
(1961) 01 AP CK 0015
In the Andhra Pradesh High Court

Macherla Kondian

APPELLANT

Vs

Ede Venkataratnam and Others

RESPONDENT

Date of Decision : 16-01-1961

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 195, 200, 202, 208, 209
Penal Code, 1860 (IPC) — Section 143, 307, 325, 326, 426

Citation : (1962) CriLJ 634

Hon'ble Judges : Anantanarayana Ayyar, J

Bench : Single Bench

Judgement

Anantanarayana Ayyar, J.—One Macherla Peda Kondihh filed a private complaint in P.R.C. No. 2 of 1958 on the file of the Judicial Second Class Magistrate, Repalle. Subsequently, he died. His brother Macherla China Kondiah (PW. 1) continued to prosecute the case. Ultimately, the learned Magistrate committed 26 accused in that case to the Sessions Court, Gunlur Division for trial. The learned Additional Sessions Judge, Guntur framed thirty-six charges against the 26 accused in S.C No. 48 of 1958 on his file. After full trial in that case, the learned Additional Sessions Judge acquitted every one of the accused of all the charges framed against him. Macherla China kondiah was examined P.W. in that case. He filed C.M.P. No. 203 of 1959 in this Court for leave to file an appeal against the order of acquittal. Special leave was granted by an order of this Court dated 24.2.1959 and the appeal filed by him was taken on file as Criminal Appeal No. 231 of 1959. No appeal was filed by the State against the acquittal of any of the accused.

2. The prosecution examined 30 witnesses and marked documents, Exs. P-1 to P-58. The prosecution story was briefly to the following effect: Ilavaram is a village which is a few miles from Repalle. The prevailing community in that village consists of Padma Saleelu who were about 3,000 strong. Yadavas and Gowdas form a small minority numbering about 200 or 300. In the elections during the year 1952, Padma Saleelu (Weavers) supported the Congress party whereas the Yadavas and Gowdas supported the communist Party. Subsequently,

in the year 1955 the Padma Saleelu got a drama called "Sasirekhapsarinayam" enacted in which there was some comic scene introduced which reflected badly on the Yadavas who were referred to as "Gollas" and whose ancestry was mentioned to be as uncertain as that of their sheep. The Yadavas felt it to be a great insult. Subsequently, the Padma Saleelu enacted some other drama. A14, who is a Yadava, filed a petition before the Magistrate for stopping the performance of a play (drama) called "Kalidasu1".

In due course, this petition reached the Sub Inspector of Police who investigated into it. In the morning of 21.12.1955, the S.I. camped at Vellatur, sent for the Padma Saleelu as well as Yadavas and took an undertaking from the Padma Saleelu not to humiliate the Yadavas any further. The very next day a big rioting took place in the village in which two groups, viz. Padma Saleelu on one side and Yadavas and Gowdas on the other, had a clash with the result that several people on both sides got injured. The party of Yadavas and Gowdas were the aggressors. They attacked the Padma Saleelu and injured a number of them. The Padma Saleelu acted in exercise of their right of private defence In the course of the attack A-14 beat P.W. 26 causing very severe injuries. The Doctor (P.W. 29) in charge of the Hospital at Repalle, examined the injured and issued wound certificates for the following injured persons (a) P.Ws. 1 to 15 and 26; (b) A-4 A-5, A-8, A-13 A-15, A-18, A-19, A-20, A-21, A-22, A-23, (c) D. Ws. 2, 5, 8 and one Tata Raghavulu who had penetrating stab wound few inches below the chest as a result of which he later died.

3. The Village Munsif (P.W. 28) sent the report Ex. P1 to the Police Station. On receipt of it, the Head constable (PW. 30) went to the village. He found A-22 and A-23 injured and sent them to the Hospital. The Circle Inspector who came to the village the same day investigated the case. He examined P.Ws. 1, 15 and 26 and sent them to the Hospital. He, however, was not examined as a witness, because at the time of the trial he was blind and he was unable to examine and identify the persons.

4. P.W. 26, Battu Kotaiah is an old man of 70 years His brother died on 21.12.1955. On the next day, i.e. 22.12.55 he went out from his house to secure vegetables for performing the second day funeral ceremony of his brother. On his way, he saw the rioting which was going on near the well close to the house of the Karnam. Then A13 beat him with a stick on the head and A-14 beat him with a stick across the chest PW. 26 vomited blood and fell down unconscious. He was taken to the Hospital at Repalle and later to the Hospitals at Tenali and Guntur. He sustained severe injuries which were described by the Doctor (P.W. 29) in the wound certificate, Ex. P-17. The injuries included the fracture of several ribs and are grievous in nature. Similarly, A-6 beat P.W. 14 who also sustained grievous injuries which are described in the wound certificate, Ex. P-15, A-7 beat P.W. 6 and the latter sustained injuries described in the wound certificate, Ex P-7 by the Doctor, (P.W. 29) various other injured prosecution witnesses were beaten by various accused as deposed to by them P.Ws.).

5. When examined, all the accused denied the offence. They stated that it was the Padma Saleelu who were the aggressors, that they attacked the Yadavas and Gowdas and caused lot of injuries to them and that one of those victims namely Tata Raghavulu died of a stab injury which was inflicted by one of the Padma Saleelu.

6. The accused examined ten defence witnesses. Of these, D.W. 1 is an old woman who is the grand-mother of A-11, A-22 and DW 2, D.Ws. 1 and 2 deposed that when they were going homeward from the rice mill after getting some paddy hulled along with A-11 and A-22, at the corner of the house of Macherla Peda Kondaiah, Macherla Venkata Rao, along with others, obstructed and removed the rice bags from them and that when D.W. 1 objected, two persons beat DW. 2 with stick on the head and that some of the assailants pushed A-11 into a ditch and beat him with sticks, that D.W. thereupon raised an alarm and ran away and that, from the large crowd of Padma Saleelu who were present, Macherla Peda Kondaiah threw a bomb on A-23 who came there. The other defence witnesses also deposed to the occurrence in support of the version of the accused.

7. The learned Additional Sessions Judge framed four points for consideration as mentioned in paragraph 4 of his judgment. He held on Point No1 that it was not the accused party that took law into their hands, but it was the prosecution party that started rioting and were the aggressors; that the accused party was entitled to fall back on the right of self-defence and use the necessary violence to ward off the attack and that the prosecution had not established that the accused committed any rioting. On Point No. 2 the learned Judge held that the prosecution had not established that A-14 beat P.W. 26 and caused injuries on him; that even assuming that A-14 beat P.W. 26 and caused the injury, it cannot be stated that he attempted to commit murder and that the offence, if made out would be u/s 325, I.P.C. and not u/s 307, I.P.C. On point No. 3 the learned Judge found that the prosecution had failed to prove charge No. 3. Or Point No. 4, the learned Judge considered the respective charges in his discussion against each accused individually and in the end found each of the accused was "not guilty" of all the charges framed against him.

8. The learned Advocate for the respondents Mr. Rajeswara Rao, has raised an objection that the appeal by Macherla China Kondaiah (P.W. 1) was not competent. In support of his contention, he points out that the complainant who filed the original complaint is not the present appellant (P.W. 1) but one Macherla Peda Kondiah who died after he filed the complaint. Even in the committing Court, Macherla China Kondiah (P.W. 1) helped in continuing the prosecution after the death of the original complainant. Macherla Peda Kondiah.

9. The word "complaint" is defined in Sec 4 of the Code of Criminal Procedure as follows:

4 (1) In this Code, the following words and expressions have the following

meanings, unless a different intention appears from the subject or context:

X X X X

(h) "Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that same person whether known or unknown, has committed an offence, but it does not include the report of a police officer:

Section 417(3) Cri. P.C. runs as follows:

If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

10. The requirements u/s 417(3) Cri. P.C. are:

(a) The acquittal must be in any case instituted upon complaint.

(b) The application must be made to the Court (for grant of special leave) by the complainant.

(c) If permission were granted, the complainant may present appeal to the High Court.

11. Requirement (a) is certainly fulfilled; for the case was instituted on complaint by Macherla Peda Kondiah. Subsequently, he died and Macherla China Kondiah appears to have helped in continuing the prosecution of the case in the committing court. The question is whether this is sufficient to enable him to claim or to be treated or recognised as complainant. For requirements (b) and (c) would be fulfilled only if P.W. is "complainant P.W. 1 styling himself as "complainant-petitioner" filed G.M.P. No. 203 of 1959 in this Court for grant of special leave to appeal u/s 417(3), Cri. P.C. In this petition, he did not refer to the facts which" had a bearing on the question whether he was the "complainant" for the purpose of Section 417(3), Cri. P.C. Order in the C.M.P. was passed without going into the question and deciding whether the petitioner was the "complainant" within the meaning of Section 417(3). Cri.P.C. Consequent the question as to whether the requirements of Section 417(3), Cri.P.C. have been fulfilled, which has not been gone into and decided in the C.M. Plan and has to be gone into and decided in this appeal.

12. The word "complainant" has not been defined in the Criminal Procedure Code. Section 200, Cri.P.C. says that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath there "complainant" obviously means a person who presented the complaint and who was to be examined on oath. In Section 202(2), Cri.P.C. it is provided that if the complaint, not made in writing, is presented to a Magistrate who is not competent to take cognizance, the Magistrate shall direct the complainant to the proper court. In these two provisions the word "complainant" has been used to

refer to a person who presents a written complaint or makes an oral complaint even before the sworn statement is recorded.

13. In *Sk. Osman Gani Vs. Baramdeo Singh and Others*, person presented a complaint before a Magistrate. The latter did not record sworn Statement but ordered police investigation and consequently received a police report and took cognizance of that report as a case. The question was whether the case was one instituted on complaint for the purpose of Section 417(3), Cri.P.C. It held that the case was not one instituted on complaint within the meaning of Section 417(3), Cri.P.C.

14. In *In Re: Syed Ibrahim*, Bench of the Madras High Court observed that a report to a village munsiff will not fall within the definition of complaint in the Code of Criminal Procedure even if, as a result of investigation of that report, the Police filed charge-sheet in court.

15. In *Prasannachary v. Chikkapinachari* AIR 1959 Mysore 106, the petitioner made a written complaint to the police and after investigation, the police filed charge-sheet. It Was held that the petitioner was not the complainant entitled to present an appeal u/s 417(3), Cri.P.C.

16. In *Udit Narayan Singh Vs. Ramrup Singh and Another*, Sub-Divisional Officer filed a complaint as required u/s 195(1)(a), Cri.P.C. as a result of a petition by a certain person. It was held by the Patna High Court that that person was not entitled to file an application for leave u/s 417(3), Cri.P.C. as complainant and that only the Sub-Divisional Officer was competent to file such application.

17. In the present case, the appellant-petitioner admittedly did not file complaint before the Village Munsiff or Police or Magistrate. The question is whether his helping to continue the Preliminary Register Case after the death of the original complainant, Macherla Peda Kondaiah made the petitioner a "complainant" or gave him right u/s 417(3), Cri.p.C.

18. In *Muhammad Ibrahim Sahib Vs. Shaik Dawood*, Bench of the Madras High Court decided that a criminal prosecution u/s 323, I.P.C did not abate by reason of the death of the person injured. The case depended on the interpretation of Section 89 of the Probate and Administration Act with which we are not concerned here. Further, in that case the entire prosecution had been closed and the entire defence evidence had been also closed by the time when the Advocate for the accused raised the contention that owing to the death of the person injured, the charge against the accused must be held to have been abated.

19. The learned Advocate for the appellant has relied on the decision of the Bombay High Court in *Mahomed Azam Vs. Emperor*, In that case, the trustees of a mosque filed a complaint under Sections 426 and 143, I.P.C. against the accused. Before evidence was recorded, the complainant died. The accused applied for action u/s 247, Cri.P.C. on the ground that the complaint had abated by reason of the complainant of death. The Magistrate rejected that application

and allowed the proceedings to continue with a certain witness on record in place of the deceased complainant. The matter was taken on revision to the High Court. The latter observed as follows:

We are of opinion, therefore, in the present case of a non-cognizable offence instituted upon a complaint, the axiom of *actio personalis moritur cum persona*, in civil law confined to torts, does not apply, and that the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant, if the latter is willing. The Courts would always be on their guard against needless harassment of an accused by substituting a complainant, who is not a fit person.

In that case, the question was considered as to whether accused were entitled to be discharged u/s 259, Cri.P.C. The learned Judges have observed about this as follows:

There can be no question that in the case of cognizable offences, where a complainant and a complaint are not necessary, the death of the injured person makes no difference to the criminal proceedings, which are a matter for the state and which are undertaken by the Government?. u/s 259?the Magistrate may not "shall" discharge the accused.

The learned Judges have referred to Sections 143 and 426, I.P.C. as offences of which complainant charged the accused. They have considered Section 259, Cr.P.C. and also mentioned that the accused applied for a discharge and not for an acquittal. The offence u/s 143, I.P.C. is punishable with rigorous imprisonment for six months. Obviously, the case under Sections 143 and 426, I.P.C. was a cognizable case and a summons case. So obviously Section 247, Cri.P.C. ought to have applied if summons procedure had been followed. Section 247, Cri.P.C. says that if summons had been issued on complaint, and if the complainant did not appear on the day of hearing; the Magistrate shall acquit the accused unless for some reasons he thinks proper to adjourn hearing of the case to some other day. In the Bombay case, some previous decisions were referred to wherein the view had been expressed that "it is open to doubt whether Section 247, of the Code was intended to apply to such a case and that it seems to apply primarily to the case of a complainant who is alive but does not appear". Thus, the learned Judges gave a liberal interpretation to the word "complainant" for the purpose of Sections 247 and 259, Cri.P.C. and held that when a witness was allowed to continue the case and act in the place of the complainant, after the original complainant had died, the witness became a substituted complainant.

20. On this question, as to whether one complainant can be substituted for another, there has been difference of opinion among the various High Courts. In *Appala Naidu v. Emperor* ILR 51 Mad 339 : AIR 1928 Mad 167 the relevant facts were as follows: When a summons case was taken up for hearing, the Magistrate was informed that the complainant had died. Thereupon, the Magistrate adjourned the case in order to enable the complainant's son to come on record.

Subsequently the case was proceeded with obviously with the presence of complainant's son in place of the original complainant and it ended in conviction. The learned Judge, Devadoss, J in revision set aside the conviction observing as follows: (at p. 340 of ILR Mad : at p. 168 of AIR:

The Magistrate adjourned the case in order to enable the complainant to appear and not for any other reason. If the complainant" is dead he could not appear before the Magistrate and, there-fore, the clause beginning with the words "unless for some reason he thinks etc cannot apply to the case of the complainant who is dead. In this case, the complainant being dead during the course of the enquiry the Magistrate should have acquitted the accused and should not have proceeded with the enquiry. I may in this connection refer to *Puran Chandra v. Dengar Chandra* 19 Cal WN 334 : AIR 1915 Cal 708 (1).

In effect, the learned Judge held that the word "complainant" used in Section 247, Cri. P.C. could mean only the man who filed the complaint and instituted the case and could not cover any other person and that the son of the complainant could not be substituted as complainant or become a complainant for the purpose of Section 247, Cri.P.C. The decision in 19 Cal WN 334 : AIR 1915 Cal 708(1) was relied and affirmed by the Calcutta High Court in *Ashraf v. Surendra Nath* AIR 1949 Cal 232. There the learned Judge has positively held that there is nothing in the wording of the section itself to suggest that it has no application when a complainant is dead and observed that the same view had received considerable support in other Courts. The decision in ILR 51 Mad 339 : AIR 1928 Mad 167 is a decision of the Madras High Court which is binding on this Court. I respectfully follow it in preference to the decision of the Bombay High Court in *Mahomed Azam Vs. Emperor*, from which I respectfully dissent.

21. In *Nabi Bakhsh v. Emperor* AIR 1924 Lab. 627 it was held:

It is clear that in a warrant case of the kind in question as the Magistrate is bound to proceed with it after framing a charge against the accused and to finish the trial, and as the complainant cannot either compound the offence or withdraw the complaint, he is not bound to attend the court in his capacity of complainant though he may be bound and can be compelled to attend as a witness?.

The position of a complainant in a P.R. Case after the case is taken on file is similar to that of the complainant in a warrant case after the charge is framed in that the case can and has to proceed without in any way requiring or depending on the presence or co-operation of complainant.

22. CPC contains various provisions for continuation of proceedings in the case of death of a party or his unwillingness to prosecute his case; for example, transposing of a party, substitution of a petitioner by another and adding of legal representatives. There is no such provision in the Code of Criminal Procedure regarding a complainant.

23. Section 417(3), Cri.P.C. actually provides for the State to direct the Public Prosecutor to present the appeal. Originally, the provision for appeal against acquittal was only by the State. This section was amended by the Amending Act XXVI of 1955 which introduced this new provision u/s 417(3), Cri.P.C. but the Legislature retained the provision for the State to direct the Public Prosecutor to present the appeal. So, Section 417(3), Cri.P.C. is a new enabling provision in which the right is given, only to the complainant. u/s 244 Cri.P.C. when following the summons procedure, the Magistrate has to take all such evidence as may be produced in support of the prosecution and he may issue summons¹ to witnesses on the application of the complainant. If complainant is not present on a day of hearing as contemplated in Section 247 Cri.P.C. the Magistrate shall acquit the accused unless he adjourns the case for some proper reason. So, a complainant, is necessary for producing the witnesses and to apply for issuing summons and for the case to continue to exist and progress.

Under Section 259 Cri.P.C. when following warrant procedure on a private complaint, the Magistrate may discharge the accused if the complainant is absent on a day of hearing if the offence is lawfully compoundable and not a cognizable offence. This is in contrast with Section 247, Cri.P.C. in that the Magistrate has no power to discharge the accused u/s 259, Cri.P.C. if the case is not lawfully compoundable or is a cognizable offence. Even if it is lawfully compoundable and non-cognizable, the Magistrate may discharge the accused and is not bound to discharge the accused. u/s 252(2), Cri.P.C. the Magistrate shall ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such or them as he thinks necessary". Thus, there is provision for the Magistrate to continue the case even if the complainant does not appear and co-operate and even after the death of a complainant.

24. In the case of P.R.C. enquiry, which has been instituted on a private complaint there is provision in Section 208(1), Cri.P.C. for the Magistrate to call for evidence even without the complainant or prosecution producing it. In procedure relating to P.R. enquiry, there is no provision similar to Section 247 or Section 259, Cri.P.C. enabling the Magistrate to discharge the accused because of the absence of the complainant as distinct from the provision in Section 209 for discharging the accused for other reasons. Thus, the case can proceed and has to proceed even after the death of the complainant and even without anyone being called complainant afterwards, unless the Magistrate chooses to discharge the accused for reasons other than the death of the complainant. Hence, any one who was allowed to help the court after the death of the complainant (who had filed the complaint) need not be called, or treated, or deemed to be a complainant for the purpose of Section 417(3), Cri.P.C.

25. In this case the proceeding which has been started by the complainant Macherla Peda Kondiah was a P.R. case relating to cognizable offences, some of which

could not be lawfully compounded (Sections 307 and 326, I.P.C.) The (mere fact that, after the death of Macherla Peda Kondiah one witness, who was a relative of Macherla Peda Kondiah, was allowed to help the committing court in its proceedings in the P.R. case does not mean that the latter was a "complainant" or deemed to be a "complainant" or substituted as a "complainant" by the Committing Court. But the fact that a person originally filed the complaint would make him] the complainant. Consequently, Macherla Peda Kondiah alone was the complainant and Macherla China Kondiah (who did not file the complaint which was taken, On file) was only a witness and did not become of the complainant. I agree with the contention of the learned advocate for the accused that the witness (P.W. 1) Macherla China Kondiah is not a "complainant" and is not competent to file appeal u/s 417(3). On this finding itself, this appeal can be and has to be dismissed.

26. The learned Advocate for the appellant, Mr. T.V. Sarma has strenuously contended that the lower court erred in holding that the accused acted in the right of private defence when they had not specifically raised the plea of private defence. He points Out that none of the accused in his statement u/s 342, Cri.P.C. pleaded that he exercised the right of private defence. The lower Court would be entitled to consider the question of right of private defence and find on evidence in favour of the accused that they acted in exercise of such right, if the accused, though they did not specifically plead that that they acted in such right, let in evidence to show that they acted in the right of private defence or made suggestion to the witnesses that they had acted in exercise of such right. The learned Additional Sessions Judge held in paragraph 41 of his judgment as follows:

There is also no doubt that a rioting took place because it is seen that Padma Saleelu, Yadavas and Gowdas were injured. The question, however, is whether the accused party stinted the rioting or whether they were acting in self-defence when they were attacked by the Padma Saleelu?. P.W. 8 makes the position absolutely clear and states that in the initial stages, Yadavas and Gowdas, were attacked and at that time they had no escape until they beat some of the Padma Saleelu. That this is true is seen from certain circumstances to which I shall refer.

The passage in the evidence of D.W. 8 referred to by the learned Additional Sessions Judge is as follows:

?As there was no escape, some Saleelu were beaten in Congress street after our people were badly beaten and after Raghavulu was stabbed.

The learned Advocate for the appellant points out that this passage in the evidence of D.W. 8 has come only in cross-examination but not in chief-examination. But this is a distinction without a difference. For, what a witness stated in cross-examination is as much evidence of that witness-as what he says in chief-examination. Further, Mr. R. Rajeswara rao, the learned Counsel for the respondents, points out passages in the depositions of P.Ws. 10 and 12 wherein

suggestion has been made to those witnesses that the accused were acting in the exercise of right of private defence. It has been elicited from P.W. 10 in cross-examination, as follows:

It is not true that we raided Gowda locality and beat Gowdas.

It has been elicited in the evidence of P.W. 12 as follows:

It is not true that I and other Saleelu went and attacked Gowdas and Yadavas.

27. In *Re: Jogali Bhaigo Naiks and Another*, it was observed that, even if the accused did not plead self-defence, it was open to the Court to consider such plea if the prosecution evidence would support it.

28. In *Sambasiva Rao v Public Prosecutor*. 1958 2 Andh W R 627 a Division Bench of this Court observed that a plea of right of self-defence need not be taken specifically, but there should be circumstances to raise such an inference or even reasonable doubt in favour of the accused that they might have in fact acted in exercise of their right of private defence.

29. I respectfully agree with the views expressed in the above decisions. I find that, in this particular case, the plea of exercise of right of private defence has been raised by way of suggestion to the prosecution witnesses (P.Ws. 10 and 12) in cross-examination and is also found in the evidence of one defence witness (D.W. 8). It cannot be said that the lower court erred in considering the question of private defence or in holding that the accused acted in exercise of the right of private defence.

30. Mr. T.V. Sarma, learned Counsel for the appellant, has contended that the occurrence was a "free fight" and, as such, the accused were liable to be convicted of various offences. In *Ahmad Sher v. Emperor* AIR 1931 Lah 513 a "free fight" was defined as "one when both sides mean to fight from the start, go out to fight and there is a pitched battle". The learned Judges proceeded to observe as follows:

The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. This definition of "free fight" was approved by the Lahore High Court in a later decision in *Mohammad v. Emperor* AIR 1947 Lah 106 wherein it was also held that the question whether or not there was a free fight in a particular case depended on the peculiar facts of that case. The same definition of "free fight" was also approved by the Supreme Court in *Gajanand and Others Vs. State of Uttar Pradesh*, wherein it was observed thus (at page 698).

There can be no question of a free fight in the present case, as there is a clear finding of the High Court that Anjaniandan's party were the aggressor.

Referring to the facts, the Lordships of the Supreme Court observed as follows (at page 698).

In these circumstances, it is not possible to suggest that both parties were pre-determined for a trial of strength and had a free fight. Gajanand's party were the worst sufferers and though they also inflicted the injuries on the other side, they did so in the exercise of their right of self-defence.

In the present case, there is a finding of the trial, court that the party of Padma, Saleelu constituted the aggressors. The mere fact that some Padma Saleelu also sustained injuries is no ground for holding that there was a "free fight".

31. In State v. Kartar Singh AIR 1958 All SO the Allahabad High Court, relying on the above-mentioned decision of the Supreme Court, held as follows (at page 95):

There could be no question of a free fight when there was a clear finding of the learned Sessions Judge, with which we concur, that it was Dayal Singh's party (the party opposed to the accused, Kartar Singh who had been the aggressor.

In this case also, I agree with the finding of the learned Additional Sessions Judge that Padma Saleelu were the aggressors and that, therefore, there can be no question of a "free fight"

32. The learned Advocate for the appellant had relied on the decision of the Madras High Court In Bachala Peda Somadu and Others Vs. Nethipudi Appigadu and Others, Therein it was held that the plea of self-defence must be specific and could not be relied upon when there is good evidence to hold that there was a general fight between two parties. The learned Judges held on the facts of that case that there was good evidence to hold that there was a general fight and, on that basis, decided that the plea of self-defence was not open to the other party. They also observed that it was admitted in that case that there was no evidence of self-defence on the record. In the present case, the lower court held On evidence that Padma Saleelu Were the aggressors and that the accused acted in exercise of the right of private defence. Further In Gajanand and Others Vs. State of Uttar Pradesh, the principle of first deciding" as to which party was the aggressor and then holding that as the party opposed to the accused was the aggressor, there could be no question of the free fight, was approved and laid down.

33. In Re: Gampala Subbigadu alias Damasagadu, it was observed that the burden lay on the person setting up the plea of private defence to prove it under Sec105 of the Evidence Act. But, that observation was made in connection with the peculiar facts of that case. In that case, there was only one aggressor and he inflicted fatal stab injuries upon the deceased by stabbing him on the back and then inflicting more stabs in front also. A contention was raised that the clear evidence of the prosecution should be rejected because the P.Ws. did not explain how the accused himself sustained these injuries. In that case, there was no scope for holding, in the light of the proved facts and circumstances, that the deceased was the aggressor.

34. In *In Re: Erasi Subba Reddi*, it was observed as follows:

?where it is clear from the evidence that the two parties were Spoiling for a fight and that each person began to pick up stones and threw it at the other party, then the accused"s party cannot plead that because the prosecution witnesses were also intent on beating them, every blow which "they gave was given in self-defence.

In that case, on facts, it was found that both parties were spoiling for a fight. In this case, the facts are different and the finding is that the accused is the aggressor. Consequently, that decision does not apply to the facts of this case.

35. In the end, I do not accept the contention of the learned Advocate for the appellant that there was a "free fight" and, that, therefore, the accused are liable to be convicted.

36. The principle that an appellate court can reverse the finding of acquittal by the trial court only for substantial and compelling reasons, has been laid down and stressed in the following decisions : *Surajpal Singh and Others Vs. The State*, , *Aher Raja Khima Vs. The State of Saurashtra*, , *Ajmer Singh Vs. The State of Punjab*, ; *Balbir Singh Vs. State of Punjab*, and *Dharamdas Hukamatrai Dorwani Vs. State of Bombay*, . In this case, there are no substantial and compelling reasons for this Court to come to a conclusion different from that of the trial Judge that the party of the Padma Saleelu was the aggressor-party and that the accused acted in exercise of right of private defence and are not guilty of any of the charges.

37. In view of my findings above, I do not consider it necessary to go into the evidence on each charge or against each accused individually-I dismiss the appeal.