caused by Raj Kumar only and there was no prior meeting of minds between Raj Kumar and Raj Kishore, hence Raj Kishore is not liable for conviction U/s 302 I.P.C read with Section 34 I.P.C. Raj Kishore caused injury to Prabhu Dayal and that act travels upto the extent of offence defined under Section 325 I.P.C., Hence, the conviction of appellant Raj Kishore under Section 325 of I.P.C. is confirmed, but conviction of Raj Kishore under Section 302 read with Section 34 of I.P.C. is hereby set aside.

30. The appeal of appellants is partly allowed.

31. Let the convict Raj Kishore- appellant No.2 convicted in Sessions Trial No.144 of 1982 arising out of Crime No.926 of

1981, Police Station Kotwali, District Hardoi be released from the concerned jail, upon completion of sentence awarded and deposition of fine imposed under section 325 I.P.C. if not required in any other case.

32. Appellant No.2-Raj Kishore is directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973 for his acquittal under Section 302 I.P.C. by this Court.

33. Sri Jaipal Singh, learned *Amicus Curiae* for the appellant No.1 Raj Kumar shall be paid fee in accordance with the rules of the Court.

34. Let a copy of this order alongwith original record be transmitted to the trial court concerned forthwith for necessary information and further action.

(Mrs. Saroj Yadav, J.) (Ramesh Sinha, J.)

Order Date :- 28.3.2022

A.K.Singh