

(2000) 09 SHI CK 0024

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No's. 335 and 439 of 1998

Naresh Kumar and Another

APPELLANT

Vs

State of H.P.
 State of Himachal Pradesh Vs Nitu Singh

RESPONDENT

Date of Decision : 21-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 173, 313
Penal Code, 1860 (IPC) — Section 100, 101, 102, 103, 104

Citation : (2000) 3 ShimLC 137

Hon'ble Judges : R.L. Khurana, J;L.S. Panta, J

Bench : Division Bench

Advocate : Vinay Thakur and Anup Chitkara, in Criminal Appeal No. 335 of 1998 and M.S. Guleria, Deputy A.G. and J.S. Guleria, Law Officer in Criminal Appeal No. 439 of 1998, for the Appellant; M.S. Guleria, D.A.G. and J.S. Guleria, Law Officer in Criminal Appeal No. 335 of 1998 and Anup Chitkara in Criminal Appeal No. 439 of 1998, for the Respondent

Judgement

R.L. Khurana, J.—The above noted two appeals arising out of the judgment dated 22.9.1998 of the learned Sessions Judge, Bilaspur in Sessions Trial No. 1 of 1997/96 are being disposed of by this common judgment.

2. The Appellants, Naresh Kumar and Subhash Chand, in Criminal Appeal No. 335 of 1998, and Respondent Smt. Nitu Singh in Criminal Appeal No. 439 of 1998, hereinafter referred to as the accused, were tried for the offences under Sections 341 and 302 read with Section 34, Indian Penal Code, in case F.I.R. No. 237/96 of Police Station Sadar Bilaspur. All the three accused have been acquitted of the offence u/s 341 read with Section 34, Indian Penal Code. Accused Smt. Nitu Singh has also been acquitted of the offence u/s 302 read with Section 34, Indian Penal Code. Accused Naresh Kumar and Subhash Chand were, however, convicted for the offence u/s 302 read with Section 34, Indian Penal Code. Each one of them upon such conviction has been sentenced to rigorous imprisonment for life and to pay a fine of Rs. 5,000/-. In default of payment of fine, each of the two accused Naresh Kumar and Subhash Chand,

has been sentenced to undergo simple imprisonment for a further period of one year.

3. Criminal Appeal No. 335 of 1998 has been preferred by the accused Naresh Kumar and Subhash Chand assailing the conviction and sentence as imposed upon them by the learned Sessions Judge, while Criminal Appeal No. 439 of 1998 has been preferred by the State of Himachal Pradesh assailing the acquittal of the accused Smt. Nitu Singh of the offence u/s 302 read with Section 34, Indian Penal Code.

4. Be it stated that the acquittal of the three accused of the offence u/s 341 read with Section 34, Indian Penal Code, as recorded by the learned Sessions Judge, has not been assailed by the State of Himachal Pradesh.

5. The prosecution story, briefly, may be thus stated. On 28.8.1996 (Raksha Bandhan day) at about 9 p.m. or 9.30 p.m. PW.1 Smt. Bohri Devi was present in her house in village Bhajwani Ropa. She was serving dinner to the members of her family, when she heard the cries "Maar Dia Maar Dia" coming from the house of accused Subhash Chand. Upon hearing such cries she immediately ran towards the spot. Her daughter Jai Kumari (PW.2) and other members of her family followed her. On reaching the spot she saw accused Subhash armed with iron rod Ex.P. 1, accused Naresh Kumar armed with knife Ex.P.2 and accused Smt. Nitu Singh armed with a "danda". They were beating Prabhat. Accused Subhash gave iron rod blow to Prabhat from behind, while accused Naresh Kumar inflicted stab wound with the knife on the chest of Prabhat. Accused Smt. Nitu Singh gave danda blows on the person of said Prabhat. In the meanwhile PW 2 Jai Kumari, Roshni Devi, Sham Lal, Sudershan Kumar and Nanak Chand also came to the spot. On seeing them the three accused fled from the spot leaving their "chappals" behind. As a result of the assault, Prabhat had fallen down injured. He was picked up and carried to the Hospital at Bilaspur in a three wheeler. He, however, died on the way to the hospital.

6. Information regarding the occurrence was given to PW. 8 Jagat Ram, the Pradhan of the Gram Panchayat, Auhar, by Nanak Chand, son of PW.1 Smt. Bohri. PW.8 in turn informed the police on telephone. On the basis of such telephonic message, a report Ex. PW 8/A came to be recorded at S.No. 17 of the daily diary at Police Station, Sadar Bilaspur, in the following terms:

At 10.30 p.m. Shri Jagat Ram, Pradhan Gram Panchayat, Auhar, in-formed on Telephone that Shri Nanak Chand son of Shri Shyam Lal, resident of village Rapaihar, told him that Prabhat Chand and Subhash Chand etc. were quarrelling among themselves at village Rapaihar and there is apprehension of casualty. Action be taken at the spot immediately. He further informed that he has not gone to the spot yet.

7. On the basis of the information received PW 17 Inspector Kashmiru Ram went to the spot and at about 5 a.m. on 29.8.1996 recorded the statement (Ex. PW 1/ A) of PW 1 Smt. Bohri u/s 154, Code of Criminal Procedure. Such statement

reads:

Stated that my husband is working as labourer. On 28.8.1996 at about 9/9.30 p.m. when I was sitting in the Court-yard of my house alongwith Jai Kumari, Smt. Anju, Sudershan Singh, eldest son Nanak Chand and my husband etc., and were taking our dinner, I and my daughters heard some commotion. I rushed towards the house of Subhash through the roadside where I found that Subhash his nephew Naresh and Nitu wife of Subhash were beating Prabhat son of my brother Roop Lal. Subhash was armed with twisted iron rod. Naresh alias Jaidi was having knife in his hand and Nitu was having danda. All the above three persons were beating Prabhat on the slab of the house of Subhash Chand. Consequently, he fell down on the slab and blood started oozing out from his stomach etc. Jai Kumari, Sudershan, my husband and Anju Devi etc., also reached at the spot. They (Subhash etc.) kept on giving beatings to Prabhat in our presence also and when we raised hue and cry, they ran away from the spot towards the house. While running, the white chappal of Subhash Chand was left on the spot. At that time, Prabhat was not in a position to speak. Thereafter, with the help of people, he was sent to District Hospital, Bilaspur alongwith Sudershan, Surender Kumar and Sheela Devi for treatment, but he died on the way. After taking Prabhat from the road to their roof (slab) all the above three persons gave him beatings and killed him on account of enmity of litigation. I have heard the statement which is correct. Action may be taken. I and my daughter have seen the knife and iron rod which can be identified by us.

8. On the above statement, a case for the offences u/s 302 read with Section 34, Indian Penal Code, came to be registered at Police Station Sadar, Bilaspur vide F.I.R. No. 237/96 (Ex.PW 15/A), and investigation was taken up by PW. 17 Inspector Kashmiru Ram.

9. The post mortem of the deceased Prabhat Kumar was conducted by PW 9 Dr. N.K. Sankhyan. The following ante-mortem injuries were found on the person of the deceased:

(i) Reddish coloured single abrasion 31 cms in length extending from right shoulder to xyphoid process. This abrasion was caused by sharp edged weapon probably with the tip of a sharp edged weapon.

(ii) Multiple depressed abrasions on the left side of the face, superior and front of left shoulder. All such abrasions were of skin colour. The inner surface of skin, on cut section, shown echymoses.

(iii) Incised stab wound with clean cut edges with both angles sharp and pointed, spindle shaped with maximum width in the centre as 1.5 cms and length 3 cms on the front of chest on its left side. Its upper boarder was 6.5 cms. from left nipple and its medial boarder was 7.5 cms from xyphoid process. Blood fluid was coming out from the said wound. It was obliquely placed, directing below upwards and lateral to medial side. The depth of the wound was 12 cms piercing skin, subcutaneous tissue, thoracic muscels, intercostal muscels, pleura,

pericardial sac, wall of left ventricle of heart, interventricular septum and finally entering into right ventricle of heart. There was gross contusion over the inter costal muscles cutting complete cartilage of 6th rib left side and partially cutting the superior part of 7th rib cartilage. Pericardial sac was having scanty blood fluid, whereas heart chambers and large vessels were empty. Left Pleural cavity was having about 150 ml of blood fluid whereas right pleural cavity was not having blood fluids. Both lungs were normal in shape and size. On cut section fluid of reddish colour with froth came out.

(iv) Incised stab wound on the back of the chest, left side in its lower portion, its medial border 13 cms. from the centre of spine and lateral border was 5 cms. from posterior axillary line and its lower border was 18 cms from the left iliac rest. The margins of the wound were clean cut. It was spindle shaped. The maximum width in the central portion was 1.5 cm with length of 5 cms. Both angles were sharp and pointed. Clotted blood was present in and around the wound. The wound was extending from the skin subcutaneous tissue, muscles of the back of the chest, however, intercostal muscles were not perforated but were pierced only with evidence of gross haematoma over these muscles. The weapon had not pierced into the pleural cavity and not damaged the ribs or costal cartilages. The depth of the wound was 3.5 cms.

(v) Multiple reddish coloured abrasions (grazed) on upper portion of the left forearm on its lateral aspect and on back of elbow. These abrasions were due to fall.

10. In the opinion of PW 9 Dr. N.K. Sankhyan injuries No. 3 and 4 were homicidal, while injury No. 5 was due to fall; Injury No. 2 was probably due to fall and injury No. 1 was probably homicidal. The cause of death was opined to be asphyxia as a result of choking due to shock due to hemorrhage caused by ante mortem injury No. 3 mentioned above. The probable time between injury and death was five minutes to fifteen minutes and between death and post mortem was about 12 to 24 hours. PW 9 further opined that injuries No. 3 and 4 could be caused by knife Ex.P2. Injury No. 2 could be caused with a blunt weapon or by a fall on a rough surface. Injury No. 1 was possible with the tip of iron rod Ex. P1. Injury No. 3 individually was sufficient to cause death in the ordinary course of nature.

11. During the course of investigation PW 17 Inspector Kashmiru Ram took into possession blood Ex. P12, chappals Ex.P3 to P8 and P13, broken pieces of bangles Ex.P14 and the knife Ex.P2 from the spot. He arrested the accused at about 2 p.m. on 29.8.1996. Blood stained shirt Ex.P9 and pyjama Ex.P 10 belonging to accused Subash Chand were taken into possession vide memo. Ex.PW 8/B. One "parna" (towel) Ex.P 11 on having been produced by the accused Naresh Kumar, which was blood stained, was also taken into possession vide memo Ex.PW 8/C. Accused Subash Chand is alleged to have produced the iron rod Ex. P1, which was blood stained. The same was taken into possession vide memo. Ex.PW 8/D.

12. The viscera of the deceased was sent for chemical examination. Vide report Ex.PW 9/D of the Forensic Science Laboratory no traces of poison or alcohol were found in the viscera.

13. The clothes of the deceased, accused Subash Chand and "parna" of accused Naresh Kumar, iron rod Ex. P1, knife Ex. P2 alongwith blood sample of the deceased were also sent for chemical examination. As per report Ex.PW 9/E, human blood of group A was found on the pant of the deceased, knife Ex.P-1, iron rod Ex. P-2, shirt Ex.P9 belonging to the accused Subash Chand and "parna" Ex. P-II belonging to accused Naresh Kumar. Insofar as pyjama Ex. P10 of the accused Subash Chand is concerned, though stains of human blood were found thereon, its group could not be ascertained.

14. On a case for the offences under Sections 341 and 302 read with Section 34, Indian Penal Code, having been made out against the three abovenamed accused, they were accordingly challaned and sent up for trial.

15. The accused pleaded not guilty and claimed trial. The prosecution in support of its case, in order to bring home the offences against each of the three accused, examined nineteen witnesses in all. The accused have denied the prosecution story. Accused Naresh Kumar in his state-ment recorded u/s 313, Code of Criminal Procedure, in answer to question No. 22 has stated:

I am innocent. I have not committed any offence. I have been falsely and illegally involved in a false case by the complainant party in league with the police. I had not inflicted the knife blows to the deceased and the complainant party has implicated me in a false case.

16. Accused Subash Chand, while denying the prosecution story, has stated:

I am innocent. I have not committed any offence. I have been falsely involved in a false case by the complainant party in league with the police. In fact, I was living with my minor sons in the house which is situated in a lonely place adjacent to a nalah in the village. Neetu Singh was also residing with me in order to look after my minor sons as I have been deserted by my wife, who is residing separately at Sundernagar. The houses Roop Lal, Shyam Lal and Nanak are also situated in that area at a distance of more than 500 yards in different directions from my house. All these persons had a jealousy regarding the presence of Neetu Singh at my house. On the unfortunate day, I was present at my house and seeing the T.V. It was raining outside and Roop Lal, Nanak Chand and Shyam Lal, who were under the influence of liquor came at my lintel and shouted Subhash Bahar Aa. Upon this, I went to the lintel of the house and Neetu Singh also followed me. As soon as we reached at the lintel, both of us were caught hold by Roop Lal etc. and as I apprehended danger to my life and life of my family members. I raised alarm and the villagers came at the spot and they rescued me from the dutches of Roop Lal etc. If the villagers had not come at the spot. Roop Lal etc. would have killed me and my family members. Neetu Singh became unconscious. Roop Lal etc. after seeing the villagers left the spot after

keeping their Chappals on the lintel as they could not collect the Chappals due to darkness in the cloudy night. I have been suffering from Fistula in ano, which is thrice operated during that period.

17. Similarly, accused Nitu Singh has stated in the following terms:

I am innocent. I have not committed any offence. I have been falsely involved in a false case by the complainant party in league with the police. In fact, I was residing with Subhash, accused to look after his sons (minors) as he has been deserted by his wife. Roop Lal etc. were jealous of this fact. On the unfortunate day, Roop Lal, Shyam Lal, Nanak, who were under the influence of liquor came at the house of Subhash alongwith Prabhat and they loudly shouted from the lintel of the house (Subhash Bahar Aa), upon this calling, Subhash went on the lintel and I also followed him. As soon as I reached at the lintel, I was caught hold by Roop Lal etc. and tried to drag me. I cried and Subhash also shouted for help and then the villagers came at the spot and got rescued us from the clutches of Roop Lal etc. Many persons came at the spot and they scuffled with each other and got us rescued from Roop Lal etc. Thereafter I became unconscious and I regained my consciousness on the following day. On the next day, the villagers brought me to the District Hospital and got me admitted for treatment. But the Doctors neither gave the MLC nor they treated me properly due to the influence of police and then application was given to the Chief Judicial Magistrate, Bilaspur, on whose order, I was referred to IGMCS, Shimla. I was taken to Shimla by the police, but the police did not get me admitted at Shimla and brought me back to Bilaspur. During investigation, police tried to procure the false medical evidence with regard to the injuries which were inflicted upon my body on that unfortunate day by Roop Lal etc. My bangles were broken at the spot when I was beaten by Roop Lal etc. Chappals of Roop Lal, Shyam Lal and Nanak were left at the spot, as due to the darkness of the cloudy night, they could not collect the Chappals.

18. Four witnesses were examined by the accused in their defence. DW 1 Shri Rajesh Kant has been examined to prove that on 28.8.1996 rain to the extent of 3.2 mm was recorded in the areas of Bilaspur. DW 2 Sant Ram, who is running a shop at village Kallar, has deposed that on the date of occurrence PW 3 Ram Parkash had not come to his shop. DW 3 Sarwan Kumar has deposed that on the day of occurrence, when he was returning from Ghumarwin he had seen Shyam Lal, Nanku Ram, Roop Lal and the deceased Prabhat consuming liquor in a cave adjacent to the main road about 250 metres away from the house of Shyam Lal, and that he came to know about the occurrence on the following morning. DW 4 Rajiv Gautam is the son of accused Subhash. He has deposed that on the relevant date at about 9.30 p.m. when he alongwith his brother Pankaj, accused Subhash and Nitu Singh was watching T.V. at his house, he heard Roop Lal, Shyam Lal, Nanku and deceased Prabhat abusing from the roadside and challenging his father to come out. Since his father did not go out, all the aforesaid four persons came on to the lintel of his house abusing his father. Upon

which his father went out to the lintel followed by accused Nitu Singh. Thereafter he heard the shrieks of his father "BACHAO". On hearing such shrieks, he and his brother went to the lintel where he saw Roop Lal and Shyam Lal holding his father. Accused Nitu Singh was caught hold by deceased Prabhat. On seeing him and his brother, Nanak Chand ran after them. They rushed back to their room and locked themselves in apprehending danger to their lives. He heard the cries of his father from the lintel. He and his brother again went to the lintel where he found his father Subhash Chand and accused Nitu Singh lying unconscious. The injureds were carried to the room which was locked from inside. After sometime PW 1 Bohri came to the spot and challenged accused Subhash Chand to come out. None of them came out. After about 15/20 minutes, Dev Raj, member Gram Panchayat came to the spot alongwith some villagers, who took DW 4, his brother and the two accused Subhash Chand and Nitu Singh to his house. He denied the presence of accused Naresh Kumar at the spot.

19. The learned Sessions Judge, upon consideration of the material placed before him vide the impugned judgment dated 22.9.1998 acquitted all the three accused of the offence u/s 341 read with Section 34, Indian Penal Code. He also acquitted the accused Smt. Nitu Singh of the offence u/s 302, read with Section 34, Indian Penal Code and convicted and sentenced accused Naresh Kumar and Subhash Chand for the offence u/s 302, read with Section 34, Indian Penal Code, as aforesaid.

20. At the very outset, it may be stated that there is no denying that an occurrence did take place on the lintel of the accused Subhash Chand on the relevant date at about 9/9.30 p.m. According to the prosecution, on the fateful day the three accused Subhash Chand, Naresh Kumar and Smt. Nitu Singh had caught hold of the deceased Prabhat, when he was passing through the common path near the house of accused Subhash, and then had taken him to the lintel of the house of accused Subhash Chand. On the lintel the three accused gave beatings to the deceased, inflicted injuries on his person with the help of an iron rod, knife and "danda" with the intention to kill him and that as a result of such injuries, the deceased Prabhat died on the way to the hospital.

21. On the other hand, as per the accused Subhash Chand and Smt. Nitu Singh, on the relevant date they were watching TV in their house. Sarvshri Roop Lal, Shyam Lal, Nanak Chand and deceased Prabhat, while under the influence of liquor came on to the lintel of accused Subhash Chand and started abusing and challenging him to come out. Accused Subhash Chand went out to the lintel followed by accused Nitu Singh. Both of them were attacked by Sarvshri Roop Lal, Shyam Lal, Nanak Chand and deceased Prabhat. They were saved and rescued by the villagers who had come to the spot on hearing their shrieks and cries.

22. It was contended on behalf of the accused that the genesis of the occurrence was different from what the prosecution has projected and that the occurrence in fact took place in the manner suggested by the accused in their defence.

23. Admittedly, an occurrence did take place between the parties on the lintel of the house of accused Subhash Chand. The prosecution case that the deceased Prabhat Kumar was dragged on to the lintel by the accused, while he was passing through the common path near the house of Subhash Chand, has not been accepted by the learned trial court, inasmuch as all the three accused have been acquitted of the offence u/s 341 read with Section 34, Indian Penal Code. Such acquittal has not been assailed by the State of Himachal Pradesh.

24. PW 1, Smt. Bohri, PW 2, Smt. Jai Kumari, PW 3 Ram Prakash and PW 4 Smt. Maya Devi, the alleged eye-witnesses, admittedly, had not seen the deceased being dragged on the lintel by the accused. They are alleged to have seen only the assault by the accused as a result of which the deceased sustained injuries and later died due to such injuries.

25. Since there was nothing to show as to how the deceased happened to be present on the lintel of the house of the accused Subhash Chand, an attempt was made by the prosecution to introduce an oral dying declaration of the deceased during the course of evidence in court, though nothing came during the course of investigation about such oral dying declaration. PW 1 Smt. Bohri has deposed:

...I enquired from the injured how he was beaten. Injured Prabhat told that he was going from the road and was dragged by the accused persons and thereafter he was beaten and inflicted knife blow....

26. PW 4 Smt. Maya Devi, the sister of the deceased has deposed:

...when we reached the spot, my brother Prabhat was lying on the lintel of the house of the accused. Blood was oozing from his stomach, head and I enquired from him what has happened. My brother Prabhat told me that Subhash has beaten him with iron rod and Naresh has inflicted the stab wound on his person and Neetu accused also gave him beating with danda....

27. The learned Sessions Judge has not considered such alleged oral dying declaration and rightly so. It appears that the oral dying declaration, alleged to have been made by the deceased, has come to be introduced as an afterthought just to explain the presence of the deceased on the lintel of the house of the accused. If PW 1 Smt. Bohri and PW 4 Smt. Maya Devi had in fact seen the occurrence as alleged by them, there was no occasion and necessity for them to enquire from the deceased as to how he was beaten. Besides, it is in the evidence of PW 1 Smt. Bohri and PW 2 Smt. Jai Kumari that the deceased Prabhat had fallen down unconscious immediately after he was inflicted the stab wound. PW 9 Dr. N.K. Sankhyan has also stated that the deceased would become unconscious immediately after receiving the stab injury No. 3 and would not regain consciousness thereafter. If the deceased had become unconscious immediately after having received the stab injury, the story put forth by PW 1 Smt. Bohri and PW 4 Smt. Maya Devi about the making of the oral dying declaration stands falsified, and, as such, cannot be relied upon.

28. PW 1 Smt. Bohri neither in her statement Ex.PW 1/A made u/s 154, Code of Criminal Procedure, nor in her subsequent statement made to the police u/s 161, Code of Criminal Procedure, has stated that the deceased had made any dying declaration before her. Similarly, PW 4 Smt. Maya Devi in her statement made u/s 161, Code of Criminal Procedure has not stated anything about the oral dying declaration having been made before her by the deceased. PW 1 Smt. Bohri in her statement Ex.PW1/A has gone to state that the deceased Prabhat was not in a position to speak. PW 4 Smt. Maya Devi in her statement Ex.DC made u/s 161, Code of Criminal Procedure, has stated that on seeing her brother deceased Prabhat in an injured condition, she had become unconscious.

29. In *Ramesh Prasad v. State of Bihar* 2000 SCC 242, the oral dying declaration alleged to have been made by the deceased to her two sisters was not believed and relied upon since the two sisters of the deceased had not stated about such oral dying declaration either in the complaint to the police or in their statements recorded u/s 161, Code of Criminal Procedure.

30. Similarly, in the present case, no reliance can be placed on the alleged oral dying declaration of the deceased. If such oral dying declaration is ignored, there is nothing on the record to show as to how and why the deceased had gone on to the lintel of the house of the accused Subhash Chand. In the absence of evidence to show as to how and why the deceased happened to be present at the lintel of the accused Subhash Chand, the entire prosecution story with regard to the occurrence becomes doubtful, and the defence version that the deceased alongwith Roop Lal, Shyam Lal and Nanak Chand had gone to the lintel of the accused Subhash Chand and that they had challenged, threatened and given beatings to accused Subhash Chand and Smt. Nitu Singh, appears to be probable. It is well settled principle of law that a probable defence, though not proved is sufficient and has to be accepted.

31. PW 18 Sub Inspector Jagdish Chand, is one of the investigation officers of the present case. He had prepared the final report and submitted the same to the court u/s 173, Code of Criminal Procedure. He has deposed to the following facts:

(a) it had come in the investigation that accused Nitu Singh had fallen in the quarrel at the spot and she was feeling pain in her back bone and was admitted in the hospital for treatment;

(b) the children of accused Subhash had also made statements that during quarrel accused Nitu Singh had fallen on the lintel and was brought inside the room by them;

(c) he had not recorded the statements of the children of accused Subhash Chand u/s 161, Code of Criminal Procedure;

(d) he did not remember whether the deceased Prabhat had threatened accused Subhash Chand by saying "Agar Maan Ka Doodh Piya Hai toh Bahar Aa";

(e) whatever he has mentioned in his report u/s 173, Code of Criminal Procedure is based on his investigation.

32. PW-17 Inspector Kashmiru Ram. another investigation officer has gone to state in the following terms:

I cannot say whether Shyam Lal, Rup Lal, Nanak Chand and Prabhat had quarreled with the accused Subhash at his house. I also do not know whether ladies were there who were pelting stones at the house of the accused Subhash.

33. PW 8 Jagat Ram, Pradhan of the Gram Panchayat Auhar, is the person who had informed the police about the occurrence on telephone. Such information was received in the police station by PW 17 Inspector Kashmiru Ram and it was recorded by him in the daily diary at serial No. 17. Ex.PW 8/A is the copy of such report. It reads:

At 10.30 p.m. Shri Jagat Ram, Pradhan Gram Panchayat, Auhar, informed on telephone that Shri Nanak Chand son of Shri Shyam Lal resident of village Rapaiher,told him that Prabhat Chand and Subhash Chand etc. were quarreling among themselves at village Rapaiher and there is apprehension of casualty. Action may be taken at the spot immediately. He further informed that he has not gone to the spot yet. The S.P. and the Addl. S.P. have been informed through telephone regarding the incident and I, the Inspector/ SHO, H.C. Dandu Ram and Constable Chaman Lal No. 430, am proceeding to the spot. S.I. Jagdish Chand shall be associated on the way.

34. A bare perusal of the above report shows that there is nothing therein to indicate as to which party was the aggressor. Nanak Chand, son of PW 1 Smt. Bohri Devi, who is claimed to be an eye witness of the occurrence and who has not been examined in the present case/is alleged to have informed PW 8 Jagat Ram about the occurrence. Had he been the eye witness, he would have told the occurrence in detail to PW 8, who in turn would have informed the police accordingly. PW 8 Jagat Ram has deposed:

On 28.8.1996, I was sleeping in my house. At about 10/10.30/11 p.m. Nanak Chand came to my house and told me that the son of Roop Lal, namely, Prabhat has been murdered by the accused persons (Naresh etc. Subhash etc.). The abovenamed Nanak told me that the injured is in a very critical condition and blood is lying at the spot and he asked me to inform the police. I informed the S.P.Bilaspur through telephone and also informed the SHO Ghumarwin and SHO Bilaspur.... My report is Ex.PW 8/A.

35. PW 8 Jagat Ram, though in his examinationin-chief, admitted the report Ex.PW 8/A having been made by him, during the course of cross-examination has contradicted himself by denying that he had conveyed to the police on telephone that a fight was going on in between Subhash Chand and Prabhat. He also denied having informed the police that any damage could be caused to either of them. PW 17 Inspector Kashmiru Ram has categorically stated about

the message in terms of Ex.PW 8/A having been received by him from PW 8 Jagat Ram.

36. The statement Ex.PW 1/A of Smt. Bohri Devi (PW 1) u/s 154, Code of Criminal Procedure, was recorded by PW 17, Inspector Kashmiru Ram at about 5 a.m. on 29.8.1996. Admittedly, the occurrence took place at about 9.30 p.m. on 28.8.1996. Information to the police vide Ex.P/W 8/A was received at about 10.30 p.m. on 28.8.1996. It is in the statements of PW 1 Smt. Bohri Devi, PW 2 Smt. Jai Kumari and PW 8 Jagat Ram that the police had reached the spot at about 1 a.m. though PW 17 and PW 18, the two investigation officers have gone to state that they reached the spot at about 3 p.m. No reasons are forthcoming as to why the statement of PW 1 Smt. Bohri or any other alleged eye witness could not be recorded immediately by PW 17 or PW 18 on reaching the spot.

37. PW 17 Inspector Kashmiru Ram, who recorded the statement PW 1/A of PW 1 Smt. Bohri Devi has deposed:

We reached at the spot at about 3.00 a.m. I preserved the spot immediately on reaching the spot. I deputed the police officials to search the accused persons and at 5 a.m. I recorded the statement of Bohri Devi. I had not done any writing work from 3.00 a.m. to 5.00 a.m. Bohri met me at her house at 5.00 a.m. for the first time. I deputed the police officials to search the accused persons on the basis of the information received in the police station. It is correct that nobody has disclosed about the name of the accused at the spot till 5.00 a.m.

(Emphasis supplied)

38. The information Ex.PW 8/A received in the police station by PW 17 does not indicate as to who was the aggressor/accused. None had disclosed the name (s) of the accused to PW 17 at the spot till 5 a.m. It is not known that in the absence of information about the accused, how PW 17 had deputed police officials to search for the accused immediately on reaching the spot.

39. PW 17 also admits that none was present at the spot when he reached there. PW 8 Jagat Ram met him on the road when he was going to the spot after 5 a.m., that is, after the statement Ex.PW 1/A had been recorded at the house of PW 1 Smt. Bohri Devi. There is nothing on the record to show as to who had indicated the place of occurrence to PW 17 and how PW 17 came to know about Smt. Bohri Devi (PW 1) to be an eye witness of the occurrence since PW 17 had gone all the way to her house to record her statement.

40. PW 18 Sub Inspector Jagdish Chand, who had accompanied PW 17 to the spot has also deposed that they reached the spot at about 3 a.m. None was present at the spot. Police remained at the spot. He sent for a photographer and deputed some police officials to search for the accused.

41. As against the above version coming in the statements of PW 17 and PW 18, Shri Jagat Ram (PW 8) has deposed:

On reaching the spot, I had seen the blood covering very large area on the lintel of accused Subhash. Family members of Sham Lal and Roop Lal were sitting and weeping at the spot. Prabhat was taken in three wheeler to Bilaspur before our arrival at the spot. I asked the family members of Sham Lal and Roop Lal to leave the spot but they told me that the accused persons may not wash the blood from the lintel. They remained there and I had left the spot and were waiting for the arrival of the police at the house of Narain Singh, which is about 200 mts. from the spot. The police reached at the spot at about 12/1 a.m. midnight with DSP. We had gone to the spot with the police.

42. During the course of cross-examination PW17 has further deposed:

Bohri might have met the police after their arrival, it may be 1 or after 1 a.m. The police has recorded the statement of Bohri, her daughter and thereafter they started preparing seizure memo at the house of Dev Raj, Member Panchayat. I cannot disclose the exact time when the statement of Bohri was recorded. Volunteered that we had gone to the house of Subhash about 3/4 a.m. at that time, the statement of Bohri and her daughter was already recorded. The statement of Bohri was recorded at her house in the electricity light. The police had gone at the spot first and thereafter we had gone to the house of Sham Lal to record the statement of Bohri as there was no light arrangement at the spot.

43. PW 17 has also stated that the accused Subhash Chand and Naresh Kumar were arrested at 4/5 a.m. on 29.8.1996.

44. PW 1 Smt. Bohri has given yet another version as to the recording of her statement Ex.PW 1/A. She has deposed:

I left the spot when the injured Prabhat was taken to the hospital in three wheeler. Volunteered that I had not made any statement or disclosed anything when the police visited the spot at 1 a.m. I came to know that the police had reached the spot at 1 a.m. I was called by the police at about 5 a.m. for recording my statement.

45. From the evidence coming on record as to the recording of the statement Ex.PW 1/A of Smt. Bohri Devi (PW 1) u/s 154, Code of Criminal Procedure, it appears that the same came to be recorded after due deliberations and consultation in order to hide the true genesis of the occurrence. The circumstances coming on the record do indicate that the incident might have happened in the manner suggested by the accused.

46. Admittedly, an occurrence did take place between the parties on the relevant date. The defence put forth by the accused is that on the relevant date the deceased and his companions, namely, Roop Lal, Shyam Lal and Nanak Chand, had after coming on the lintel of their house threatened and challenged accused Subhash Chand to come out and thereafter assaulted them (the accused). Though the accused have not stated or suggested anywhere that they caused injuries to the deceased and/or his companions in exercise of their right of

private defence, it is well settled that even if an accused has not pleaded self defence, it is open to the court to consider such a plea if the same arises from the material on record. The burden of establishing that plea is on the accused and it can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material available on the record.

47. The question, therefore, which arises for consideration is whether the Appellant had the right of private defence and if so, whether he did not exceed such right of private defence.

48. Broadly speaking, the right of private defence rests on three ideas, namely:

(a) there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence;

(b) the right does not commence until there is a reasonable apprehension; and

(c) there must be no more harm inflicted than is necessary for the purpose of defence.

49. The apex court in *Dominic Varkey Vs. The State of Kerala*, , has held:

...It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the 4th clause of Section 99 of the Indian Penal Code, namely, that no more harm is inflicted than is necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. Circumstances must show that the court can find that there was apprehension to life or property or of grievous hurt. If it is found that there was apprehension to life or property or of grievous hurt the right of private defence is in operation. The person exercising right of private defence is entitled to stay and overcome the threat....

50. It has further been held that the apprehension is in the mind of the person exercising the right of self-defence and the apprehension is to be ascertained objectively with reference to the events and deeds at that crucial time and in the total situation of surrounding circumstances.

51. In *Gottipulla Venkatasiva Subbrayanam and Others Vs. The State of Andhra Pradesh and Another*, , the Supreme Court has observed that the right of private defence serves a social purpose and as observed by the Supreme Court more than once there is nothing more degrading to the human spirit than to run away in face of peril. This right, it has further been observed, is basically preventive and not punitive. It is in this background that the provisions of Sections 96 - 106 I.P.C., which deal with the right of private defence have to be construed. According to Section 96 nothing is an offence which is done in the exercise of the right of private defence and u/s 97 subject to the restrictions contained in Section 99 every person has a right to defend : (1) his own body and the body of any other person against any offence affecting the human body and (2) the property whether moveable or immovable of himself or of any other person

against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit these offences. The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. It has also been held in the aforesaid decision that even if the plea of self defence has not been taken by the accused, it does not preclude the court from giving to him the benefit of the right of private defence if on proper appraisal of evidence and other relevant materials on record the court concludes that the circumstances in which he found himself at the relevant time gave him the right to use his instrument in exercise of the right. *

52. Section 102, Indian Penal Code, deals with the commencement and continuance of the right of private defence of the body. It provides:

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

53. Dealing with the scope of Section 102, Indian Penal Code, the apex court in *Deo Narain Vs. The State of U.P.*, has held:

...the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to the present and imminent and not remote or distant danger. This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that the Appellant could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in the above section. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. It is a preventive and not punitive right. The right to punish for the commission of offences vests in the State (which has a duty to maintain law and order) and not in private individuals. If after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. In our view, therefore, as soon as the Appellant reasonably apprehended danger to his body even from a real threat on the part of the party of the complainant to assault him for the purpose of forcibly taking possession of the plots in dispute or of obstructing their cultivation, he got the right of private defence and to use adequate force against the wrongful aggressor in exercise of that right.

54. Sections 97 - 106, Indian Penal Code prescribes the extent and limitations of the right of private defence. From a plain reading of these 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. (See: Rajesh Kumar Vs. Dharamvir and others,

55. In Bhaiya Bahadur Singh v. State of Madhya Pradesh AIR 1996 SC 3373, it has been held:

When an accused person sets up a plea of self defence, the onus to establish that plea lies on him. It is well established that the accused is not required to prove that plea beyond reasonable doubt but has merely to show it as probable. The onus to probabalise the defence version, from the salient facts and circumstances appearing in the prosecution case, or otherwise set up by the accused in the form of defence evidence, is always on him.

56. The evidence coming on the record of the present case, therefore, has to be examined in the light of the above stated legal position.

57. No injury has been proved to have been sustained by accused Subhash Chand and Naresh Kumar. Insofar as accused Neetu Singh is concerned, two simple injuries were found on her person by PW 10 Dr. J. Goswami as under:

(a) abrasion on right thumb ;

(b) contusion on right popliteofossa. No colour change or swelling seen.

58. Nothing has come on the record to show that either the deceased or any one of his companions or all of them were armed with any weapon at the relevant time. It is also not the case of the accused that knife Ex.P 2 and iron rod Ex. P.I belonged to the deceased and his companions. Therefore, keeping in view the injuries sustained by the deceased, out of which one was sufficient in the ordinary course of nature to cause death, the only inference is that the accused Subhash Chand and Naresh Kumar were armed therewith. The evidence coming on record shows that the accused might have had a right of private defence to start with, but the use of lethal weapons like iron-rod Ex. P.I and knife Ex.P.2 against the deceased and his companions, who were unarmed would show that the accused Subhash Chand and Naresh Kumar had crossed all the frontiers of the right of private defence. Therefore, both of them are guilty of the offence u/s 304, Part I, of the Indian Penal Code. In coming to the above conclusion, we are supported by the decision of the Apex Court in Puttan alias Ellappan v. State of Tamil Nadu 2000 SCW 1810.

59. Insofar as accused Smt. Nitu Singh is concerned, she stands rightly acquitted by the learned trial court, since no injury found on the person of the deceased can be attributed to her. Rather, it was she who had received the injuries, though of minor nature. Evidence has come on the record that as a result of the assault she had fallen unconscious and removed from the spot by the sons of accused Subhash Chand and later admitted to Hospital. The acquittal of accused Smt.

Nitu Singh as recorded by the learned trial Court does not call for any interference.

60. As a result, the appeal preferred by the State against the acquittal of accused Smt. Netu Singh being Cr. A. No. 439 of 1998 is dismissed. The acquittal is affirmed. Her bail bonds shall stand cancelled and discharged. Cr.A.No. 335 of 1998 preferred by the two accused Subhash Chand and Naresh Kumar is partly allowed. Their conviction for the offence u/s 302/34, Indian Penal Code is altered to the one u/s 304, Indian Penal Code. Upon such conviction, each of the two accused Subhash Chand and Naresh Kumar are sentenced to rigorous imprisonment for a period of 8 years and also to pay a fine of Rs. 5,000/- each. In default of payment of fine, each of the abovesaid two accused shall undergo simple imprisonment for a further period of one year. The case property be dealt with as per the orders of the learned trial Court.