THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

Crl. A. No. 16 of 2016

Prakash Subba,
Son of Late Ash Bir Subba
@ Maila Buro,
Resident of Lower Kamrang,
Namchi P.O. and P.S. Namchi,
South District of Sikkim.

… Appellant.

versus

State of Sikkim

… Respondent.

Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973.

Appearance:

Mr. Bhaskar Raj Pradhan, Sr. Advocate with Mr. Tempo Gyatso Bhutia, Ms. Tshering Palmoo Bhutia, Ms. Sonam Chuden Bhutia and Mr. Dichen Wangdi Lachungpa, Advocates for the Appellant.

Mr. Karma Thinlay, Addl. Public Prosecutor with Mr. Santosh K. Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the State.

J U D G M E N T
(14.03.2017)

Satish K. Agnihotri, CJ

The instant appeal is directed against the conviction of the appellant/convict under provisions of Section 304 Part I IPC and sentencing to seven years rigorous imprisonment and a fine of Rs.5,000/-. In default of payment of fine, the appellant/ convict is to further undergo three months simple imprisonment.

2. The trial Court, on appreciation and consideration of evidences adduced by the parties and other circumstantial evidences, held that on 29.06.2014, around 2135 hours, the appellant/convict Prakash Subba assaulted the deceased Yogesh Subba on the neck with a Khukuri (M.O. IV) inflicting fatal injuries without premeditation and on sudden provocation, in heat of passion and fit of anger, which resulted into death of the deceased. It is further held that the appellant/convict was fully aware that hitting the deceased with such a weapon even without any motive or intention will cause death of a person and as such the deceased, who happened to be his son was killed by the appellant/convict, who had no intention to do it. Fatal injuries sustained by assault on the neck of the deceased were the cause of his death. Resultantly, the convict was held guilty under the aforestated provisions and sentenced accordingly.

3. Mr. Bhaskar Raj Pradhan, learned Senior Counsel appearing for the appellant/convict, would contend that the appellant has been held guilty without proving the case by the prosecution. The prosecution has failed to establish its case even by way of circumstantial evidence. The trial Court has proceeded to convict the appellant/convict relying upon inadmissible evidences. There was a lack of proper investigation as it was done on tampered records to establish the guilt of the appellant/convict. The appellant/convict was wrongly convicted under Section 304 Part I IPC. The entire judgment is based on such evidences, which are not admissible in the teeth of legal provisions under Sections 25, 26 and 27 and Section 60 of the Indian Evidence Act, 1872 read with Section 162 of the Code of Criminal Procedure, 1973.

4. Elaborating the above contentions, learned Senior Counsel would contend that the trial Court has mainly relied upon the statements of Krishna Prasad Ghimiray (PW-4) who witnessed the disclosure statement made by the appellant/convict to the police on 30.06.2014 at around 13:20 hours. Deepak Das (PW-5) was also a witness to the disclosure statement made by the appellant/convict and Karma Doma Bhutia (PW-19) was the Investigating Officer. It is further urged that the disclosure made by the appellant/convict before the police was held as 'extra judicial confession', contrary to the

provisions of Sections 25 and 26 of the Evidence Act. In support of his contention, learned Senior Counsel relied on decisions of the Supreme Court in ***State (NCT of Delhi) vs. Navjot Sandhu alias Afsal Guru***[1] and ***Indra Dalal vs. State of Haryana***[2].

5. It is next contended that relying on the said purported disclosure statement made on 30.06.2014, at 13:20 hrs. the prosecution has stated the fact that Khukuri was recovered in pursuance thereof, when the Investigating Officer had already showed the said Khukuri to Dr. O.T. Lepcha (PW–12) beforehand, as is evident from the Autopsy Report (Exhibit-18) conducted between 11.30 a.m. to 12.30 p.m. on the same day, much prior to recording of alleged disclosure statement (Exhibit-8). This fact is contrary to the well settled principles of law, as exposited by the Supreme Court in ***Vijender Vs. State of Delhi***[3] ***and Indra Dalal*** (supra). Further, reliance on the statements of the disclosure statement witnesses is also hit by the provisions of Sections 25 and 26 of the Evidence Act and as such is inadmissible in evidence. Learned Senior Counsel further refers to and relies on the observations of the Supreme Court in ***Mohamed Inayatullah vs. The State of Maharashtra***[4]***,***

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1 *(2005) 11 SCC 600*
2 *(2015) 11 SCC 31*
3 *(1997) 6 SCC 171*
4 *(1976) 1 SCC 828*

Surinder Pal Jain vs. Delhi Administration[5]***,*** and ***Mustkeem alias Sirajudeen vs. State of Rajasthan***[6].

6. It is further contended that the learned trial Court had accepted the prosecution evidence as it is on the basis of investigation report and without finding out the fact independently, relying solely on the police report submitted under provisions of Section 173 Cr. P.C. to hold the appellant/convict guilty which is erroneous. The finding of the trial Court is not supported by legal evidence.

7. Learned Senior Counsel would next contend that the so called eye witnesses are not coherent as Vickey Chettri (PW-18) who allegedly stated in his Sec. 161 Cr. P.C. statement that he had seen the appellant/convict making first attack on the deceased, but in his statement before the trial Court he stated that he did not see the appellant/convict assaulting the deceased with a Khukuri. Ratna Tamang (PW-10) wife of the deceased and daughter-in-law of the appellant/convict, being an interested witness, could not be relied on without there being a corroborative statement from other witnesses. Mr. Pradhan would further contend that it is a cardinal principle of criminal jurisprudence that if two views are possible, the view favourable

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5 *(1993) Supp (3) SCC 681*
6 *(2011) 11 SCC 724*

to the accused should be adopted. In support of his contention, the learned senior counsel relies on the decisions of the Supreme Court in ***Kashiram and others vs. State of M.P.***[7] and ***State of Rajasthan vs. Raja Ram***[8].

8. Submitting that the human blood was not found in Khukuri, as per the RFSL expert, it is further stated that though the blood allegedly found on the body of the appellant/convict, was examined, but the appellant/convict was not medically examined. Thus, the conclusion that the presence of human blood on the body of the accused as an evidence to support the case of the prosecution is against the basic principles of criminal jurisprudence. Discovery of alleged Khukuri cannot be described to be the result of the disclosure statement made by the appellant/convict as is evident that the same was shown to the Doctor, much before disclosure statement was recorded. The trial Court has further held that the presence of Khukuri in the house is a common practice in the State. It cannot be held that Khukuri belonged either to the accused or to the victim. It is further contended that alternatively without prejudice as the trial Court has held that there was no premeditation or motive to kill the victim and the victim was killed on a spur of moment, to save himself from squeeze of the neck by the deceased

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7 *(2002) 1 SCC 71*
8 *(2003) 8 SCC 180*

in a situation where the convict was strangulated which might led to death of the convict, the convict in private defence gave the Khukuri blow on the body of the deceased and as such the appellant is entitled to the benefit of private defence. Private defence falls within the parameter of Section 96 of the IPC, wherein the alleged offence committed by the convict is no offence in the eyes of law.

9. *Per contra*, Mr. Karma Thinlay, learned Additional Public Prosecutor appearing for the prosecution-State, would contend that after a scuffle between the appellant/convict and deceased, the appellant/convict went to his room upstairs. After a while, the deceased again rushed to the room of appellant/ convict and there was a noise of scuffle and fighting which led to death of the deceased. When the other members of the family went to the room, it was found that the deceased was lying in a pool of blood on account of injuries on the neck which led to the conclusion that the appellant/convict was the person who has committed the offence. While going to the room of appellant/ convict, the passage was found locked by the deceased, thereafter the deceased was found in a pool of blood as stated by the family members. There is a little confusion in respect of witnesses statements. It is not the case of the appellant/convict that a third person was involved in committing the assault on the deceased. In respect of the blood stain found on the body of the

appellant/convict, it is stated that since no cut injury was noticed in the body of the appellant/convict, further examination was not done. That the forensic examination report, Exhibit-19, clearly gives a positive finding that the same was human blood group of 'A'. The deceased's blood group was also 'A'. The weapon of offence was recovered at the instance of appellant under Section 27 of the Indian Evidence Act. It is further submitted that it is for the accused to dispel the burden under Section 106 of the Evidence Act, when there were only two occupants in the room, where the deceased was found bleeding profusely due to fatal injuries on the neck, by the family members - witnesses. It was, therefore, incumbent upon the appellant to have tendered some explanation in order to avoid any suspicion. The appellant/ convict did not give explanation but made a statement of having committed offence before the police. Thus, the appellant/ convict did not fully discharge the burden as contemplated under the provisions of Section 106 of the Evidence Act. Section 106 of the Evidence Act stipulates that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The convict failed to give any explanation except making bald denial in its Section 313 Cr. P.C. statement. Thus, considering all circumstantial evidence and lack of explanation on the part of the convict, it was rightly held that the convict has assaulted the deceased which resulted into

his death. To support his contention, learned Addl. Public Prosecutor has relied on ***K.H. Shekarappa and others vs. State of Karnataka***[9]***, Prithipal Singh and others vs. State of Punjab and another***[10] and ***Gajanan Dashrath Kharate vs. State of Maharashtra***[11]***.***

10. Mr. Karma Thinlay, learned Addl. Public Prosecutor, would further contend that the medical report supports the cause of death. It is also submitted that the blood might not be found in the weapon of offence but in due course of time disclosure made by the appellant/ convict in pursuance thereafter discovery of weapon of offence cannot be rejected outright as is evident from the observations made by the Supreme Court in ***State of Rajasthan vs. Raja Ram***[12]***, Sunil Clifford Daniel vs. State of Punjab***[13]***, Mritunjoy Biswas vs. Pranab alias Kuti Biswas and another***[14]***,*** and ***Kiriti Pal and others vs. State of West Bengal and another***[15].

11. The contention of right of private defence is not applicable to the appellant/ convict in the facts of the case. The appellant / convict has admitted the fact of assaulting the

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9 *(2009) 17 SCC 1*
10 *(2012) 1 SCC 10*
11 *(2016) 4 SCC 604*
12 *(2003) 8 SCC 180*
13 *(2012) 11 SCC 205*
14 *(2013) 12 SCC 796*
15 *(2015) 11 SCC 178*

deceased and the same cannot be rejected on the ground that it was disclosed before the police officer, as the disclosure was made before lodging of FIR and commencement of the investigation. Learned Additional Public Prosecutor relies on an observation of the Privy Council in ***Pakala Narayana Swami vs. Emperor***[16] and ***Faddi vs. State of Madhya Pradesh***[17].

12. The trial Court had already considered the aspect of private defence while converting the conviction from Section 302 IPC to Section 304 Part I IPC. Thus, further interference is not necessitated. Learned Addl. Public Prosecutor pleads for dismissal of the appeal and confirmation of the conviction and sentence.

13. Before recording the sequential events which led to the death of Yogesh Subba (deceased), I proceed to examine the statements made by the witnesses. Amrita Subba (PW-9) wife of the convict and mother of the deceased stated in her main examination that she does not remember anything about the incident. In the cross-examination by the prosecution, she stated that the father and son (accused and deceased) used to have discussions and the deceased was slightly drunk on the

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16 AIR 1939 Privy Council 47
17 AIR 1964 SC 1850

relevant day, i.e. on 29.06.2014, when the incident took place. She denied her statement given under the provisions of Section 161 Cr. P.C., wherein she had stated that at around 08.30 p.m. on 29.06.2014, when she was in the sitting room cutting vegetables, her nephew Vickey was in the kitchen cooking food. Her husband, the convict, came home in an intoxicated state and noticed the three mattresses on the bed, he asked Vickey to take the mattresses upstairs to the bedroom. When Vickey was removing the mattresses upstairs, her son Yogesh Subba came there and started discussion. There was a hot discussion between the convict father and the deceased son and they started hitting each other. They were separated and the convict went upstairs to his bedroom. The deceased son followed him. Anticipating further fight Vickey was sent upstairs. On hearing the screaming, she along with her daughter-in-law, namely Ratna Tamang (PW-10) went upstairs and noticed the deceased was lying on the floor in a pool of blood and on the side Vickey was standing. Thereafter, a vehicle was arranged by Vickey to remove the deceased to the hospital. Amrita Subba (PW-9) denied all in her statement before the Court. Accordingly, she was declared hostile. In cross-examination by the counsel for the defence, it was stated by her that due to omission and commission of her sons, who were in the habit of taking drugs, she was suffering from depression and further it was stated that

the outside of the relevant room, the area was very slippery on account of construction in the house.

14. Ratna Tamang (PW-10) wife of the deceased and daughter-in-law of the convict stated that the convict came around between 8.00 and 8.30 p.m. on the fateful day i.e. 29.06.2014 and started scolding the deceased in connection with the mattress and T.V. and an altercation followed. The convict asked the nephew Vickey Chettri (PW-18) to take the T.V. from ground floor to the first floor. Accordingly, Vickey took the T.V. to the first floor. On finding that the T.V. was removed to the first floor, where the convict was living, the deceased entered into scuffle with his father, the convict. At this moment, the witness was called by her mother-in-law. On reaching there, she found that her deceased husband was holding the convict's neck from behind. They were separated by Vickey and her mother-in-law (PW-9). The convict went to his room on the top floor and the deceased followed him. Thereafter, she along with Vickey and her mother-in-law (PW-9) followed them. In the meantime, her brother-in-law, namely, Deepesh Subba also came and persuaded them not to continue with the arguments and altercation. Her brother-in-law and deceased came out of convict's room and the deceased also caught hold of Deepesh Subba. Thereafter, again the deceased went to convict's room, where she stated to have seen the convict giving a blow of

Khukuri on the left side of the neck of the deceased. Resultantly, he fell down on the ground. In her cross-examination, she stated that the convict told the deceased to take the mattresses, the deceased got agitated and started altercation. She along with her mother-in-law and Vickey Chettri intervened and separated them. In the cross-examination, she also reiterated the fact that when her father-in-law, the convict, entered into the house and enquired about the mattress and asked to take the TV to upstairs and a scuffle between the convict and the deceased followed. She was called by her mother-in-law from the room and they were again separated by her mother-in-law, Vickey and herself in the victim's room. Thereafter, the deceased had an altercation with Deepesh Shubba. It is also stated by her that she had seen that her deceased husband slapped Deepesh. She reiterated the fact that she had seen that her father-in-law gave a Khukuri blow on the left side of her deceased husband's neck. She admitted the fact that her deceased husband also used to consume alcohol occasionally but didn't take drugs since her marriage.

15. Vickey Chettri (PW-18), another witness of the incident stated in his deposition that he was present in the house of the convict along with the wife of the deceased and her mother-in-law. The convict asked him to take the quilt to the guest room. When he was taking the quilt to the guest room the

deceased enquired as to why he was taking the said quilt. He replied that the quilt was taken to the guest room on the direction of the convict. The deceased started quarreling with the convict and gagged the neck of the convict. But on intervention by other family members they were separated. The convict left for his room upstairs. After sometime, the deceased also went to the room of the convict. A commotion and scream was heard by the wife of the deceased and wife of the convict and they went to the room upstairs. On reaching there they noticed that the deceased was lying on the floor, profusely bleeding from the neck. Then he went for a taxi to evacuate the deceased to the hospital and got admitted in the emergency ward. In his cross-examination, Vickey Chettri (PW-18) stated that the deceased was a very arrogant person and he used to bring lots of friends to the house and create nuisance and he used to consume alcohol. He further stated that the appellant/convict, his uncle asked him to take the quilt upstairs, however, the police has recorded "mattress" instead of quilt. He further stated that the deceased was in the habit of beating up his younger brother and on the relevant day when his younger brother interfered in the scuffle, he was assaulted by the deceased. The deceased followed the convict after approximately 15 minutes. On hearing the commotion from the upstairs he along with wife and mother of the deceased went to

the upstairs and found that the passage was locked, which was broke open and entered the room of the convict, wherein the deceased was found lying in a pool of blood. The witness categorically stated that he had not seen the convict assaulting the deceased with the Khukuri. Deepesh Subba, brother of the deceased and son of the convict was not examined.

16. It has come on record that the police officer at Sadar Police Station received information at around 21:35 hrs. on the same day from STNM Hospital that the deceased was brought to the emergency ward with serious injuries and later, he expired. On this information, the police officer Milan Kanta Sharma (PW-1) lodged FIR under Section 174 Cr. P.C. and proceeded to the hospital for further action. The autopsy was conducted on the next day on 30.06.2014 between 11.30 a.m. and 12.30 pm. The postmortem reported saturated wound placed over the left neck measuring 16 x 3 x muscles with clear cut margins. The depth of the wound is more over the anterior aspect of the wound and shallower over the posterior aspect. The left lower lobe of the left ear was also incised. The wound involved the skin, muscles and the vessels (Jugular). Horizontally placed spindle shaped wound was situated over the left side of chest posteriorly over the 4.5 intercostals space (left) and measures 12x4 cm x muscles. The cause of death was due to severe hypovolaemia as

a result of loss of blood due to homicidal chop wound of the neck and back as a result of sharp cutting moderately heavy weapon.

17. That at about 22:30 hrs. on the same evening, the convict surrendered at the Sadar Police Station and reported verbally that in the evening he has murdered his son, namely Yogesh Subba, the deceased in his residence. The police officer reported that he was found to be in drunken condition and also blood stains on his both the legs. He was referred to the STNM Hospital for medical examination. On examination, it was found that there was no cut or injury on his body and the blood stain found on his leg was human blood of Group 'A'. The sample blood of the deceased on examination was also reported to be of Group 'A'. Presence of blood in the cloths collected from the deceased as well as from the convict was not prominently noticeable. Human scalp hair seized from the place of occurrence gave positive test for blood group 'A'.

18. The time of recovery of Khukuri, the weapon of offence is doubted by the learned Senior Counsel appearing for the appellant/ convict, stating that the said Khukuri was available and shown much before the disclosure statement and alleged recovery was stated to have been made thereafter. The autopsy report does not give the timing of writing of the report but it is stated that the autopsy started at 11.30 a.m. and concluded at

12.30 p.m. Indisputably, in the report, there is a mention of Khukuri, wherein it is stated that the suspected weapon of offence was shown by the Investigating Officer to Dr. O.T. Lepcha (PW-12), who conducted the autopsy. The question remains as to whether the Khukuri was discovered in pursuance of the disclosure statement or the same was recovered prior to the disclosure statement made by the convict.

19. Krishna Prasad Ghimiray (PW-4) and Deepak Das (PW-5) are the witnesses to the disclosure statement. Both the witnesses have stated that the convict disclosed before the police in their presence on 30.06.2014 at around 13:20 hrs. that when he returned back from the town, he saw the mattresses being folded and kept on the table. He asked his family members as to why it was done, his son Yogesh Subba came forward and caught hold of his neck, when the nephew of the accused came and intervened and separated them. It was further stated that Yogesh Subba, the deceased followed the accused to his room and caught hold of the neck of the accused and squeezed. The accused tried to escape from the clutches of the deceased son and at the relevant time he could catch hold of Khukuri which was kept nearby the door. The accused disclosed before the police that after grabbing the said Khukuri, he gave one Khukuri blow on the neck of the deceased and another Khukuri blow on the back of the deceased. Thereafter, the accused kept the

Khukuri inside the godrej almirah, which he would show to the police. After recording the statement, they have gone to the place of occurrence, where the police seized one Khukuri along with the wooden scabbard from the same place, which was marked as M.O. IV. In the cross-examination, PW-4 stated that the property seizure memo was prepared by the police but was not filled up in presence of them. They were asked to sign the seizure memo only. However, PW-4 reiterated that he went to the place of occurrence at around 2.30 p.m. He also denied the name of other witness. The other witness, Deepak Das (PW-5) denied recording of the statement by the police in his presence. He also denied going to any other place beside the police station and the contents of the Exhibits 8, 9 and 10.

20. The Khukuri along with the scabbard was examined by the forensic expert, wherein no blood was found, which was marked therein as B10-82(A) and B10-82 (A1).

21. On analysis of the aforestated narrations of the family members, who were present during the incident on the fateful day, i.e. on 29.06.2014 at around 8.00 to 8.30 p.m., emerging facts are that the victim entered into the house and on seeing the mattresses and T.V. in the ground floor, directed his nephew, Vickey Chettri (PW-18) to take the same to upstairs. On this direction, the deceased got up and became angry which resulted

into a scuffle. It is also established that the deceased held his father, the convict, by neck and tried to assault him. On intervention by other family members, namely his mother, his wife and Vickey Chettri, they were separated. After some time again altercation took place between the deceased and the convict. The deceased's younger brother, Deepesh Subba reached and intervened. The deceased assaulted his brother also. After this incident, the convict went to his room upstairs. The deceased after sometime followed the convict to his room locking the door of the passage. The commotion and scream arising from the room prompted other members of the family to go to the room of the convict upstairs. On finding the door of the passage locked, it was broken open and on reaching there it was noticed that the deceased has received fatal injuries on the neck which led to profuse bleeding and resulted into death of the deceased in the hospital. Wife of the deceased had stated that she had seen the convict giving blow with the Khukuri on the neck of the deceased which is not corroborated by other witnesses present in the room. Thus, the statement of wife of the deceased, who was an interested witness, is not credible and unworthy of acceptance. Vickey Chettri, the nephew of the convict and cousin brother of the deceased was present throughout the incident and had also taken the deceased thereafter to the hospital, was consistent in his statements and is

credible. Thus, it is established that no eye witness had seen the convict assaulting the deceased with Khukuri. All the witnesses have seen the deceased lying in a pool of blood on account of fatal injuries on the neck. The deceased succumbed to his injuries in the hospital. The post mortem report clearly indicates the death was caused due to serious cut in the neck which led to severe hypovolaemia as a result of loss of blood due to homicidal chop wound of the neck and back as a result of sharp cutting moderately heavy weapon.

22. It appears that the prosecution has proceeded to establish the case on the basis of statement made by the family members as well as confessional statement made by the appellant/convict in the police station on 29.06.2014 in the night. Mr. Bhaskar Raj Pradhan would submit that the confession made by the appellant/convict before the police cannot be held as 'extra judicial confession' in the teeth of Section 25 and 26 of the Indian Evidence Act, 1872.

23. As analyzed earlier, the convict came to the police station around 22:30 hrs. and on the same evening, he made confessional statement before the police that he has murdered his son. Section 25 of the Evidence Act prescribes that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 stipulates confession

by accused while in custody of police not to be proved against him. In the case on hand, before the convict was taken into custody, he has made the statement.

24. It is evident that the weapon used for assaulting the deceased does not figure in the list of exhibits handed over to PW-19, the subsequent Investigating Officer. The Investigating Officer has recorded the disclosure statement after commencement of the investigation. The Khukuri was discovered on the disclosure statement made by the appellant/convict in presence of independent witnesses. The appellant/ convict had not denied the discovery of Khukuri. Thus, even if thereafter one witness has turned hostile, the evidence of the appellant/ convict cannot be rejected.

25. Admittedly, there was a scuffle between the appellant/ convict and deceased, which had first taken place down stairs. Thereafter, the appellant/convict went to his room upstairs and he was followed by the deceased. When the members of the family heard commotion and scream from the room, they went to the room upstairs and found the deceased lying on the floor in a pool of blood.

26. In ***K.H. Shekarappa and others*** (supra) wherein the deceased were brought to the police station alive and when they

were produced before the medical officer, they were dead. The Supreme Court held as under: -

> "**15.** In view of the fact that the learned Judges of the court of appeal were equally divided in their opinion, the appeals with their opinions were laid before another learned Judge of that Court. The third learned Judge of the High Court of Karnakata, after hearing the parties and considering the record of the case, delivered his opinion mentioning that the guilt of the appellants was proved, but they had not committed offences punishable under Sections 143, 148, 326, 218 and 302 read with Section 149 IPC but had committed offences punishable under Sections 304 Part II and 324 both read with Section 34 IPC for having caused death of two persons, Rajakumar and Gurumurthy and causing hurt to injured Prakash respectively."

27. In ***Prithipal Singh and others*** (supra), the accused abducted the deceased and thereafter he was found dead. The Supreme Court observed as under: -

> "**79.** Both the courts below have found that the appellant-accused had abducted Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as to what happened to Shri Khalra, and if he had died, in what manner and under what circumstances he had died and why his *corpus delicti* could not be recovered. All the appellant-accused failed to explain any inculpating circumstance even in their respective statements under section 313 CrPC. Such a conduct also provides for an additional link in the chain of circumstances. The fact as to what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact situation, the courts below have rightly drawn the presumption that the appellants were responsible for his abduction, illegal detention and murder."

28. In ***Gajanan Dashrath Kharate*** (supra), the Supreme Court in the facts of the case, where the appellant was present with his father when death of his father took place. The Supreme Court held as under:

> "**13.** As seen from the evidence, appellant Gajanan and his father Dashrath and mother Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4-2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would

> undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime."

29. It is well settled principles of law as observed by the Supreme Court as aforestated when the deceased and the accused were together at the time of causing serious injury which led to the death of the deceased, it is incumbent upon the other person to give explanation. The appellant/convict has failed to offer any explanation in respect of the fatal injuries caused to his son, the deceased. All the facts leading to causing of fatal injuries and, thereafter, the appellant/convict had gone to the police station making a statement that he has murdered his son and did not offer any explanation in respect of the fatal injuries caused to the deceased, it leads to the conclusion that the convict had caused Khukuri blow on his son, Yogesh Subba, who sustained fatal injuries leading to his death. Finding of blood stain on the legs of the convict when he surrendered before the police without having any injury on his body and also the medical report indicates the blood group found on the legs of the convict was of Group 'A' and blood group of the deceased was also Group

'A'. All the facts lead to a conclusion that the fatal assault caused by the convict on his deceased son resulted in to his death.

The contention of the prosecution that the appellant/convict failed to discharge the burden as contemplated under Section 106 of the Evidence Act and also did not offer any explanation merits acceptance. It is held that the fatal injuries were caused by the appellant/ convict on the deceased who succumbed to his injuries.

30. In ***Pakala Narayana Swami*** (supra), while examining the confession made by the accused under Sections 25, 26 and 27 of the Evidence Act, observed as under:

> "…….No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. S. 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer so much of such information whether it amounts to a confession or not may be proved. It is said that to give S. 162 of the Code the construction contended for would be to repeal S.27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two Sections can in some circumstances stand together. Section 162 is confined to statements made to a police officer in course of an investigation. S. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. S. 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e.g. to a fellow prisoner, a doctor or a visitor. Such statements are not covered by S. 162. Whether to give to S. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by S. 27 it does not seem necessary to decide."

31. Subsequently in ***Faddi vs. State of M.P.*** (supra), wherein the person who lodged the first information report regarding the occurrence of the murder was subsequently held as

accused of the offence and tried. The Supreme Court, analyzing the scope of Section 25, held as under: -

> "(15) The report is not a confession of the appellant. It is not a statement made to a police officer during the course of investigation. Section 25 of the Evidence Act and S. 162 of the Code of Criminal Procedure do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court, viz., how and by whom the murder of Gulab was committed, or whether appellant's statement in Court denying the correctness of certain statements of the prosecution witnesses is correct or not. Admissions are admissible in evidence under S. 21 of the Act. Section 17 defines an admission to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, thereafter mentioned, in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (c), (d) and (e) to S. 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in S. 21 to the provision that admissions could not be proved by the person who makes them. It is therefore clear that admissions of an accused can be proved against him.
>
> **xxxxx xxxxx**
>
> **(18)** We therefore hold that the objection to the admissibility of the first information report lodged by the appellant is not sound and that the Courts below have rightly admitted it in evidence and have made proper use of it."

32. In ***State (NCT of Delhi) vs. Navjot Sandhu*** (supra), the accused Afzal made confessional statement in his talk with TV and press reporters admittedly in the immediate presence of the police while he was in police custody. The Supreme Court held that the said confession should not be relied upon irrespective of the fact whether the statement was made to a police officer within the meaning of Section 162 Cr. P.C. or not.

33. In ***Indra Dalal*** (supra), the confessional statement of the accused persons were recorded after the arrest of the

accused persons when they were in police custody. The Supreme Court held as under: -

> "**16.** The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.
>
> **17.** The word "confession" has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgement of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is, other than a police officer, shall also become inadmissible.
>
> **18.** In the present case, as pointed out above, not only the confessions were made to a police officer, such confessional statements were made by the appellants after their arrest while they were in police custody. In *Bullu Das v. State of Bihar : (1998) 8 SCC 130*, while dealing the confessional statements made by the accused before a police officer, this Court held as under: (SCC p. 132, para 7)
>
> > "7. The confessional statement, Ext. 5, stated to have been made by the appellant was before the police officer in charge of the Godda Town Police Station where the offence was registered in respect of the murder of Kusum Devi. FIR was registered at the police station on 8-8-1995 at about 12.30 p.m. On 9-8-1995, it was after the appellant was arrested and brought before Rakesh Kumar that he recorded the confessional statement of the appellant. Surprisingly, no objection was taken by the defence for admitting it in evidence. The trial court also did not consider whether such a confessional statement is admissible in evidence or not. The High Court has also not considered this aspect. The confessional statement was clearly inadmissible as it was made by an accused before a police officer after the investigation had started."

34. In the case on hand, the appellant/convict has made disclosure statement on its own before initiation of investigation

and lodging of FIR. The appellant/convict was neither in custody nor under any influence or fear of police. The disclosure of the appellant/convict before the police on 29.06.2014 at 22:30 hrs. may not be rejected outright when the same is corroborated by evidence of other witnesses who are family members. Thus, reliance on the statement of the convict by the trial Court was neither improper nor illegal and it was admissible to this extent.

35. The next question raised by Mr. Pradhan is that the Khukuri was not discovered pursuant to the statement made by the appellant/convict as the khukuri was also shown to the Doctor before the confessional statement was made. On 30.06.2014, the statement was made around 13:20 hrs., stating that after assaulting the deceased, he has kept the Khukuri inside the almirah. PW-4 was the disclosure statement witness and he reiterated of being witness to the disclosure statement and also discovery of Khukuri in his presence. Autopsy report which records availability of Khukuri was written after autopsy report was concluded at around 12.30 p.m. Whether the Khukuri was shown during the conduct of autopsy or thereafter is not clear from the evidence. It appears that after autopsy was done, some time was taken to prepare the autopsy report and in the meantime, the Khukuri was recovered from the place of occurrence and produced before the Doctor. There is no dispute

that the Khukuri was discovered as a result of statement made by the accused at 13:20 hrs on 30.06.2014.

36. In the forensic examination, no blood was found on Khukuri. The contention of the learned Senior Counsel appearing for the appellant/convict is that the disclosure statement witnesses, particularly PW-5, had stated in the cross-examination that no statement was recorded by the police in his presence. He also does not know the contents of the exhibits and he did not go to any other place besides the police station. When the other witness, PW-4, had stated clearly that he has gone to the place of occurrence and the statement was recorded in his presence.

37. Referring to a decision of the Supreme Court in ***Anter Singh vs. State of Rajasthan***[18], the learned Additional Public Prosecutor would contend that the seizure memo cannot be out rightly rejected in view of the fact that some witnesses have made departure from the statement made during the investigation. In the facts circumstances of the case, his contention is worthy of acceptance.

38. In ***Sunil Clifford Daniel*** (supra), the Supreme Court observed as under:

> "**42.** A similar issue arose for consideration by this Court in *Gura Singh* v. *State of Rajasthan* : (2001) 2 SCC 205, wherein the Court, relying upon earlier judgments of this Court, particularly in *Prabhu Babaji Navle* v. *State of Bombay* : AIR 1956 SC 51, *Raghav*

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18 *(2004) 10 SCC 657*

> *Prapanna Tripathi* v. *State of U.P.* : AIR 1963 SC 74 and State of Rajasthan vs. *Teja Ram* : (1999) 3 SCC 507 (SCC p. 514, para 25) observed that a failure by the serologist *to detect the origin of the blood due to disintegration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all*. Sometimes it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain, with some objectivity, no benefit can be claimed by the accused, in this regard."

39. In ***Kiriti Pal and others*** (supra), the Supreme Court observed as under:

> "**23.** Wooden butts recovered on 28-1-2009 were sent to the forensic science laboratory. On the seized wooden butts, blood was detected, but the same was insufficient for serological test (Ext. 56). Detection of blood on the seized wooden butts cannot be discarded on the ground that it was insufficient for serological test. There is no legal proposition, the detection of blood is unworthy of acceptance merely because it was insufficient for serological test and the case of the prosecution cannot be doubted on that score."

40. In view of the well settled principles of law, applying to the facts of the case, when the Khukuri was recovered in pursuance of the statement made by the convict, the Khukuri and scabbard had marks of blood over it at the relevant time and when it was sent for forensic examination, it appears that the same was not sufficient due to denaturation and reported negative test for presence of blood, as the report was made after about one and half months. Thus, it is held that the Khukuri, which was used for assaulting the deceased, was recovered in pursuance of the statement made by the convict. The contention of the learned counsel appearing for the appellant/convict deserves to be rejected.

41. Statement made by the convict before the police at the first instance when he was not in the custody cannot be out rightly rejected under the provisions of Section 25, 26 and 27 of the Evidence Act. The confessional statement made on 30.06.2014 is admitted to the incident of recovery of weapon of offence. The other part of the confession is not admissible under the provisions of Section 26 and 27 of the Evidence Act. However, the statement made on 29.06.2014 at 22:30 hrs. before commencement of the investigation and lodging of FIR by the convict corroborate with other witnesses and deserves consideration. The submission of learned Senior Counsel appearing for the appellant/convict is that the trial Judge has held the guilt mainly relied on the report submitted by the police is not correct, circumstantial evidence clearly indicate the involvement of the convict in assault of the deceased.

42. The next question, whether the accused has given Khukuri blow exercising his right of private defence. The wife of the deceased has stated in her statement that her father-in-law was a good person. The reputation of the father-in-law in the society was also appreciated by other witnesses.

43. Section 96 IPC contemplates that nothing is an offence which is done in the exercise of the right of private defence. Section 97 IPC provides for right of private defence of

the body and of property. Section 98 IPC prescribes right of private defence against the act of a person of unsound mind, etc. Section 99 IPC stipulates that there is no right of private defence against an act which does not reasonable 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. Section 100 IPC reads as under:

> "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.
>
> *Seventhly*– An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act."

44. In the case on hand, learned Senior Counsel appearing for the appellant/convict submits that the act of accused to defend his body is protected under provisions of

Sections 96 and 97 IPC and such offence is not an offence as it has come on the statements of family members that the deceased assaulted the father, the convict and caught hold of his neck on the ground floor. Thereafter, according to the convict, the deceased again caught hold his neck and squeezed. Resultantly, he gave a Khukuri blow to remove the deceased. It is further recorded by the trial Court that there was no premeditation and on sudden provocation, the assault was done in heat of passion on a spur of moment. Learned Senior Counsel also submitted that the Khukuri assault was made in defence and not to kill his own son, the deceased.

45. In ***Deo Narain vs. The State of U.P.***[19]***,*** the Supreme Court held as under: -

> "**5.** ……. The blow, it is known, was aimed at a vulnerable part like the head. A blow by a lathi on the head may prove instantaneously fatal and cases are not unknown in which such a blow by a lathi has actually proved instantaneously fatal. If, therefore, a blow with a lathi is aimed at a vulnerable part like the head we do not think it can be laid down as a sound proposition of law that in such cases the victim is not justified in using his spear in defending himself. In such moments of excitement or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to cooly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression. No doubt, the High Court does seem to be aware of this aspect because the other accused persons were given the benefit of this rule. But while dealing with the appellant's case curiously enough the High Court has denied him the right of private defence on the sole ground that he had given a dangerous blow with considerable force with a spear on the chest of the deceased though he himself had only received a superficial lathi blow on his head. This view of the high court is not only unrealistic and unpractical but also contrary to law and indeed even in conflict with its own observation that in such cases the matter cannot be weighed in scales of gold."

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19 (1973) 1 SCC 347

46. In ***Yogendra Morarji vs. State of Gujarat[20],*** the Supreme Court has analyzed the penal clauses dealing with the right of private defence and held as under:

> "**13.** The Code excepts from the operation of its penal clauses "large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations". The most salient of them concerning the defence of body are as under : firstly, there is no right of private defence against an act which is not in itself an offence under the Code; secondly, the right commences as soon as – and not before – a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is coterminous with the duration of such apprehension (Section 102). That is to say, the right avails only against a danger imminent, present and real; thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence (Section 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack". It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; fourthly, the right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled; fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant; sixthly, the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the protection of the public authorities" (section 99)."

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20 (1980) 2 SCC 218

47. In ***Laxman Singh vs. Poonam Singh and others***[21]**,** analyzing Section 96 IPC, the Supreme Court held as under:

> "**6.** 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 acted in 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 of the plea of self-defence, and, in the absence of proof, it is not possible for the Court of 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 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 of record. (See *Munshi Ram and others 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 off 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

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21 AIR 2003 SC 3204

> discharge his onus by establishing a mere preponderance of robabilities 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."

48. In ***Shriram vs. State of M.P.[22],*** the Supreme Court held as under: -

> "**11.** As noted in *Buta Singh* v. *State of Punjab* : *(1991) 12 SCC 612* a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who are armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use 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 hypertechnical 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 a finding of fact."

49. In ***Thankachan vs. State of Kerala[23]***, the Supreme Court examining the right of private defence held as under :

> "7. It is also useful to notice also the subsequent decisions of this Court entitled *Wassan Singh v. State of Punjab : (1996) 1 SCC 458* and *Sekar v. State : (2002) 8 SCC 354* (to which one of us, namely, Justice Arijit Pasayat was a party), wherein the said principle has been reiterated. In moments of excitement or disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use only so much of force in retaliation commensurate with the danger apprehended to him. Where an assault is about to take place by use of force, it would be lawful to repel the force in self-defence and the right of private defence would commence as soon as the threat to him becomes imminent. Such situations have to be judged in the light of what happens on the spur of the moment on the spot and keeping in

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22 (2004) 9 SCC 292
23 (2008) 17 SCC 760

view the normal reaction in the ordinary course of human conduct as to how each person would react under such circumstances in a sudden manner with an instinct of self-preservation. Further, as observed in *Sekar case* (SCC p. 359, para 8) that "the number of injuries is not always a safe criterion for determining who the aggressor was".

8. 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 to prove the charge and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea in defence to the hilt and may discharge his onus by establishing on the principle of mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

50. In ***Darshan Singh vs. State of Punjab and another***[24], the Supreme Court has resolved the principles of right to private defence as under: -

"58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

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24 (2010) 2 SCC 333

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

51. In ***Suresh Singhal vs. State (Delhi Administration)***[25], the Supreme Court observed as under: -

"27. It was argued by Mr. P.K. Dey, learned counsel for the State, that the deceased and his brothers were unarmed and there was no need for the appellant to have used the gun. Given the fact that the deceased and the others were attempting to strangulate the appellant, it would have been unrealistic to expect the appellant to "modulate his defence step by step with any arithmetical exactitude". This Court has held that a person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or upon being directly threatened.

28. We are inclined to think that the appellant had been put in such a position.

29. We have no doubt that the appellant exceeded the power given to him by law in order to defend himself but we are of the view that the exercise of the right was in good faith, in his own defence and without premeditation… ……"

52. In ***Rajesh Kumar vs. Dharamvir and others***[26], the Supreme Court held that :

"**20.** 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 and the fascicle of Sections 97 to 106 thereof lays down the extent and limitation of such right. From a plain reading of the above sections it is manifest that such a right can be exercised only to repel unlawful aggression and not to retaliate. To put it differently, the right is one of defence and not of requital or reprisal. Such being the nature of right, the High Court could not have exonerated the accused persons of the charges leveled against them by bestowing on them the right to retaliate and attack the complainant party."

53. In *State of U.P. vs. Ram Niranjan Singh : (1972) 3 SCC 661*, the Supreme Court in the facts and circumstances obtaining therein was of the opinion that two incidents which

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25 2017 SCC Online SC 82
26 (1997) 4 SCC 496

have taken place on 7th December, 1965 were integrated ones and, thus, the same right of private defence the Respondent had for causing the death of the deceased No. 1 was available to him in respect of the deceased No. 2. The said decision has no application to the present case.

54. In ***Subramani and others vs. State of T.N.***[27], again a positive case of exercise of right of private defence was made out. Therein the question was as to whether the accused had exceeded their right of private defence. They were held to have initially acted in exercise of their right of private defence of property and in exercise of the right of private defence of person later and in that factual backdrop, it was held:

> "21. In the instant case we are inclined to hold that the appellants had initially acted in exercise of their right of private defence of property, and later in exercise of the right of private defence of person. It has been found that three of the appellants were also injured in the same incident. Two of the appellants, namely, Appellants 2 and 3 had injuries on their head, a vital part of the body. Luckily the injuries did not prove to be fatal because if inflicted with more force, it may have resulted in the fracture of the skull and proved fatal. What is, however, apparent is the fact that the assault on them was not directed on non-vital parts of the body, but directed on a vital part of the body such as the head. In these circumstances, it is reasonable to infer that the appellants entertained a reasonable apprehension that death or grievous injury may be the consequence of such assault. Their right of private defence, therefore, extended to the voluntarily causing of the death of the assailants."

55. In common thread running through the cases cited hereinabove, the principles of applicability of law to right of private defence as contemplated under Sections 96 to 99 IPC is

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27 (2002) 7 SCC 210

well settled. The right to private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation. Though it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack. Pleading in so many words is not necessary. No aggressor can claim right to private defence on his life and property on the ground that the life and property is a natural right.

56. A person who is born in the civilized world has to adopt a method to survive and preserve his life and property. Applying this principle to the fact of the case, the appellant/convict being father did not like certain actions of his son. He asked articles like mattresses and TV, to be removed and placed in the room upstairs, the son, who was, as reported by the witnesses, arrogant, assaulted him and held his neck firstly on the ground floor. On intervention, the father leaves the place and goes to his room upstairs. The deceased followed him and again started squeezing his neck hard with hands leading to strangulation, which may cause death, in such a situation the

appellant/convict has every right to exercise private defence and in such an unexpected situation, he hit the deceased with a weapon which caused fatal injuries. It cannot be held that he exceeded his right of private defence and he ought to have modulated his assault in composed mind.

57. It is well settled that in case of strangulation, it is unrealistic to expect of the appellant/convict to modulate his defence step by step with any arithmetical exactitude. The appellant/convict exercised his right to preserve his life and limb and exercised his right to defence, inflicted injuries on the deceased son. It has come on record that the appellant was a doting father and used to take care of his family members and also has a reputation in the society. In such a background, I am of the firm opinion that the assault made by the appellant/convict with a Khukuri on his deceased son was in exercise of his right of private defence and it is within the scope and ambit of Section 96 IPC, and as such the act was no offence.

58. Resultantly, the impugned judgment rendered by trial Court is set aside, the appellant is acquitted from all the charges. The appeal is allowed. The appellant be set at liberty forthwith.

Sd/-
Chief Justice
14.03.2017

Approved for Reporting : Yes/~~No~~.
jk Internet : Yes/~~No~~.