IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.13 OF 2000

1. Sayyad Magdum Janny

2. Abdul Shaikh

3. Sayyad Mehhboob

All presently undergoing
sentence at Central Jail,
Aguada, Bardez, Goa..... **APPELLANTS**

VERSUS

STATE..... **RESPONDENT**

Mr. S.G. Dessai, Sr. Advocate, with Mr. Arun B. de Sa & Mr. Shivam S. Dessai, Advocates, for the Appellants.

Ms. Winnie Coutinho, Addl. Public Prosecutor, for the State-Respondent.

CORAM : P.V. KAKADE,J.

DATED : DECEMBER 20, 2002.

J U D G M E N T

The Appellants/Accused have preferred this Appeal against the Judgment and the Order passed by the Additional Sessions Judge, Margao, in Sessions Case No.19 of 1997 holding them guilty of commission of the offences punishable under Section 304 (Clause I) read with Section 34 of the Indian Penal Code and Section 323 read with Section 34 of the Indian Penal Code and sentencing them to

Rigorous Imprisonment for five years and to pay fine of Rs.2,000/-, in default, to undergo Simple Imprisonment for a period of three months, for the earlier offence; and to Rigorous Imprisonment for six months for the latter count of the offence. Both the substantive sentences were directed to run concurrently.

2. The facts giving rise to the case, in a nutshell, are thus:

One Sayyad Raja (P.W.2) had advanced a sum of Rs.8,000/- to accused No.1 in November 1996. On 31-3-1997, at about 9.30 p.m. the said Sayyad Raja and his wife had gone on their two-wheeler to STD booth to phone some relatives and, at that time, accused no.1 was sitting in that booth. Sayyad Raja (P.W.2) demanded his money of Rs.8,000/- from the accused No.1, but the accused No.1 refused to pay and there was some hot exchange of words and during that time the accused No.1 also gave threats to P.W.2 Sayyad Raja and there was also a scuffle between them. Thereafter, at about 9.45 p.m., P.W.2 Sayyad Raja and his wife returned to their home and wife got down and P.W.2 came back to Arlem, Raia, near the saw mill at the house of his brother Sayyad Kassim, the deceased, at about

10.00 p.m. P.W.2 collected his brother Sayyad Kassim and Kassim's brother-in-law Rajab Ali Shaikh (P.W.1) and all of them proceeded towards Kavate, Raia Manora at the house of Sayyad Raja (P.W.2) for dinner. The scooter was being driven by P.W.1 Rajab Ali Shaikh. At about 10.10 p.m. they reached the house of accused No.1 which was on their way and P.W.2 told Rajab Ali Shaikh to stop the two-wheeler so that he wanted to demand his money from the accused No.1. P.W.1 stopped the scooty by the side of the road and P.W.2 along with his brother Sayyad Kassim got down. At that time, all the accused persons with common intention assaulted Shaikh Kassim (the deceased), P.W.2 Sayyad Raja and Rajab Ali Shaikh (P.W.1). P.W.1 ran away from the scene and came to Arlem, collected his scooter from one Saife Sayyad and went to Police Station and then came back to the scene. In the meantime, Sayyad Kassim was thrown in a gutter and the accused persons had left the scene. The son of the owner of the house in which the accused No.1 was sitting lifted Sayyad Kassim from the gutter and put him on the road. Sayyad Kassim had died.

3. Thereupon, P.W.1 Rajab Ali Shaikh lodged complaint on 1-4-1997 at about midnight

which was recorded by P.I. Rohidas Patre (P.W.11). The offence was registered under Section 302 read with Section 34 of the Indian Penal Code at 0.10 hours. It was followed by panchanama of the scene of the incident. One metal pipe and one iron rake with blood stains were also found at the scene of offence and were also seized by the police under panchanama. Photographs were taken of the scene of the offence. P.W.11 arrested accused No.1 on 1-4-1997. Inquest panchanama was drawn by P.W.11 on that very day in the presence of the panch witnesses. The injured P.W.1 Rajab Ali Shaikh was examined by P.W.3 Dr. Martina Fernandes at 11.55 p.m. on 31-3-1997 and P.W.2 was examined at about 1.25 a.m. on 1-4-1997. The Medical Officer issued certificates accordingly. The dead body of Sayyad Kassim was sent for post-mortem examination which was performed by Dr. Avinash Pujari on 1-4-1997 in the afternoon. The accused No.2 came to be arrested on 3-4-1997 and the accused No.3 was arrested on the next day. Statements of witnesses came to be recorded between 1-4-1997 and 14-4-1997. The seized articles as well as samples of blood etc. were sent for chemical analysis and the report of the Chemical Analyser was received in due course. On completion of the investigation, the charge-sheet was sent to the Magisterial Court who

committed the case to the Court of Sessions as the offences involved were exclusively triable by the Sessions Court.

4. The learned Sessions Judge framed the charge-sheet against the accused persons for offences punishable under Sections 304 and 323 read with Section 34 of the Indian Penal Code. The accused persons denied the charge and claimed to be tried. The defence of the accused at the trial stage was that of the denial simpliciter.

The prosecution led its evidence at length on which basis the learned Sessions Judge came to the conclusion that the act of the Appellants/accused came within the four corners of the offences punishable under Sections 304 (Clause I) and 323 read with Section 34 of the Indian Penal Code and proceeded to record the Order of conviction and consequent sentence against them in the aforesaid manner. Hence the Appeal.

5. I heard Mr. Surendra Dessai, the learned Senior Counsel, for the Appellants and Ms.Winnie Coutinho, the learned Additional Public Prosecutor the the Respondent State, at length.

6. At the outset, it may be noted that the defence of the Appellants at the trial state was that of denial simpliciter. However, in the course of his arguments, Mr. Dessai, the learned Counsel for the Appellants, took up a stand to the effect that the accused had acted in furtherance of their right of private defence. It was submitted on behalf of the Appellants that there was grave and sudden provocation and the witnesses including the deceased were armed with weapons and in view thereof, the accused persons acted in self-defence as a result of which the deceased died in the course of the incident. In the light of this aspect, it would be just and proper on my part initially to deal with the evidence on record as it is, in order to ascertain whether such evidence is sufficient to bring home the guilt, and then, consider the submissions made on behalf of the Appellants setting up the theory of right of private defence.

7. On a critical perusal of the entire evidence on record, it is to be noted that the evidence of P.W.1 Rajab Ali Shaik as well as that of P.W.2 Sayyad Raja forms the backbone of the prosecution case in view of the fact that not only they were present at the time of the incident but

also they are found to be injured persons in the course of the incident in the hands of the accused persons. Then again, the evidence of P.W.1 and P.W.2 is fortified by various circumstantial aspects of the evidence in general, and the testimony of P.W.7 Sayyad Babu in particular, who is said to be chance witness and has stated that at the time of the incident he was passing by the road and saw the accused No.1 was carrying iron pipe and accused No.3 had rake whereas accused No.2 was not armed with anything. He has further stated that he has seen that they assaulted the witness Sayyad Raja and the deceased Sayyad Kassim at that time. According to him, the accused No.1 assaulted the deceased with iron pipe and accused No.3 assaulted him with the iron rake. He was frightened and went home. This witness, in my considered view, has provided the support to the testimonies of P.W.1 and P.W.2. It is true that his statement is recorded by the Investigating Officer with delay of about 14 days, but scrutiny of his evidence does not show anything as to why he should be totally discarded and disbelieved from consideration.

Before turning to the evidence of P.W.1 and P.W.2, it must be noted that there is sufficient evidence on record to support the

finding recorded by the learned Sessions Judge to the effect that the death of Sayyad Kassim was homicidal. A perusal of the post-mortem report prepared by P.W.4 Dr. Avinash Pujari makes this aspect quite clear. The evidence of Dr. Pujari shows that the cause of death was shock due to damage suffered by brain, intra-cranial haemorrhage, fracture of left rib and contusion of left lung as a result of impact by blunt force or object. It is true that he has not specifically pointed out which injury was fatal one, still he has stated in the course of cross-examination that the contusion and abrasions on the body of the deceased were alongwith internal injuries which together were not simple. Be that as it may, the fact remains that it must be gathered from his evidence that the cumulative effect of injuries on the person of the deceased have caused the death at the relevant time. This aspect has to be taken into account with the evidence as well as admitted position of the presence of the accused persons whether at the time they have taken up the plea of private defence. Therefore, there is no doubt whatsoever that the deceased suffered homicidal death.

8. A critical perusal of the entire

evidence of P.W.2 clearly shows that there was a quarrel between himself and accused earlier to the incident near the telephone booth and, in fact, there was scuffle between them. He has stated that thereafter he came to his house. He has further stated that after coming back by the scooty and reaching his wife at his home he went to his brother Kassim at about 9.00 p.m. and thereafter along with Kassim and Kassim's brother-in-law Rajab Ali Shaikh went to his house for dinner at which time Rajab Ali Shaikh (P.W.1) was riding the scooty. This aspect is corroborated by the evidence of P.W.1 Rajab Ali Shaikh himself when he has stated that on that day he was alone at home and his family members had gone to attend the wedding and at about 8.30 hours P.W.2 came and took him and Sayyad Kassim for dinner. Evidently all the three accused persons are residents of Raia Manora and, therefore, it is also established that their house is on the way to the house of P.W.2 and, therefore, the narration to that regard made by P.W.1 and P.W.2 cannot be doubted at all and is found to be most natural.

So far as the description of the actual incident is concerned, P.W.2 has deposed that on reaching near the house of the accused, he saw that

all the three accused were on the road and on seeing them, he asked P.W.1 to stop the vehicle as he wanted to ask the accused No.1 about the money which he had borrowed. At that time, the assault started as a result of which the accused No.1 gave blow with iron pipe on his head on the right side and also on the left leg due to which he fell down. He has further stated that on seeing him falling down, his brother Kassim came to his rescue and Kassim was also assaulted by accused No.1 and 3 wit the said weapons. Though he could not see the nature of the weapons used by accused no.1 and accused No.3 to assault his brother, the pipe with which he was assaulted was of iron. he has stated that after the assault on his brother, the accused persons went away and he tried to go near his brother but he could not do so and fell down on the road unconscious and regained his consciousness in the hospital where he found that Kassim had died. This particular description of the assault is fully corroborated by P.W.1 and there is absolutely no doubt whatsoever that accused No.1, 2 and 3 assaulted the deceased as well as the witnesses at which time iron rods and iron rake were used as a result of which the deceased died and the witnesses suffered injuries.

The entire evidence of these witnesses is fully corroborated by the other evidence on record including that of panch witnesses and thus there is no doubt whatsoever that the incident did take place as per the account given by P.W.1 and P.W.3 in respect of the entire incident. The perusal of the entire Judgment of the learned Sessions Judge shows that he has appreciated each and every aspect of the prosecution evidence on record and has come to the reasonable conclusion that the offences charged against the accused persons are duly proved beyond the reasonable doubt.

9. Mr. Dessai, the learned Counsel for the Appellants, vehemently urged that the prosecution has not established that the injury suffered by the deceased was likely to cause death or the injury inflicted was sufficient in the ordinary course of nature to cause death. According to him, the evidence of the doctor P.W.4 does not show that the deceased suffered such injury as was likely to cause death or any injury inflicted was sufficient in the ordinary course of nature to cause death. However, in my considered view, the evidence of Dr.Pujari is definitely sufficient to show that the cumulative effect of the injuries suffered by the deceased was

sufficient in the ordinary course of nature to cause death. In other words, what is necessary in this regard is presence of evidence to reach this conclusion, and not necessarily a statement to that effect by medical witness himself. Be that as it may, the fact remains that the medical evidence is sufficient to show that the cumulative effect of the injuries on the deceased were sufficient in the ordinary course of nature to cause death and, therefore, in my considered view, the finding recorded by the learned trial Judge that the offence under Section 304 (Clause I) has been committed, cannot be faulted with.

10. Mr. Dessai further urged that the plea of private defence though not taken by the Appellants during the trial, it does not prevent the Court to give them the benefit of private defence if on proper appraisal of the evidence and other relevant material on record the Court concludes that the circumstances in which the accused found themselves at the relevant time gave them the right to private defence. In my view, there cannot be any two opinions regarding the legality of this proposition. Indeed, if such circumstances are apparent from the record or could reasonably be gathered from preponderance of the

facts revealed by the record, then the defence would be entitled to propagate the theory of right of private defence though it is not taken at the stage of trial. However, it also cannot be overlooked that in order to raise the theory of private defence, there must be cogent circumstantial evidence apparent from the record to prima facie hold that such right is available to the accused in the present case. It was pointed out, and in fact much ado was made on behalf of the Appellants, of a stray sentence in the course of cross-examination of P.W.2 to the effect that he reached the spot of incident of assault with iron rod at about 9.00 p.m.. In my considered view, it is not at all an admission that P.W.2 was carrying any weapon at that time. In fact, the so-called admission, in my considered view, cannot be read in isolation of other evidence on record. In other words, the entire other evidence is sufficient to show that neither P.W.2 nor other witnesses or the deceased were armed at the relevant time and place. It was urged on behalf of the Appellants that there was grave and sudden provocation on the part of the witnesses and the deceased to the accused persons as a result of which the incident took place and the Appellants were forced to defend themselves against the assault of the witnesses. In my

considered view, the evidence on record never indicates that there was any sudden or grave provocation to accused persons from the deceased or the witnesses so as to enable the accused to act in right of their private defence. In this regard it must be noted that, as laid down by the Supreme Court in the case of **Sekar alias Raja Sekharan v. State by Inspector of Police, Tamu Nadu** (2002 AIR SCW 4315), the plea of right of private defence cannot be based on surmises and speculations. While considering the right of private defence is available to the 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 an accused, the entire incident must be examined with care and viewed in its proper setting. Section 96 of the Indian Penal Code 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 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. Therefore, keeping this principle in view, on perusal of the entire set of facts revealed from the evidence on record, I am more than satisfied that there is no such circumstance or evidence revealed on record which would be sufficient for the Appellants to base their plea of right of private defence. It is also revealed from the record that the witnesses and the deceased were unarmed at the relevant time and were not at all an aggressor party. The fact that both the witnesses and the deceased were proceeding to the house of P.W.2 for dinner at which time the house of accused No.1 was on the way is established. It is also established that the witnesses and the deceased stopped seeing the accused persons in order to enable the accused No.2 to ask the accused No.1 to return his money at which time the accused persons st arted assault on them with weapons such as iron rod and iron rake. The fact that it is not established that what weapon the accused No.1 was carrying or whether he was carrying any weapon or not would not absolve him of his liability contemplated in Section 34 of the Indian Penal Code in commission of the grave

offence like under Section 304-I along with Section 323 of the Indian Penal Code. Therefore, I have no doubt whatsoever that the right of private defence is not available in this case to the Appellants and, therefore, they cannot be given the benefit of the provision of Section 96 of the Indian Penal Code.

11. Once we reach this conclusion, all other objections raised on behalf of the Appellants regarding the prosecution evidence are put at rest. It was urged on behalf of the Appellants that the prosecution has suppressed the material facts on record because they have not explained the injuries which were on the persons of the accused which were caused at the time of the incident. However, it must be noted that evidently those were very simple injuries and there is nothing on record to show that such injuries were caused due to aggressive assault on the part of the witnesses or the deceased. However, it is well established legal proposition that the effect of non-explanation by the prosecution about the injuries on the accuse persons would depend on the facts and circumstances of each case. In the present case, we have already seen that non-explanation of the injuries on the persons of

the accused by the prosecution would not, by itself, make available the right of private defence to the Appellants and, therefore, it cannot be said that the prosecution is guilty of suppression of truth from the Court.

12. For the reasons recorded above, I have no doubt whatsoever that the learned trial Judge has rightly concluded that the Appellants are guilty of the offences punishable under Sections 304 (Clause I) and 323 read with Section 34 of the Indian Penal Code. I am also satisfied from the record that the Appellants have no right of private defence available from the evidence on record and, as such, the reasoning adopted and the findings recorded by the learned Sessions Judge would brook no interference.

13. As a result, the Appeal stands dismissed.

The Appellants are on bail and they shall surrender to the concerned Police Station within 3 (three) weeks from the date of this Order.

P.V. KAKADE,J.