

GAHC020000952023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/2/2023

SHRI. ZANABEMO HUMTSOE
S/O LATE MHONRAO, VILLAGE-
SUNGKHA, P.O/P.S. BHANDARI,
PERMANENT RESIDENT OD ETSU COLONY,
BHANDARI TOWN, WOKHA

VERSUS

THE STATE OF NAGALAND AND ANR
NAGALAND KOHIMA

2:SHRI. SUKHUMO KIKON(NPS)

COMPLAINANT/INFORMANT

PRESENTLY SERVING AS SDPO
BHANDARI

WOKHA - 79711
NAGALAN

Advocate for the Petitioner : JOSHUA SHEQI

Advocate for the Respondent : P.P, NAGALAND

– B E F O R E –

HON'BLE Mr. JUSTICE NELSON SAILO

Date of Hearing : 21.06.2024 & 25.06.2024

Date of Judgment : 27.06.2024

J U D G M E N T & O R D E R (CAV)

Heard Mr. Joshua Sheqi, learned counsel for the appellant and Mr. Kevi Angami, learned Public Prosecutor, Nagaland.

[2.] This is an appeal under Section 374 Cr.P.C filed by the appellant against the Judgment dated 27.10.2022 and the Order dated 10.11.2022 whereby, he was convicted under Section 304 Part-II IPC and sentenced to undergo Rigorous Imprisonment for 5 years by the Court of District & Sessions Judge, Wokha, Bhandari, Nagaland in GR No. 30/2020 corresponding to Bhandari P.S Case No. 7/2020.

[3.] Brief facts of the case is that on 20.03.2020, a written *suo moto* FIR was received from Sukhumo Kikon, SDPO, Bhandari stating that one person had been chopped to death at Lio-Wokha old village and on reaching the place of occurrence, it was confirmed that the accused person Sh. Zanabemo Humtsoe (appellant herein) had murdered his own brother

Sh. Oponthung. Accordingly, BDI P.S Case No. 07/2020 under Section 302 IPC was registered and investigated into.

[4.] During the investigation, the appellant was arrested and one 12-bore SBBL gun with a broken butt and bent barrel used for the commission of the offense was seized. Inquest over the dead body was conducted and on the refusal of the family members to conduct a post-mortem examination, the dead body was handed over to Sh. Y James Humtsoe, uncle of the deceased. Upon completion of the investigation, the Investigating Officer finding a prima facie case well established against the appellant under Section 302 IPC submitted the charge sheet on 14.07.2020. Be it stated herein that the statement of the appellant under Section 164 Cr.P.C was also recorded on 24.03.2020. The charge was framed against the appellant under Section 302 IPC on 27.01.2021 and to which, he pleaded not guilty and claimed to be tried. Accordingly, trial against the appellant was initiated. During the trial, the prosecution examined as many as 5 prosecution witnesses and upon closure of the prosecution evidence, the appellant was examined under Section 313 Cr.P.C. Thereafter, the appellant examined one witness as the defence witness and upon conclusion of the trial and after hearing the parties, the learned Trial Court convicted the appellant and sentenced him to imprisonment in the manner as already

indicated herein above.

[5.] Mr. Joshua Sheqi, learned counsel submits that the confessional statement of the appellant recorded under Section 164 Cr.P.C does not show any intention on the part of the appellant to kill the deceased person. The deceased person aggressive by nature was the one who provoked the appellant. After breaking the beer bottle he was holding, the deceased rushed to their uncle's house, took out a gun and fired at the appellant. The appellant in order to protect himself tried to neutralize the deceased by snatching the gun and hitting him with the butt of the gun and which was only an act of his defence. The learned counsel submits that the evidence of DW-1 also clearly shows that the deceased person was aggressive by nature and therefore, he submits that under the facts and circumstances, the provisions of the right of private defence as provided under Section 97, 99 & 100 are attracted and particularly the first and second exception to Section 100 IPC.

[6.] The learned counsel submits that in criminal jurisprudence, the prosecution has to prove its case with proof beyond reasonable doubt which is only missing in the present case. He submits that there were no eyewitnesses to the alleged crime and therefore, the conviction of the appellant is on the basis of circumstantial evidence. He submits that for a

conviction on the basis of circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn should form a complete chain so that there is no escape from the conclusion that the crime was committed by the accused. However, in the instant case, from the evidence led by the prosecution, it cannot be said that the chain is complete.

[7.] The learned counsel further submits that it is an established principle of law that when two views are possible, one to the guilt of the accused person and the other in favor of the accused person, the view which is favorable to the accused person should be adopted by giving him the benefit of doubt. He submits that in the present case, the dead body was not sent for post-mortem examination and the seized weapon was also not sent for expert opinion and no medical report or FSL report was adduced by the prosecution to prove the guilt of the appellant and therefore, the appellant should be given the benefit of the exception Clause Nos. 1. & 2 of Section 100 IPC and accordingly, be acquitted from the charge. In support of his submission, Mr. Joshua Sheqi, learned counsel relies upon the following authorities:-

(i) *Puran Singh & Ors. vs. State of Punjab*,
(1975) 4 SCC 518.

(1) *James Martin vs. State of Kerala*, (2004) 2 SCC
203.

(2) *Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681.*

(3) *Dharshan Singh vs. State of Punjab & Anr, (2010) 2 SCC 333.*

(4) *Sujit Biswas vs. State of Assam, (2013) 12 SCC 406 and*

(5) *Sukumaran vs. State Rep. By The Inspector of Police, (2019) 15 SCC 117.*

[8.] Mr. Kevi Angami, learned Public Prosecutor, on the other hand, submits that the sequence of the evidence led by the commission of crime is overall not disputed by the defence. He submits that the appellant has not taken the plea of his right of self-defense before the learned Trial Court. He submits that as per Section 105 of the Evidence Act, 1872, the burden of proving the existence of circumstances is upon the accused person and the appellant in the instant case has failed to discharge such burden.

[9.] The learned Public Prosecutor further submits that Section 99 IPC provides for Acts against which there is no private defence. The second provision of Section 99 provides that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Referring to the evidence of DW-1, the learned Public Prosecutor submits that the appellant on the night of the incident around 8:00 to 8:30 PM gave him a call stating that his younger brother, the deceased was under

the influence of alcohol and was creating nuisance. DW-1 then asked the appellant to leave the deceased person all by himself. Thereafter, at around 11:00 to 12:00 PM on the same night, DW-1 received another call from the appellant and that was when the appellant informed him that he had murdered his younger brother.

[10.] The learned Public Prosecutor submits that it is therefore clear from the events that unfolded that there was enough time for the appellant to take recourse to other remedies as may be available in terms of the 2nd proviso to Section 99 IPC. He submits that under the given facts and circumstances, the learned Trial Court has rightly convicted the appellant under Section 304 Part-II IPC and has awarded him a just sentence. The learned Public Prosecutor, therefore, submits that the impugned Judgment of conviction and the impugned order of sentence may not be interfered with by this Court.

[11.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on records of the Lower Court. In order to find out as to whether the conviction and sentence of the appellant are justified or otherwise, the evidence led by the prosecution as well as the defence may be examined.

[12.] PW-1 who was the SDPO at Bhandari at the relevant time in his examination-in-chief deposed that on 19.03.2020, when it was already late in the night, he received information over the phone that one person had been murdered at Lio-Wokha old village. He along with P.S staff immediately went to the place of occurrence and on reaching he saw the dead body lying on the bed. He was informed that the deceased was murdered by his own brother. Inquest over the dead body was conducted and as for the post-mortem examination, the same was refused by the family members of the deceased. When he enquired as to how the incident had happened, he was told by the persons gathered at the place of occurrence that the appellant had hit his brother on his head with a 12-bore SBBL gun which caused the death. He was shown the gun that was used to hit the deceased. The following day, he lodged an FIR at Bhandari Police Station and upon the registration of the FIR, the case was endorsed to S.I Y Yanbemo for investigation.

[13.] In his cross-examination, PW-1 stated that he can neither identify nor ascertain the name of the victim and that it was S.I C Yanbemo who conducted the inquest upon the dead body. Although, there were supposed to be some eyewitnesses during the alleged assault by the appellant upon the deceased but he was not in a position to identify and

name any of the eyewitnesses. He also could not specifically mention the name of the person who told him that the appellant had murdered his brother. He also stated that the issue which led to the argument between the two brothers could not be ascertained and that he agreed to the suggestion that the cause of the death of the deceased was not ascertained as he could not identify or observe in external and internal injury on the body of the deceased. On being re-examined, PW-1 stated that at the place of occurrence, he did not enquire much about the incidents and instructed S.I C. Yanbemo to do all the necessary inquiries.

[14] PW-2, who is the I.O in the case, in his examination-in-chief stated that on 19.03.2020, a telephone call was received at the Bhandari Police Station informing that one person was beaten to death at Lio-Wokha old village. He and the party immediately went to the place of occurrence and confirmed that the appellant had murdered his own brother. PW-2 conducted the inquest over the dead body at about 1:47 hours. At the time of the inquest, he saw injury mark on the forehead of the deceased and also his head portion was smashed. After the inquest was done, the dead body of the deceased was handed over to the Y James Humtsoe after observing all the legal formalities in view of the refusal by the relatives of the deceased to conduct post-mortem examination. PW-2 stated that he was endorsed to

investigate into the matter and during the investigation, he arrested the appellant and brought him into the Police Station and interrogated him. The weapons used by the appellant were also seized alongwith the Nokia mobile phone and power point charger. PW-2 stated that at the time of interrogation, the appellant admitted before him that he had beaten his brother to death by using the weapon mentioned in the seizure memo i.e. the broken SBBL gun. Thereafter, upon finding the prima facie case against the appellant under Section 302 IPC, he submitted the charge sheet before the Court. PW-2 exhibited the inquest report, his signature, handing over the dead body and the seizure memo for seizing the gun and the other materials.

[15.] In his cross-examination, he stated that the circumstantial evidence during the course of the investigation led him to determine that the case was that of murder. Since the alleged crime was said to have been committed during the middle of the night and therefore, there were no eye witnesses to the crime and some people from the village told him that they heard gunshot while they were sleeping but they could not make out who had fired the shot. PW-2 further stated that no bullet injuries were found on the body of the victim during the inquest and that during the investigation he came to understand that there was a difference between the appellant and

the deceased over inheritance which led to a misunderstanding between them. The PW-2 further stated that during investigation, the appellant told him that his action was in his defence. However, as there was no eye witness, PW-2 stated that he cannot vouch to the suggestion that the action of the appellant was in self-defense or intentional. He also denied the suggestion that the appellant should have the benefit of 304 IPC instead of 302 IPC.

[16.] PW-3, in his examination-in-chief stated that he was presently residing at his native village Lio Wokha Old Village and he was a cultivator by profession. That he personally knew the appellant and his family since a long time back. The appellant was staying in his house 4 to 5 months prior to the incident and he was involved in the road construction which was going on between his village & Sungkha village. Most of the time the appellant used to be away at the site looking after the on-going works and sometime he stayed at the camp and at times he came and spent the night in his house for one or two days at times. On 19.03.2020 both the brothers reached his compound in the evening and he saw them arguing. He pacified them to settle down and go to sleep and thereafter, he went to his room and slept. At about 10:30 to 11:00 PM, he heard a gunshot and at the same time, he was woken up by the appellant saying that he had killed his brother. He

immediately, went outside his room and saw the deceased lying dead on the ground with oozing from his head. He immediately informed the Village GB about the incident and the GB came to his house and also informed the police about it. He also stated that he saw 12-bore SBBL gun lying on the ground a little away from where the body lay. He stated that the gun belonged to his younger brother Robin but prior to the incident, the deceased was using it. He saw that the gun was broken and the barrel bent. The dead body was handed over to the family of the deceased.

[17.] In his cross-examination, PW-3 stated that during the stay of the appellant in his house, he never saw him involved in any bad activities. The appellant was not in a possession of a gun when he went and pacified him and the deceased while they were quarreling inside the house. He also stated that he had not seen the two brothers quarreling or fighting on any other days. PW-3, however, admitted that both the deceased and the appellant were drunk on that night and that he did not see the incident with his own eyes. Further, the gun was in good shape prior to the incident and later he saw that it was broken and the barrel was bent when he saw it near the dead body. He also stated that he was not aware about the reason behind the incident.

[18.] PW-4, in his examination-in-chief, stated that presently he was the Head GB of Lio-Wokha old village and it was around 10:00 to 10:30 PM on 19.03.2020 while he was sleeping in his own house, Mr. Thungchamo S/o Sh. Nribemo came and informed him that the appellant had murdered his own brother. At the relevant time, the two brothers were residing in the house of Nribemo and the appellant was supervising the ongoing construction in his village. On reaching the house, he saw the dead body lying on the ground and the appellant was standing near it. Except for Nribemo, the owner of the house, there was nobody else and he found the incident had happened in the compound of Nribemo's house. He asked who had murdered the deceased and to which, the accused replied that he had killed his own brother by hitting him with a gun. As it was an unnatural death, he told the appellant to stay in the same place and inform their family members in the village. PW-4 stated that was present at the place of occurrence till the arrival of the police. After the police investigated and formalities were done, the dead body was handed over to the family members. He identified the seized given with broken butt. After the arrival of the police, he also examined the dead body and saw an injury mark on the back side of the deceased's head. As the cause of the death was known, the families members refused post-mortem examination of the body and it was handed over to the family members.

[19.] In his cross-examination, PW-4 stated that the gun that was used in the alleged crime belonged to Robin Humtsoe and that he was out of station. However, he was informed by the father of Robin Humtsoe that the deceased collected the gun from the house of Robin Humtsoe in an attempt to shoot his brother. In his re-examination, PW-4 stated that when he reached the place of occurrence, he saw the gun was already damaged and was lying on the ground near the dead body. He was told that the gun belonged to Robin Humtsoe but was not in station at the relevant time. When he asked the appellant how his brother died, he told him that he hit his brother with the gun which was lying on the ground.

[20.] PW-5, in his examination-in-chief, stated that he was presently the Headmaster of Government High School, Changsu village. At the relevant time on 19.03.2020, he was in his farm at Hayi Yan. When he heard about the news of the death of the deceased, he immediately went to the place of occurrence. As the victim and he himself belonged to the same Clan, he went there to inquire as to how it happened. On reaching there, he saw the dead body inside the room and after the arrival of the Police, on completion of the formalities, he received the dead body since the family members of the victim were yet to arrive. When the family members of the deceased arrived, they took over the dead body and he went back to his farm. The

defence declined to cross-examine PW-5.

[21.] The appellant examined Sh. Johny Kikon as DW-1, who in fact, is the sole defence witness. DW-1, in his examination-in-chief, stated that he is a Government Primary School teacher and posted at Bhandari. The appellant and his family are immediate neighbors at Etsu Colony, Bhandari town and that apart, they had family relations as well. The deceased, the appellants and their other brothers were his students while he was teaching at Don Bosco School, Bhandari. Being associated with them for the last 16 to 17 years as immediate neighbor and also as a Teacher and tutor to them, he could observe the different traits and characters the appellant and his other siblings who were all boys had. As all the siblings were boys, there were times when certain altercations used to take place among them and the deceased used to be in an aggressive mood and often resorted to arming himself with whatever weapons or fatal materials that he could lay his hands on. In the year 2017 & 2018, the appellant used to assist him in maintaining his vehicle and in the latter part of 2019, the appellant was sent to his native village to supervise the road construction under the PMGSY project. He noticed the deceased going to the village at times when the appellant was in the village and when he asked him why he did so, the deceased replied that the appellant was working very hard in the village and therefore, he used to

go to the village to relieve him at times. He therefore could understand that there was a bond of love and affection between the brothers.

[22.] DW-1 further stated that on 19th or 20th March, 2020 at around 8:00 to 8:30, he received a call from the appellant on his mobile phone informing him that his younger brother (the deceased) was under the influence of alcohol and was creating a nuisance by arming himself with the firearm and strolling alone intimidating the appellant. He therefore told the appellant to escape and leave the deceased all by himself. Later, on the same night at around 11:00 to 12:00 PM, he received another phone call from the appellant and when he picked up the phone, he noticed that the appellant was not in a state to speak clearly and rather he was crying and told him that he had unintendedly murdered his younger brother. On hearing this, DW-1 scolded him and told him that they had asked him to stay away from him as he was armed. In reply, the appellant said that he did stay away from the deceased and was staying in his house but the deceased came in search of him with a gun and tried to shoot him. Therefore, in the process when they were wrestling for the gun, accidentally a part of the gun hit his younger brother and to which, he succumbed to his injury and died. He, therefore, requested DW-1 to report the matter to the Police and to take him into custody. DW-1 therefore stated that by the narration of the incident by

the appellant, it could be safely concluded that the unfortunate incident was accidental without any intention. He stated that had the appellant intentionally injured his brother he would not have surrendered to the Police and would have not absconded. He also stated that he has never seen the brothers involved in any criminal activities nor did they have any Police record.

[23.] From the evidence of the prosecution particularly PW-1 SDPO Bhandari and PW-2, the case I.O, it may be seen that according to them they had received a telephone call on 19.03.2020 late in the night to the effect that one person had been murdered at Lio Wokha Old Village. Therefore, they along with the staff of the Police Station immediately went to the place of occurrence and upon reaching, they found the dead body lying on the bed. They were informed that the appellant had murdered his own brother. PW-2 had conducted inquest over the dead body and he found injury in the forehead of the deceased and also his head portion was found to be smashed. PW-2 stated that upon interrogating the appellant, the appellant admitted that he had beaten his brother to death by using the 12-bore SBBL gun.

[24.] PW-3, who is the owner of the house where the appellant and

the deceased were staying at the relevant time, stated that on 19.03.2020 both the brothers, upon reaching his compound in the evening, were arguing with each other. He tried to pacify them and were asking them to settle down and to go to sleep. Thereafter, at about 10:30 to 11:00 PM, he heard gunshot and at the same time he was awoken up by the appellant who told him that he had killed his brother. He immediately went out of his room and saw the deceased lying dead on the ground with oozing from his head. He also saw the 12-bore SBBL gun lying on the ground a little away from where the dead body lay. PW-3 also stated that he informed the village GB about the incident who then came to his house and also informed the police.

[25.] PW-4, who since then became the head of GB of Lio-Wokha village in his evidence, also state that while he was sleeping in his house on 19.03.2020, the son of PW-3 at around 10:00 to 10:30 PM came and informed him that the appellant had murdered his own brother. On reaching the place of occurrence, he saw the dead body lying on the ground and the appellant standing near it. There was no one in the house except for PW-3. When he put the question as to who had murdered the deceased, the appellant replied that he had killed the deceased who was his own brother by hitting him with a gun. PW-4 also stated that he was at the place of occurrence till the police came and that he identified the seized gun which

had a broken butt. He also stated that he saw an injury mark on the back side of the head of the deceased. PW-4, in his cross-examination, again reiterated what he had stated in his examination-in-chief which was to the effect that when he asked the appellant how his brother died, the latter told him that he hit his brother with his gun which was lying on the ground. It, therefore, can be seen that the evidence of all the prosecution witnesses corroborate with each other with regard to the death of the deceased, the cause of the death and who was responsible for the same.

[26.] The defence also examined one witness namely; Johny Kikon as DW-1. According to the DW-1, he knew the family of the appellant and the deceased since they were his immediate neighbor and that he was also a teacher and tutor to them. He was aware about the fact that the deceased amongst the siblings was the aggressive one and that he would often resort to arming himself with whenever material he could get when he was in an aggressive mood. According to him, the appellant on 19th or 20th March, 2020 at about 8:00 to 8:30 had called him over phone informing him that his younger brother was under the influence of alcohol and creating nuisance and that he had a firearm with him. He then asked the appellant to leave the deceased all by himself and to stay away from him. Later in the night at around 11:00 to 12:00 PM, he received another phone call from the

appellant and when he picked up the phone, he noticed that the appellant was unable to speak but managed to say while crying that he had unintentionally murdered his younger brother. According to the appellant, although he tried to stay away from the deceased as was told to him by DW-1, the deceased came in search of him with a gun and tried to shoot him and in the process, they wrestled for the gun and a part of the gun hit his younger brother and for which, he succumbed to his injury and died.

[27.] From the evidence of DW-1 as well, it can be seen that the appellant was responsible for the death of the deceased and that immediately after the incident, he called up DW-1 to inform him about what had happened. It may be seen that the statements of the appellant was also recorded under Section 164 Cr.P.C wherein, the appellant stated that on that fateful day, he and his younger brother were drinking wine together. They had a discussion about his service and he was telling him that even that year, he will not be getting into any service and by saying this, he himself got angry. He then broke the beer bottle which he is holding and he went to his uncle's house and brought a gun and fired at the appellant. In order to save himself, the appellant pulled the gun from him and for his own safety, he hit him with the butt of the gun on his head three times. After hitting him, he broke the gun into pieces on the ground. Thereafter, he called Johny who

was his relative and informed him that he had killed his brother and asked him to inform the police. It may be seen that the relative of the appellant Johny is DW-1. DW-1 in his evidence has stated that he had received two phone calls from the appellant on the night of 19.03.2020. In his first phone call, he had stated that his brother was under the influence of alcohol and was creating nuisance and he had a gun in his hand and to which, DW-1 asked him to stay away from his brother and to leave him alone. Thereafter, another phone call was made by the appellant to DW-1 and by this time, he informed the latter that he had killed his brother. It can therefore be seen that the fact that it was the appellant who had killed his brother by hitting him with the butt of the gun which was being wielded by the latter is consistent even from the appreciation of the evidence of DW-1 and the 164 statements of the appellant.

[28.] From the above evidence led by the parties, it can be seen that there was no eye witness to the crime but the fact that the appellant had admitted to have committed the crime by using the butt of the gun has been consistent from the evidence led by the prosecution and also the defence as well and also from the 164 statements of the appellant himself. The Apex Court in the case of *Trimukh Maroti Kirkan (supra)* in the given facts of that case observed and held that there is no eye witness of the

occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. The circumstances should unerringly pointed towards the guilt of the accused and taken cumulatively, the circumstances should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. In the present case as well, from the materials available on record, there is no other explanation as to how the deceased had died. The appellant himself had informed the persons to whom he came into contact after the incident and who are the prosecution witnesses and the sole defence witness in the case and it was he who had killed his brother. Therefore, in the considered view of this Court, there is no escape from the conclusion that it was the appellant who had caused the death of his brother.

[29.] Another aspect of the matter is that an attempt has been made on the part of the defence that the reason for taking such an action against the deceased person was purely for self defense. The appellant, in his 164 statements, had stated that after the deceased brought a gun and

fired at him, he in order to save himself pull the gun from him and hit him with the butt of the same gun on his head for three times and thereafter, he broke the gun into pieces on the ground. PW-2, who is the I.O of the case in his evidence, stated that while conducting inquest over the dead body, he saw injury mark on the forehead of the deceased. He also saw that his head portion was smashed.

[30.] The Apex Court in *Dharshan Singh (supra)*, after referring to various decision of the same Court with regard to the right of private defence under Section 96 to 106 IPC laid down 10 principles. The 10 principles were also relied upon by the Apex Court in the case of *Sukumaran (supra)* as well. The 10 principles laid down as contained in paragraph No. 58 of the *Dharshan Singh (supra)* are abstracted below for ready perusal:-

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

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

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

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

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

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

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

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

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

(ix) The [Indian 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.”

[31.] From the above abstract, it may be seen from the (ii) and (iii) principle that 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. Mere reasonable apprehension is enough to put the right of self defense into operation. It is not necessary that there should be actual commission of 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 exercise. Principle No. 7 (vii) also provides that even if the accused does not plea self defense, it is open to consider such a plea if the same arises from the material on record. However, what is important to notice here is principle (vii) which provides that in private defence, the force used by the accused ought not to be wholly disproportionate or much later than necessary for protection of the person or property. As already noticed herein above, from the materials available on record, it is in evidence that the appellant used the butt of the gun to hit the deceased person on the head of three times. The

case I.O in his evidence also stated that when he conducted inquest over dead body on reaching the place of the occurrence, he saw injury mark on the forehead of the deceased and also found his head portion to be smashed. The appellant in his 164 statement also confessed that he hit the deceased on the head with the butt of the gun for three times. The evidence led by the prosecution in this regard is neither upon rebutted nor falsified by the defence. Therefore, it only appears that the appellant had used excessively force in an attempt to defend himself. Therefore, in the considered view of this Court, the exceptions carved out under Section 100 of the IPC with regard to the right of private defence is not attracted.

[32.] Thus upon due consideration of the case in its entirety, I do not find any ground for interfering with the impugned judgment of conviction and the order of sentence passed by the learned Court below. Having come to such conclusion, reference to other authorities relied upon is found to be not necessary. The appeal accordingly is found to be without merit and is dismissed.

[33.] Registry shall send back the Lower Court Record immediately.

JUDGE

Comparing Assistant