

(2012) 06 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 156 of 2004

State of H.P.

APPELLANT

Vs

Mahender Singh and Jagdish @ Jageshwar

RESPONDENT

Date of Decision : 14-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 232, 313, 378
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2012) 2 ShimLC 1172

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Advocate : Vivek Singh Thakur, A.A.G, for the Appellant; M.S. Guleria, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—This is an appeal filed by the State of H.P. u/s 378 Cr.P.C. against the judgment of the Court of learned Additional Sessions Judge, Mandi, dated 23.12.2003, vide which he acquitted the respondents of the charge framed against them u/s 302 read with Section 34 of I.P.C. Briefly stated, the facts of the case are that on 16.8.2001, at 9.30 a.m., a telephonic message was received at Police Station Sadar, Mandi, that one Parvinder resident of village Alothi has been murdered and police should come and investigate. This information was recorded vide rapat No. 3 dated 16.8.2001. S.H.O. alongwith other police officials proceeded to the spot. He thereafter recorded the statement of Kaushalya Devi, mother of the deceased, in which she had stated that her husband is already dead and she has two sons, namely Parvinder, now deceased and Mohinder, respondent and third her step son Jageshwar, respondent. It was alleged that all the three brothers were living separately and she was living with Mohinder, respondent. On the previous day, she had taken her son Parvinder, deceased, to Deodhar temple for treatment, since he used to remain ill and was mentally disturbed. She further stated that she came back at about 2/2.30 p.m. and was

in her house. At about 8.00 p.m., she heard the cries of Parvinder and she was going towards the house of Parvinder where both the respondents met her in the courtyard of the house and her son Parvinder, deceased was lying in the courtyard of his house stained with blood. She asked both the respondents as to what has happened to Parvinder and Mohinder who was having a Darat in his hand and Jageshwar was having injuries on his face and they appeared to be under the influence of liquor gave beatings to her and gave a threat that she should leave the place and should not tell any person about the occurrence. Thereafter, both the respondents kept taking liquor in their house and she did not come out because of fear and remained in the maize fields till morning. In the morning, she went to the courtyard of the house of Parvinder and found him dead and she expressed a doubt that her son may have been killed by both the respondents since he used to remain ill and was mentally disturbed and the deceased used to proclaim that Jageshwar's wife Geeta Devi made him ill by practicing magic (Jadu-tona). She informed the Pradhan and other persons and on her statement a case was registered and after investigation, the challan was filed before the Court of Judicial Magistrate First Class, Court No. 2, Mandi, who committed the case to the Court of learned Sessions Judge, who assigned the case to the Court of learned Additional Sessions Judge, who tried the respondents as detailed above, leading to their acquittal.

2. We have heard the learned counsel for the parties and have gone through the record of the case.

3. The submissions made by the learned Additional Advocate General for the appellant were that there was sufficient evidence on record to prove that the death had occurred due to the injuries inflicted by the respondents and particularly respondent Mohinder. This fact was established on the basis of some admissions made by Smt. Kaushalya, mother of the deceased and accused persons in the statement u/s 313 Cr.P.C. recorded of accused Mohinder and the statement of DW-1 Geeta Devi wife of accused Jageshwar. It was submitted that there were number of injuries on the person of the deceased and no right of private defence was available to respondents Mohinder or Jageshwar and even if there was any such right of private defence, accused Mohinder had exceeded the said right of private defence and caused injuries on the person of the deceased more than what were required, which proved fatal leading to the death of the deceased. Thus, it was submitted that the findings of the learned trial Court to the contrary leading to the acquittal of the respondents are not correct and can be termed as perverse and as such, are liable to be reversed accordingly.

4. On the other hand, the submissions made by the learned counsel for the respondents were that Smt. Kaushalya Devi PW-1, mother of the deceased was not an independent witness and had never stated even in her statement u/s 154 that she had witnessed the occurrence or that the deceased was killed by both the respondents. It was submitted that in case she had witnessed the occurrence and stated so u/s 154 Cr.P.C., the mere fact that she turned hostile was not

sufficient to disbelieve her and this could have been argued that since she was the mother of the respondents, therefore, she has every reason to resile from her statement. However, it was submitted that once she had not stated so in her statement u/s 154 Cr.P.C. that she was an eye witness and, therefore, even if her statement is admitted as correct, it does not prove the guilt of the respondents that they had caused the injuries or Mohinder had caused the injuries on the person of the deceased. It was further submitted that there was no other evidence on record to establish that the injuries were caused on the person of the deceased by Mohinder in exercise of right of private defence to save his brother Jageshwar, respondent or his wife and children since the deceased was bent upon to eliminate them. It was also submitted that right of private defence cannot be calculated in arithmetic manner step by step and it depends upon the facts of the case, the threat to a person or the property and once that threat was available, the accused had the right of private defence and while exercising the right of private defence, respondent No. 1 or 2 had an apprehension that because of his past conduct, the deceased may kill respondent Jageshwar or his wife and children. For that, a reference was made to the past conduct of the deceased in creating a scene on some earlier occasions.

5. It was further submitted that the prosecution has to prove their case on their own and not upon the admission made by one of the accused in his statement u/s 313 Cr.P.C. or on the basis of the defence evidence put up by the accused persons. The admission made by the accused u/s 313 Cr.P.C. cannot be ignored and coupled with the defence version, it can be used as against the accused, but it cannot be used as a substantive evidence to prove the case of the prosecution, in which they have failed miserably. Both the learned Additional Advocate General as well as the learned counsel for the respondents had substantiated their pleas by the relevant case law, which shall be discussed below.

6. On appraisal of the evidence led by the prosecution, it is clear that the prosecution had examined 19 witnesses to substantiate their case. The evidence of the prosecution can be discussed under separate heads for better appreciation of the evidence.

A - DIRECT EVIDENCE:

7. PW-1 Smt. Kaushalya Devi, mother of the accused persons and the deceased, has stated that she had gone with deceased in the morning for treatment. She stated that the deceased started assaulting accused Jageshwar with Darat by entering in his house. This, she had not stated in her statement u/s 154 Cr.P.C., with which she was confronted. She further stated that on hearing cries of Jageshwar and his family, Mohinder accused came there and in order to save the entire family from being done to death by Parvinder, accused Mohinder may have by accident caused injuries to the deceased. She further stated that he struck injuries in Pucca house in his courtyard with another Darat, which was already in the hand of Mohinder. She further stated that Parvinder (deceased) had struck 3-4 blows with Darat to Jagdish, but she cannot say how many blows had been

struck to Parvinder by Mohinder. She further stated that she ran away and fell down and sustained injuries on the mouth. However, she was not beaten by anybody.

8. PW-1 was declared hostile and was subjected to detailed cross-examination by the learned Public Prosecutor for the State. She denied that her statement was recorded by the Judicial Magistrate at Mandi. She was confronted with the said statement. It is clear from a perusal of her statement that in her statement u/s 154 Cr.P.C., she had nowhere stated that the injuries were inflicted in her presence, but had only stated that she had gone to the spot on hearing the cries of Parvinder i.e. deceased and saw that her son Parvinder was lying blood stained in the courtyard of his house. She had alleged that the deceased attacked the accused persons and Mohinder was having a Darat in his hand and there was injury on the face of Jageshwar and also she was threatened by them not to tell this fact to anybody. However, she had not stated that she had witnessed the occurrence or that the injuries on the person of the deceased were inflicted in her presence by the respondents. In case, she had stated in her statement u/s 154 Cr.P.C. that she had witnessed the occurrence and subsequently, she had turned hostile. The portion of her statement made u/s 154 Cr.P.C. could have been used against her on the presumption that being mother of the accused persons, she may have turned hostile and her hostile statement could have been still used against the accused persons. However, in her first version to the police with which she was confronted, she nowhere stated about the fact that she witnessed the injuries being inflicted either by the deceased on the person of Jageshwar, respondent or by respondent Mohinder on the person of her son Parvinder, now deceased. Therefore, she was not an eye witness and even if she had turned hostile and had come up with a plea that the injuries were inflicted in her presence, but that is contrary to the version given by her, in which she had only stated about the threat and nothing had stated that as to who had caused injuries and how many blows had been struck upon the deceased, who was lying blood stained in his courtyard.

9. Apart from the above, her behaviour looks very surprising that her real son has been inflicted blows and is lying blood stained in the courtyard of his house, but she remains throughout the night in the maize fields out of fear, may be of respondents and reports the matter to the Pradhan and others only on the next morning. It may be that both the respondents were also her sons, one her real son and one her step son, but the deceased was her real son, for whom she had sympathy since she had taken him for treatment during the day time, but when she found him lying blood stained, she does not go to the Pradhan or other persons in the village to report them about this occurrence or ask them to provide medical assistance to her son, who may be still alive. Therefore, her version cannot be believed in isolation to consider her version as a version of eye witness particularly when she was not an eye witness in view of her own statement u/s 154 Cr.P.C.

10. Apart from the above, the prosecution had examined PW-13 Smt. Nirmala Devi, Pradhan of the Gram Panchayat, who stated that in the morning on 16.8.2001, Smt. Kaushalya Devi came to her to apprise her about the occurrence. She further stated that she disclosed to her that Parminder has been killed by his brothers. She alongwith Ward Member Sant Ram and Roshan Lal went to the place of occurrence and found Parvinder lying dead and they telephoned to the police. The call did not mature and then she asked one of the persons to inform the police. Though the facts as have been brought on record to show that rapat was entered on the basis of a telephonic message. She has come up with another plea that prior to the occurrence there was a complaint by Parvinder in regard to the beatings given by his brothers, for which an application was submitted on 28.4.2001. She proved it, a copy of which is Ext. PW13/A and stated that they went to the house of Parvinder on 10.5.2001 accompanied by Up Pradhan and few Panches. At the time of compromise, Kaushlya Devi, Mohinder, Jagdish and Chet Ram were present and a compromise was signed by Parvinder and others, copy of which has been proved as Ext. PW13/A. However, this part of the evidence does not inspire confidence since no Panchayat record was maintained in this regard by making any entry in register in regard to the complaint filed or the compromise entered. The possibility that this evidence was created in connivance with the police to make out a case of enmity in between the brothers cannot be ruled out. This also assumes significance in view of the admission made by PW-1 Kaushalya Devi that her children never fought for landed property.

B - MEDICAL EVIDENCE:

11. PW-9 Dr. Jiva Nand had conducted the postmortem examination of the body of Parvinder with alleged history being beaten to death by his brothers at about 8.00 p.m. on 15.8.2001. He made the following observations in regard to the injuries on the body of the deceased:-

INJURIES ON BODY OF DECEASED:

1. There was incised (chop) wound lying obliquely below and behind left ear lobule over left occipital region of size 10 cm in length 3cm wide at centre and 2 cm deep, (bone deep) with sharp margin and some abrasions at place with swollen margin and marked destruction of underlying tissue with splinting of the occipital bone near posterior end of the wound. There was lot of clotted and fluid blood in the wound, over margins and at the sides of the wound.

2. Another chopped wound below injury No. 1 extending from the middle of thyroid cartilage to the left side of neck upto mastoid process of size 14x3cm deep x 4cm wide with sharp margins, abraded ends and cutting and distruction of underling neck tissue including blood vessels i.e. external and internal carotids, vertebral arteries, internal juglar vein, vagus neves and mussles of both anterior and posterior triangle of neck and then finally cutting the third and 4th cerical vertebrae at spinal process with dislocation of both C3 and C4 with 1pt of

clotted and fluid blood at fracture site. There appears multiple chop wound at this site causing crushing of underlying tissues into small pieces and also cutting of spines of left side of C3 and C4 at multiple places.

3. There were multiple linear contusions below injury No. 2 and on front of neck left side lying in various direction, dark brown to skin colour of variable length x varying from 4 cm to 8 cm and 1 cm wide. They were antemortem in nature.

4. One chope wound on back of left shoulder over scapula of size 7 x 1 cm x 2 cm deep with its upper part tapering into a contusion on and front point of left shoulder of size 7 x 1 cm brownish in colour. There was lot of clotted blood over the wound on the margin and on the sides of wound.

5. There was obliquely lying linear contusion extending from 2nd left costochondral junction to lateral and downward direction upto 6th inter costal space along anterior axillary line of length 20 cms with superficial laceration of skin at its middle of 11cm width all over the wound some clotted blood present over margin.

7. Nearly transversely lying contusion of skin to brown colour extending from 7th costochondral junction left side to left side of chest upto midaxillary line over 6th ribs left side of 1cm width x 22 cm in length with some superficial skin laceration at places.

8. Obliquely lying contusion on left side of chest and abdomen extending from 5th inter costal space just below left nipple downward, backward upto left renal angle skin to brown colour with some superficial lacerations of skin at places. It was skin to brown colour and antemortem in nature.

9. One penetrating wound on lower part of posterior aspect of left upper arm of size 1 x 1 cm and bone deep with lot of fluid and clotted blood was present over wound having irregular margins. It was 4cm above acromion process of ulna. It was antemortem in nature.

10. Contusion lying over posterior lateral aspect of right upper arm near elbow of size 7cm long and half cm wide brownish in colour antemortem in nature.

11. There was superficial laceration skin deep lying nearby transverse on frontal aspect of left knee just above patella 5 x 1 cm in size brownish in colour with underlying contusion and was antemortem in nature.

12. 1 x 1cm penetrating wound with irregular margins in lateral side of left leg 4cm above left malleolus bone deep with lot of fluid and clotted blood over and around the wound.

13. Chop wound on terminal part of left ring finger ventral aspect of size 1 x 1 cm bone deep cutting the underlying bone with lot of fluid and clotted blood over the wound. The margins were sharp but ends were lacerated with lot of clotted blood over margins.

14. There were underlying fracture of the ribs of left side namely 3rd, 4th, 5th, 6th and 7th along anterior axillary line with clotted blood present over fractured side.

THORAX:

There were multiple contusion as already mentioned with fracture ribs 4th to 7th left side near Anterior axillary line with contusion and clotted blood over fracture side. Both pleuras were normal pale. Mucosa of larynx and trachea were normal pale white. Both lungs were pale white with some mottled dark spots at places otherwise normal. Pericardium Normal. All the chambers of heart were normal with small amount of fluid blood in left ventricle only. Coronaries were normal. Aorta and pulmonary veins were normal and smpty.

12. He gave his opinion as under:-

In my opinion the deceased died due to haommorhagic shock as a result of antemortem injuries to the neck tissue and other parts of body. Duration between the injury and death was few minutes and between death and post-mortem 12 to 24 hours.

13. PW-4 Dr. Hari Praya, Medical Officer, had examined Smt. Kaushalya on 16.8.2001 and she observed as under:-

On 16.8.2001 on the request of S.H.O. P.S. Sadar Mandi I had examined medically Kaushalya wife of Gian Chand aged 50 years resident of village Alathu Sai, P.O. Marathu at 3.45 PM who was brought with the alleged history of beaten by her son on 15-8-2001. On examination there was abrasion on aspect of the inner side of the lip. It was 1cm in length and partial skin thickness deep. Swelling of the upper lip present. No injury to gums and teeth. The injury was simple in nature caused with blunt object and the duration of the injury was within 24 years.

14. She issued MLC Ext. PW4/A and stated that this injury was possible by fist blow. In cross-examination, she admitted that this injury was also possible by fall if a person struck against hard object.

15. PW-8 Dr. P.K. Soni, Radiologist, had conducted the medical examination of Jageshwar and Mohinder Singh accused and he observed as under:-

On the same day, at 8.15 PM, I medically examined accused Jagdish Chand. Patient came walking to O.P.D. He was conscious, co-operative his pulse, his pulse was 80 per minutes, B.P. was 110/80 MMg. No smell of alcohol. On examination, the following injuries were noted:

1. Incised wound with central gaping, clean regular edges smudged with clotted dark brown blood on the left shoulder one and half inch long and half inch wide in centre and 1/4 inch on peripheries. No underlying bone injury. However, Advised x-ray of left shoulder and clavicle AP-LAAT.

2. Inverted L- shaped wound on side of nose just above the lip on left side. The long portion of the injury measured one inch x one fourth inch has got regular margins. The Horizontal edge has got irregular medical margins and regular margin on lateral edge. Underlying bone was normal. No injury to teeth, Colour of the surrounding skin was dark brown. No bleeding at the time of examination.

3. Half inch wound just above the medial end of L Clavicle with regular margin. Surgical emphysema below the wound was there. X-ray left clavicle was advised.

Nature of the injuries were simple and MLC x-ray No. 454 dated 17.8.2001 show no fracture. Duration of injuries was upto 48 hours and the weapon used was sharp for injury Nos. 1 and 2 and with pointing edge for injury No. 3. He issued MLC Ext. PW8/B in respect of accused Jageshwar.

16. On the same day, he also examined accused Mohinder Singh and observed as under:-

On examination no injury was seen on his body. In this respect, I issued MLC Ext. PW8/C, which is in my hand and bears my signature.

He further stated that Injury No. 3 is possible by the tip and Injuries No. 1 and 2 are not possible with Darat Ext. P-1, but Injury No. 2 cannot be caused by Darat Ext. P-1. He however admitted in his cross-examination that Injuries No. 1 and 2 are possible by straight sharp edged weapon.

C. OTHER CORROORATIVE EVIDENCE:

17. PW-2 Himmat Ram has been examined, since he was a witness to the recovery of a packet having some sarson (mustard) seeds flowers, blood stained clothes of the deceased vide recovery memos Exts. PW2/A and PW2/C and he turned hostile, but admitted his signatures on these memos.

18. PW-3 Sohan Lal is having his house at a distance of 100 yards from the house of the accused and he stated that no person of the family of the accused visited his house or stated anything and he turned hostile by stating that Geeta Devi did not visit his house in the evening. PW-5 Praveen Kumar is photographer, who had taken the photographs of the body Exts. PW5/A-1 to PW5/A-12 and has proved the negatives also. PW-6 Ravi Singh, Patwari, had gone to the spot, prepared Shajra Tatima Ext. PW6/B and copy of jamabandi Ext. PW6/C.

19. PW-7 Rekha Devi is having her house at a distance of 50 to 60 yards from the house of the accused and stated that the houses of each other are not visible. She had only learnt about the death of Parvinder when the Pradhan visited the spot and she turned hostile. PW-10 H.C. Nand Lal was MHC at that relevant time, with whom the parcels were deposited by the S.H.O. PW-11 H.C. Raj Kumar who was constable at that time, had taken the sealed parcel to the office of Chemical Examiner. PW-12 Bhikham Singh, constable had entered rapat No. 3 received on 16.8.2001 referred to above. PW-14 Inspector/SHO K.D. Sharma has received the report of the FSL Exts. PW14/A to PW14/C and

attached with the case file. PW-15 Ghanshyam Chand, ASI, had recorded the FIR in this case on the basis of the statement of Kaushalya Devi. PW-16 Dr. Baldev Singh, JMIC, had recorded the statement of Kaushalya Devi Ext. P-10 on application Ext. P-8 submitted by the police. The application was submitted by PW-17 Om Parkash, S.I. PW-18 Constable Om Parkash had brought the statement of Kaushalya Devi to the Police Station and gave it to the MHC. PW-19 Inspector Ashish Sharma had conducted the investigation in this case, prepared site plan etc., took into possession blood stained clothes, packet of mustard seeds etc. He had also recorded the disclosure statement of one of the accused, namely, Mohinder Singh, leading to the recovery of the Darat in question

20. Coming to the plea of private defence taken by accused Mohinder Singh and elaborately dealt by the learned trial Court in its judgment leading to the findings that the accused had not exceeded his right of private defence, we will have to make reference to the circumstances vide which this plea of right of private defence had arisen and was discussed by the learned trial Court elaborately. We may refer to some evidence, vide which this plea was discussed in detail. In his statement u/s 313 Cr.P.C. accused Mohinder Singh had taken a specific plea in regard to question No. 16, that is, "you and co-accused struck injuries with drat to Parminder as a result of which, he died". In reply to this question, Mohinder Singh, respondent had stated as under:-

I have caused injuries to the deceased to save save the life of Geeta Devi, her children and Jageshwar.

21. In reply to the similar question No. 16, Jageshwar, respondent, has stated that the injuries on the person of the deceased were caused to save his life and the life of his wife and children.

22. Apart from the above, the accused had also examined, DW-1 Geeta Devi wife of Jageshwar alias Jagdish. She stated that the deceased was a hot temperament and dangerous person. He used to call her witch (Dian). She stated that on the evening of occurrence, accused Mohinder was lopping the branches of bushes near his house. The deceased came from his house having Darat. He was in furious mood and threatened to kill her and her family members by saying that where is the Dian, he will kill her and her all the family members. The deceased attempted to kill her, she ran away to save her life alongwith her children in the house. When the deceased attempted to kill her and her children, her husband Jagdish intervened to save her and her children from the hands of the deceased. The deceased attacked with Darat on her husband. On this, she and her children and her husband raised an alarm by saying "Bachao-Bachao". On hearing the cries for help, accused Mohinder appeared on the spot having Darat in his hand and at that time, Parvinder was attacking with Darat on her husband. Accused Mohinder in order to save her life and her family from the hands of Parvinder attacked the deceased with the Darat he was having in his hand. He kept on striking the deceased with the Darat till the deceased was holding Darat in his hand. She further stated that in case accused Mohinder had not attacked the

deceased, he would have eliminated the entire family. She further stated that Mohinder had launched the attack on deceased to save them. On previous occasion also, the deceased had been attacking the public and had been taken by the police to the Police Station. She further stated that there were two Darats on the spot when the police arrived.

23. In regard to the second Darat, specific questions were put up to her and she stated that the Darat of Parvinder was taken in possession by the police. It is in evidence of the prosecution that the Darat used by Mohinder was taken in possession in pursuance of the disclosure statement made by him.

24. From the above discussion, it appears that there were two Darats, one used by Parvinder and one used by accused Mohinder and the police had taken in possession only one Darat at the instance of accused Mohinder, but not the one with which Parvinder had caused injuries on the person of Jageshwar accused. It is in evidence that Jageshwar had four injuries, as detailed above and Mohinder was lopping the branches of the trees with his Darat and he came to the spot to save the family of Jageshwar and caused injuries to the deceased.

25. Coming to the right of private defence, learned counsel for the respondent had placed reliance upon the following decisions to substantiate his plea that the right of private defence was available to Mohinder respondent to save the family of Jageshwar including him, his wife and children, since the injuries had been inflicted upon the person of Jageshwar by the deceased and in view of the background of the deceased by which earlier also he had behaved in this manner and was mentally disturbed, for which his mother had taken him during day time to a temple. Accused Mohinder caused injuries on his person, which were numbering 14, but these were caused till he was holding Darat, for which there was a threat to accused Mohinder that the deceased would kill his brother Jageshwar or his family, in case he was not attacked.

26. Reliance was placed upon the decision in Mohd. Ramzani Vs. State of Delhi, The observations made in Para-19 are relevant and are being reproduced below:-

The onus which rests on an accused person u/s 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. A person faced with imminent peril of life and limb of himself or another is not expected to weigh in "golden scales" the precise force needed to repeal the danger. Even if he at the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it.

27. Reliance was placed upon the decision in Nagarathinam and Others Vs. State rep. by Inspector of Police, . The observations made in Paras 23, 28 and 35 are relevant and are being reproduced below:-

23. ... It is now well settled that a person apprehending death or bodily injury cannot be expected to 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 were armed with weapons.

28. The matter might have, thus, been otherwise if the prosecution could have established that the appellants have exceeded their right of private defence. The exercise of the right of private defence, in our opinion, must be determined, having regard to the entire factual scenario.

35. Keeping in view the totality of the circumstances, the possibility that the appellants have exercised their right of private defence cannot be totally ruled out. Prosecution had made all attempts to suppress a part of the occurrence. The genesis of the occurrence has, thus, not been proved. The totality of the circumstances brought on record do not, thus, point out to the guilt of the appellants. They are, therefore, entitled to be acquitted.

28. Reliance was also placed upon the decision in Udaykumar Pandharinath Jadhav @ Munna Vs. State of Maharashtra, . The observations made in Paras 2 and 4 are relevant and are being reproduced below:-

2. During the course of the trial, the appellant put up a defence that the injuries had been caused by him in the exercise of his right of private defence as the deceased who was an expert in karate had first attacked him and caused him an injury on the neck. He also stated that he had been able to disarm the deceased and had caused some injuries to him thereafter. In the course of the hearing before us, Mr. Kanade, the learned counsel for the appellant has first and foremost contended that the prosecution story was false and that the appellant had been roped in for some unknown reasons. We have gone through the entire evidence and are of the opinion that this argument has no merit as the case against the accused is proved by the evidence of the eyewitness whose presence cannot be doubted and in addition the fact that the accused had caused the injuries, has also been admitted though he has pleaded the right of private defence. Mr. Kanade then fell back on the alternative argument that he had caused the injuries in his right of private defence and therefore no case of murder could be spelt out.

4. It is significant that despite the fact that this statement had been made by Santosh in his cross-examination, the Public Prosecutor did not challenge the correctness thereof in any manner. In other words, it is clear that the prosecution itself has accepted this statement as being true. It is well settled that in order to make out a case of private defence, the accused need not plead it in specific terms (as it would, indeed, be a very courageous accused who would come out and take the risk of admitting his presence) but if the circumstances justify an inference with regard to such a right, the court must examine that possibility as well. In this background, we are of the opinion that the plea of private defence is available to the appellant though it has not been specifically raised by him. The

learned Government Counsel has, however, pointed out that three injuries had been caused on the person of the deceased and as such the complete exoneration on the plea of right of private defence was not available to the appellant.

29. Reliance was placed upon the decision in *Darshan Singh Vs. State of Punjab and Another*, . Their Lordships of the Supreme Court had summarized the case law in Paras 58 and 25 to 40, by referring to the various judgments of the Supreme Court and others and had laid down the following principles regarding right of private defence:-

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognise 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 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.

(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.

30. The law has been laid down clearly and the circumstances in which the right of private defence was available or it was open to an accused, even if he does not plead the same and under what circumstances it is available to an accused.

31. The learned Additional Advocate General has placed reliance upon the decision in *Ranjitham Vs. Basavaraj and Others*, . In that case, plea of exercise of right of private defence was taken by A-2. The High Court accepting such plea. Priority of. Held, to establish right of private defence, accused has not laid any evidence. It was held that in the facts and circumstances of instant case, the High Court erred in drawing inference that A-2 stabbed deceased in exercise of his right of private defence. Such finding of High Court is perverse and is set aside. The observations made in Paras 17 to 25 are relevant, which may be summarized as under:-

It is well settled that the right of private defence cannot be weighed in a golden scale and even in absence of physical injury, in a given case, such a right may be upheld by the court, provided there is reasonable apprehension to life or reasonable apprehension of a grievous hurt to a person. Further, the onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probabilities. Furthermore, whether a person legitimately acted in exercise of his right of private defence is a question of fact to be determined on the facts and circumstances of each case. In a given case, it is open to the court to consider such a plea, even if the accused has not taken it, but the surrounding circumstances establish that it was available to him. The burden is on the accused to establish his plea. The burden is discharged by showing preponderance of probabilities in favour of that plea. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and whether the accused had time to have recourse to public authorities, are all relevant factors to be considered.

32. In regard to the powers to be exercised by a Court hearing an appeal against the acquittal, in *Mrinal Das and others Vs. State of Tripura*, (2011) 9 SCC 479, the following observations were made in Paras 13 and 14, which are relevant, which may be summarized as under:-

In an appeal against acquittal in the absence of perversity in the judgment and order, interference by the Supreme Court exercising its extraordinary jurisdiction is not warranted. However, if the appeal is heard by an appellate court, it being the final court of fact, is fully competent to reappraise, reconsider and review the evidence and take its own decision. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/

report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed.

33. It is clear from the above discussion that whether the right of private defence is available or may be claimed by the accused in the given circumstances depends upon the facts of each case. A right of private defence is available in case there is a reasonable apprehension of death or injuries being caused by the deceased and the right of private defence commences as soon as a reasonable apprehension arises. It has also been clearly laid down in the above decisions that it is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetic exactitude. The accused need not prove the existence of right of private defence beyond reasonable doubt. It is not necessary that there should be an actual commission of an offence in order to give rise to the right of private defence. However, 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.

34. Analysing the facts of the case in the light of the above decisions, it is clear that the right of private defence was available to accused Mohinder or the other accused since accused Jageshwar had been caused some injuries and there was a threat to the life of wife of Jageshwar and his children. The fact that the deceased had behaved abnormally previously also cannot be ignored, though there is no reliable evidence in this regard, but only there is a possibility that this may have happened earlier and keeping in view the abnormal behaviour of the deceased, as has come up in evidence of his mother, accused Mohinder or Jageshwar may have thought it fit to intervene and cause injuries on the person of the deceased, so as to make him immobile by not allowing him to use the Darat with which he had come or with which he had caused injury on the person of Jageshwar. There was a threat to the wife of Jageshwar or children, which if considered by arithmetic exactitude, may be that the accused may have exceeded his right of private defence, but cannot be said that the accused had to proceed step by step in causing the injuries whether first injury was sufficient or more injuries were required to be inflicted upon the person of the deceased.

35. Apart from the above, it is the admission made by accused Mohinder in his statement which suggests that the right of defence was exercised by him and coupled with this, is the testimony of Geeta Devi, who may have stated so that these injuries were inflicted by Mohinder to save her husband, for which there was no evidence on record since her husband was also charged with the murder of the deceased. She may have deposed to save her husband and may have stated that these injuries were inflicted by Mohinder and not by her husband in exercise of right of private defence. Thus from which ever angle the facts of the case are considered, the right of private defence though not specifically pleaded, can still be considered, if the facts justify that such a plea was available to an accused. There may be a case of exceeding of right of private defence and in the given facts and circumstances of the case, it cannot be said that this private

defence was exceeded by Mohinder or even by other accused in causing the injuries to the deceased. In case a view has been taken by the learned trial court that right of private defence was available to accused Mohinder, it is possible that other view could also have been taken by the learned trial Court that he had exceeded his right, but the view taken by the learned trial Court can be said to be plausible in the given facts and circumstances, but cannot be termed as perverse, to call for an interference by this Court.

36. A specific question had come to our mind during the course of arguments and that question is as to whether the learned trial Court had properly considered to record the statement of the accused u/s 313 Cr.P.C. when there was no evidence as against any of the accused that they had caused the injuries. A Sessions Judge while trying the case have three situations to appreciate the evidence (i) he has to satisfy himself in case there is some evidence to record the statement of the accused u/s 313 Cr.P.C., (ii) to hear the arguments u/s 232 Cr.P.C. before the accused is called to lead defence evidence, if any and (iii) after defence has been heard and arguments have been heard on both the sides. At every stage, the learned Sessions Judge has to satisfy that the case was made out as against the accused on the basis of the evidence led by the prosecution.

37. Coming to the first stage, in case the learned Sessions Judge had considered the question in its right perspective at the time of recording of statement of accused persons u/s 313 Cr.P.C., in our view, no case was made out for recording statement of the accused u/s 313 Cr.P.C., since no witness had deposed that these injuries were caused to the deceased by accused Mohinder or Jageshwar. It is only when accused Mohinder in reply to question No. 16 admitted this fact that he had caused the injuries coupled with the testimony of DW-1 Geeta Devi that this Court could come to the conclusion that these injuries were caused by him. The prosecution has to prove this case and it has to stand on its own leg and no reliance can be placed upon the admission made by the accused in his statement u/s 313 Cr.P.C. or defence evidence to prove its case. Once this principle is applied, there was no evidence to record the statement of the accused u/s 313 Cr.P.C. that these injuries were caused on the person of the deceased by accused Mohinder since the main principal witness PW-1 Smt. Kaushalya Devi was not even an eye witness in view of the statement made by her u/s 154 Cr.P.C. or in her statement and as such, once this scale is adopted that the prosecution has to prove its case on its own, though the admission made by the accused in his statement u/s 313 Cr.P.C. and defence evidence can be used in corroboration to the evidence produced by the prosecution, but it can not be used as a substantive evidence to prove the prosecution case. In our considered view, the prosecution had not been able to prove its case on its own and ignoring the testimony of DW-1 and the statement u/s 313 Cr.P.C. of accused Mohinder, there was no evidence to hold that these injuries were caused by accused Mohinder. In the alternative, the plea of private defence was taken by the accused, which is not required to be proved beyond reasonable doubt, but it is sufficient if the accused is able to make out a case in the alternative, in which they have pleaded

and in the facts and circumstances of the case, findings recorded by the learned trial Court holding that the prosecution has failed to prove its case, cannot be termed as perverse, calling for an interference by this Court. In view of the above discussion, we accordingly hold that there is no merit in the appeal filed by the appellant, which is dismissed accordingly. The bail bonds furnished by the respondent shall stand discharged forthwith.