**SUPREME COURT OF INDIA**

Shivanna

Vs.

State of Karnataka

Crl.A.No.1130 of 2006

(Arijit Pasayat and Lokeshwar Singh Panta JJ.)

08.11.2006

**JUDGMENT**

**ARIJIT PASAYAT, J.**

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Karnataka High Court partly allowing the appeal filed by the appellants. Each of the appellants was held guilty under Section 304 Part II read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'), and was sentenced to undergo rigorous imprisonment of 8 years and to pay a fine of Rs.1,000/- with default stipulation. Additionally, each was convicted in terms of Section 148 IPC and Sections 324 and 326 read with Section 149 IPC.

Background facts which gave rise to the prosecution of the appellants are as follows:

The accused No.l's wife Devamma (PW 14) resided with her elder brother Mahadevappa (hereinafter referred to as the 'deceased'). Since the date of marriage accused no.1 had been residing with them for some time and later, he shifted to his brother's house and visited them only some times. After some years, he discontinued coming to their house. Three children were born to them. The land of the accused no.1 measuring 4 acres was being cultivated by him and since there was demand from his wife Devamma (PW 14) to give a share to the extent of 1 acre 10 guntas to his children, which was accepted. The possession was with his children, but was being cultivated by deceased Mahadevappa, Devamma (PW 14) and the children. They began to demand more share for which accused no.1 did not agree. On 14.6.1995 in the morning, Devamma (PW 14) and deceased learnt that accused no.1 alongwith others was cultivating the land allotted to the share of Devamma's children. Therefore, the deceased, his son Sangaraju (PW2), brother Puttaswamappa (PW3) and Mahadeveswamy (son of accused no.1 and PW-14) went to the said land. PW-2 prevented the cultivation of the land being done by accused Shivanna (accused no.1). Therefore, Lingaraju (accused no.2) hit on the head of PW-2 by means of a crow-bar. When deceased came to his rescue, he was assaulted on his head by Ramesha (accused no.3), Chinnaswamy (accused no.5), Nanjundappa (accused no.6) and M.H.Mahadevappa (accused no.4) attacked deceased by means of crow-bar, spade and a club. Puttaswamappa (PW 3) was held by accused no.4 and accused no.1,

accused no.3 and the accused no.2 attacked him. The attack by the accused persons by means of crow-bar, spade and club resulted in the death of Mahadevappa. Thereafter, all the accused persons ran away from the spot. The injured and the deceased were brought to the Primary Health Centre, Hullahalli, where Dr. Dhananjaya (PW1) examined them. He treated PWs 2 and 3 and advised them to go for further treatment to Mysore. An intimation was sent to the police and S.F.M.Mumtaz (PW-17) went to the hospital and recorded the complaint of PW 2 and sent it to the police station for registration. The said complaint was received at about 2.00 p.m. by Puttannaiah, ASI, Nanjangud Rural PS. (PW-19) and he registered a case against these appellants and recorded FIR. The investigation was taken up by K. Srikanta, Circle Inspector of Nanjangud Circle (PW-18). He went to the place of offence, conducted spot mahazar and took further steps. The accused persons were absconding. Accused no.1 was arrested on 20.6.1995 and his voluntary statement was recorded as per Ex.P.16. The accused Nos.2, 3, 5 and 6 were arrested later on 8.9.1995 and were produced before Siddaiah, PSI (PW-21) who recorded their voluntary statements. In furtherance of the voluntary statement, the weapons used in the offence were seized. After further investigation by Sri R.Malelsh, Circle Inspector of Police, T.Narsipur Circle, who was in additional charge of Nanjangud Circle, a charge sheet was placed against the accused.

Since accused no.4 was absconding his case was separated and separate trial in Sessions Case no.178 of 1996 was held. Both these Sessions cases were tried together. Charge for offences punishable under Sections 143, 148, 324, 326, 341, 302 read with Section 34 IPC was framed.

In order to substantiate its case 24 witness were examined. PWs. 2, 3 and 4 were stated to be eyewitnesses. PW 14 wife of accused no.1 spoke about the motive. Doctor (PW 1) who examined PWs 2 and 3 spoke about the injuries on them. He had conducted post mortem examination on the dead body of the deceased. Accused persons pleaded innocence and false implication. On consideration of the evidence on record the Trial Court recorded conviction and imposed sentence as detailed below:

(i) for the offence punishable under Section 302 of the IPC to undergo life imprisonment and to pay a fine of Rs.1,000/- each;

(ii) for the offence punishable under Section 143 of the I.P.C., to undergo imprisonment for six months; (iii) for the offence punishable under Section 148 of the I.P.C.: to undergo Imprisonment for one year; (iv) for the offence punishable under Section 341 of the I.P.C.: to undergo imprisonment for one month; (v) for the offence punishable under Section 324 of the I.P.C.: to undergo Imprisonment for one year; and (vi) for the offence punishable under Section 326 of the I.P.C. to undergo imprisonment for three years and to pay a fine of Rs.500 each, in default to undergo S.I. for 15 days.

The accused persons filed appeal before the High Court questioning judgment of the Trial Court. As noted above the High Court maintained conviction in respect of some of the alleged offences and directed acquittal in respect of others.

In support of the appeal, learned counsel for the appellant submitted that the prosecution witnesses PWs 2 to 6 and deceased were the aggressors. They were trying to encroach upon the land of the accused persons and, therefore, exercising the right of private defence they assaulted them. In the course of assault A1 has suffered five injuries. It is also submitted that the sentence imposed is quite heavy and major part of the sentence has already been suffered by the accused persons.

In response, learned counsel for the State submitted that this is not a case where the right of private defence can be said to have been exercised. There is no material to show that the prosecution witnesses were the aggressors. The deceased was attached with crow bars and spades. Therefore, this is a clear case where the High Court has been rather lenient in altering the conviction to Section 304 Part II IPC. It was pointed out that injuries sustained by the accused were minor in nature and may have been sustained when the scuffle took place.

The only question which needs to be considered is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and Ors. v. Delhi Administration (AIR 1968 SC 702), State of Gujarat v. Bai Fatima (AIR 1975 SC 1478), State of U.P. v. Mohd. Musheer Khan (AIR 1977 SC 2226), and Mohinder Pal Jolly v. State of Punjab (AIR 1979 SC 577). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. (AIR 1979 SC 391), runs as follows:

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

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.

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.

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).

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.

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.

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."

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 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. (see V. Subramani and Anr. v. State of T.N. (2005 (10) SCC 358).

There is no material on record to show that the prosecution witnesses were the aggressors. On the contrary, categorical findings have been recorded by the Trial Court and the High Court on analysis

of evidence to the effect that the accused persons have committed the crime after they had entered upon the land and were ploughing the land.

That being so, plea of right of private defence has been rightly rejected by the Trial Court and the High Court.

The residual question is whether the sentence as maintained by the High Court is harsh. Considering the background facts, while maintaining conviction the sentence is altered to six years rigorous imprisonment so far as Section 304 Part II IPC is concerned. The fine with default stipulation as imposed by the Trial Court and maintained by the High Court needs no interference. The conviction and sentence as imposed in respect of other offences do not suffer from any infirmity to warrant interference. The sentences shall run concurrently.

The appeal is allowed to the aforesaid extent.