

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.35 OF 2013**

State of Goa,
Through Mapusa Police
Station, Mapusa Goa

.. Appellant

Versus

1. Mr. Mervin Thomas Menezes,
S/o Aloysius Menezes,
Aged 20 years,
Flat No.F/6, First Floor,
Kamat Park, Povocao,
Moirra, Bardez, Goa
 2. Mr. Faustus Salvino Barbosa,
S/o Jose Barbosa,
Aged 20 years,
H.No.303, Povocao,
Moirra, Bardez, Goa.
- .. Respondents

Mr. Mahesh Amonkar, Additional Public Prosecutor for the appellant.

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado Advocate for the respondents.

**CORAM :- F. M. REIS, &
C. V. BHADANG, JJ.**

Reserved on : 10th June, 2016

Pronounced on : 7th March, 2017

JUDGMENT : (Per C. V. Bhadang J.)

By this appeal, the appellant/ State is challenging the

acquittal of the first respondent(accused no.1) from the offence punishable under Section 302 read with Section 34 of Indian Penal Code (IPC, for short).

2. The prosecution case may be briefly stated thus :

The first respondent is the son of Aloysius Menezes while the second respondent is his friend. The deceased Thomas Menezes happened to be the uncle of the first respondent. The incident in question occurred on 14/10/2008 at about 17.45 hours at flat No.G3, Kamat Park, Povocao wado, Moira, Bardez, Goa. The deceased Thomas was residing in the said flat along with his wife Carmen Menezes (PW12). The said flat comprises of two bed rooms, a kitchen and a hall. The flat is situated on the ground floor of the building. It is said that one of the bed rooms in the said flat, was in possession of Aloysius, who had locked the said room from outside. The rest of the flat was in possession of the deceased and his wife Carmen Menezes (PW12). According to the prosecution, Aloysius along with his mother, Magdelina Menezes and the first respondent were staying in a flat in the B Wing of the said building. Further according to the prosecution, there were constant quarrels and disputes between Aloysius and the first respondent on one hand and the deceased on the other, as regards the ownership of the said flat. There were complaints lodged by them against each other.

According to the prosecution, some household articles belonging to the complainant Carmen (PW12), were lying in the bed room in possession of Aloysius.

3. On 14/10/2008, the deceased Thomas had gone to break open the lock of the said bed room and was carrying a hammer and a screwdriver. While he was trying to break open the lock, the respondents went there. It appears that there was some altercation between the first respondent and the deceased, whereupon, the deceased told that he wants to remove his belongings from the bed room. It is the material prosecution case that the second respondent caught hold of the deceased and the first respondent assaulted him with the hammer on his head. He was also assaulted with fist blows. As a result of the assault, the deceased sustained injuries, to which he subsequently succumbed. According to the prosecution, Carmen (PW12) raised alarm on account of which, PW1 Joe Alpers and Casao Colaco and other persons gathered on the spot, by which time, both the respondents fled away on a Bullet motorcycle. Indisputably, Aloysius, the father of the first respondent went to the police station and lodged a complaint against the deceased of having assaulted the first respondent. It appears that the police arrived at the spot, where PW12 lodged the

complaint against the respondents, on the basis of which, an offence under Section 302 read with Section 34 of IPC was registered against the respondents. During the course of investigation, the Investigating Officer (IO) recorded the statements of the witnesses. A spot panchanama was drawn. It is said that the hammer and the screwdriver were recovered from the spot. The blood stained clothes of the respondents were recovered, on the basis of a confessional statement, under Section 27 of the Evidence Act. The seized articles were sent for report of the Chemical Analyser (CA) and the finding showed that the hammer as well as the clothes of the respondents, were having blood stains, matching with the blood group of the deceased.

4. On completion of the investigation, a chargesheet came to be filed, which was eventually committed to the Court of Sessions.

5. The respondents pleaded not guilty and claimed to be tried. At the trial, the prosecution examined in all 18 witnesses and produced contemporary record of the investigation. The respondents did not enter into witness box, nor led any defence evidence. The defence of the respondents was of total denial and

false implication.

6. The learned Sessions Judge framed a solitary point, as to whether the respondents have committed murder of Mr. Thomas Menezes in furtherance of their common intention. The learned Sessions Judge disbelieved the evidence of the only eye-witness Carmen (PW12), the wife of the deceased. However, the learned Sessions Judge found in para 47 of the judgment that there was sufficient material to prove beyond reasonable doubt that at the time of the incident, there was scuffle between the accused and the deceased and it was for the accused to explain how the blood of the deceased had come on their clothes. The learned Sessions Judge also found that there were marks of hammer on the latch of the bed room and that the first respondent (accused no.1) had also suffered injury by the screwdriver during the scuffle. The learned Sessions Judge ultimately found that "it is possible that in order to protect the possession of his flat and also to protect himself in defence, the accused no.1 had committed act of assault". Thus, the learned Sessions Judge came to the conclusion that the accused had acted in exercise of their right of private defence as the said defence was probablised. In the face of such a finding, the respondents came to be acquitted by a judgment and order dated 29/01/2013. Feeling aggrieved, the State is before this Court.

7. We have heard Shri Amonkar, the learned Additional Public Prosecutor for the State and Shri Lotlikar, the learned Senior Counsel for the respondents at length. With the assistance of the learned Counsel for the parties, we have perused the impugned judgment and the evidence led.

8. It is submitted by Shri Amonkar, the learned Additional Public Prosecutor for the appellant that the learned Sessions Judge ignored important piece of evidence and proceeded to acquit the respondents by accepting the theory of right of private defence, both of person and property. It is submitted that the learned Sessions Judge could not have disbelieved the evidence of Carmen (PW12). It is submitted that there is gross misappreciation of the evidence of PW12. The learned Additional Public Prosecutor would submit that PW12, being the wife of the deceased, was a natural witness to the occurrence and her evidence could not have been discarded on the basis of some contradictions/ omissions, which are not material for the said purpose. It is submitted that there was sufficient corroboration forthcoming to the evidence of PW12 in the form of seizure of hammer and screwdriver from the spot. The presence of the hammer marks on the latch, as also the discovery of the blood stained clothes of the respondent no.1 and the presence

of the blood stains thereon matching the blood group of the deceased. The learned Additional Public Prosecutor has taken us through the entire evidence in order to demonstrate that this was a case, wherein the defence of right of private defence could not have been accepted. It is submitted that the respondents had a clear motive in as much as there was a dispute between the deceased on one hand and the respondent no.1 and his father on the other, about the ownership and possession of the flat and the respondent no.2 was a friend of the respondent no.1. It is submitted that once having accepted the presence of the respondents on the spot and there being a scuffle, the learned Sessions Judge erred in acquitting the respondents on the theory of private defence. The learned Additional Public Prosecutor would submit that the learned Sessions Judge has not examined the issue of proportionality. In other words, the impugned judgment does not show as to whether the respondents can be said to have exceeded the right of private defence. It is submitted that while considering such a defence, it is necessary for the Court to examine the defence in the context of the circumstances and the evidence led, in order to find out whether the accused was justified in exercising the right of private defence or exceeded in doing so.

9. On the contrary, it is submitted by Shri Lotlikar, the learned Senior Counsel for the respondents that the evidence of PW12 would not inspire confidence. It is submitted that PW12, who is only eye-witness, has given four different versions of the incident, which itself is sufficient to discard her evidence. It is submitted that according to PW12, the portion in front of the door of the bed room was only sufficient for barely two persons to stand. It is not possible that the deceased, two accused and PW12 could witness the incident. It is submitted that in any case, it was the deceased, who was carrying the hammer and the screwdriver and was trying to break open the lock. Thus, there was no premeditation on the part of the respondents nor they were holding any weapons. It is submitted that there is no evidence to show as to how the hammer, which the deceased was holding, came in the hands of the first respondent, so as to accept the story that it is the respondent no.1, who assaulted the deceased by means of the hammer. It is submitted that the version of PW12 is to the contrary, which shows that the hammer and the screwdriver were lying in front of the door. It is submitted that in any case, when the deceased was trying to break open the lock of a room in possession of the father of the respondent no.1 and that he was armed with an hammer and the screwdriver, would be sufficient to accept the alternate defence about the exercise of right of private defence. The learned Senior

Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Yogendra Morarji Vs. State of Gujarat;*** [(AIR 1980) SC 660], ***Moti Singh Vs. State of Maharashtra;*** [(2002)9 SCC 494]. It is submitted that the scope of interference in an appeal against acquittal is limited and unless and until it is shown that the view taken by the learned Sessions Judge is perverse or an impossible view, no interference is called for.

10. The prosecution case is mainly based on the evidence of PW12, who claims to be an eye-witness to the incident. She is the wife of the deceased. It has come in her evidence that at the time of the incident, she along with her husband was staying in the flat at Kamat Park, Moira, which belonged to her husband. The flat was purchased by her husband Thomas and his mother Magdelina Menezes. The flat is having two bed rooms, hall and a kitchen and there were two entrances, one in front and other at the back. Magdelina resides with Aloysius in the B Wing of the same complex. She states that one of the bed rooms of the flat was in possession of Aloysius, who had locked the same from outside. She further states that their relationship with the respondent no.1 was strained on account of dispute in respect of the flat. She had filed several complaints with Mapusa police against Aloysius and his family

members. She had certain belongings kept in the bed room, which was locked by Aloysius.

11. The evidence of PW12 would further show that on 14/10/2008 at about 5.45 p.m., the deceased had gone to break open the lock of the bed room, carrying hammer and screwdriver. She was also present along with her husband. The bed room has two doors. The lock, which was put on the door, was on the rear door of the room. The other door was locked from inside the bed room.

She then claims that when the deceased was breaking the lock on the rear door of the bed room, both the respondents came there and the respondent no.1 asked the deceased as to why he was opening the door by breaking the lock, whereupon the deceased told him that he wants to take out his belongings from the room, such as tube light and fan, etc. This was followed by an argument between the respondent no.1 and the deceased, in which the respondent no.1 started hitting the deceased. The second respondent caught hold of the deceased while the first respondent started hitting him with fist blows. She shouted for help, when the respondent no.1 started hitting the deceased with hammer on the head. Thereafter, Thomas fell down and had a bleeding injury to his head. Even after Thomas fell down, the first respondent

continued hitting him with the hammer. She came on the road screaming for help, when one Joe Alpers and Casa Colaco came there. Both these persons saw Thomas lying near the door outside the room. These persons then called an Ambulance. After the Ambulance came, Doctors examined Thomas and declared him dead. She specifically claims that before Joe Alpers and Casao Colaco came there, both the respondents went away from the spot on their Bullet motorcycle. She then claims that Aloysius came on the spot subsequently and filed false complaint against the deceased. After the police came on the spot, she lodged the complaint Exh.42. She has stated that at the time of the incident, the deceased was wearing brown coloured short pant and nothing on the top. The first respondent was wearing a blue coloured long pant and gray T-shirt, while the second respondent was wearing red T-shirt and cream coloured long pant. She has also described the tools namely, the hammer, having handle of iron, while the screwdriver was having green hard plastic handle. She identified the tools before the Court and the clothes.

12. This witness is cross-examined at length. She was cross-examined as to the location of the flat and the two buildings at Kamat Park at Moira, Mapusa-Aldona Road. She has stated that the distance between the building in which she was residing and the

compound wall in front of the building towards the side of the road, would be around 2 metres and the distance between the compound wall and the road in front of the compound wall would be around 12 metres. She also admitted that there is lot of traffic on Mapusa-Aldona road.

It has further come in the cross-examination of this witness that the names of the deceased, Magdalena and Aloysius are mentioned in the sale deed pertaining to the flat. She came to reside in the flat for the first time in December, 2003. She married the deceased in December, 2004. One bed room, out of the flat, was locked for the first time in October, 2008 by Aloysius, forcibly. The last of the complaints filed by her against Aloysius was about 8 days before the incident. She also claimed that the bed room was locked by Aloysius with a latch and padlock on it. The deceased wanted to forcibly open it by breaking the lock. Screwdriver and the hammer (identified before the Court) were taken by Thomas to break open the door. When the respondents came there, the deceased was in the process of breaking the lock. At that time, the deceased had already inflicted a blow on the door, in order to break the lock with the hammer. She was confronted with the omission in the complaint about she being present along with the deceased, when the deceased was breaking the lock, which is not found in the complaint, which she was unable to explain. It has further come in

her evidence that she also tried to prevent the deceased from breaking open the lock, but the deceased did not listen.

13. After she screamed for help, many persons gathered on the road, but nobody came, except Joe Alpers and Casa Colaco. She states that she made a call to Joe Alpers from her cell, whereupon he came on the spot. Casa Colaco came to the spot upon hearing her screaming. When the deceased was breaking the lock, the first respondent did not ask him to stop, but just started hitting him. There was no discussion between the deceased and the first respondent. She claims that the deceased had kept the hammer and the screwdriver on the floor before both the accused could come to the spot. There are four steps leading to the rear door of the bed room. The height between the front and rear door of the bed room would be around 3 feet. After climbing the steps, there is small place in front of the rear door where the deceased had kept the hammer and the screwdriver. The first respondent climbed up the steps and assaulted Thomas in the said space. She was also confronted with certain omissions vis-a-vis the complaint Exh.42. She states that after the deceased went to break open the lock at around 5.45 p.m., both the accused came to the spot five minutes thereafter. The police arrived at the spot at around 6.45 p.m. After the Ambulance went and the police arrived, Aloysius came there

and informed that he had already lodged the complaint against the deceased. It was suggested to this witness that the only person, who came on the spot was Joe Alpers, whom she called by making a call from her cell phone. She denied that she did not scream as she has not witnessed any incident. She also denied that for the first time, she saw the spot when her husband was lying dead and thereafter, she called Joe Alpers from her cell. She has claimed that behind the rear door of the bed room, there is elevated space and four steps. The steps are not facing the door, but are along side the wall. The space in front of the door is cemented and polished and is barely enough for one person to stand. She claims that the first respondent initially assaulted the deceased with fist blows and then with hammer. This assault did not take place on the space in front of the door, but on the ground near the steps. She claims that the accused brought the deceased down on the ground at the time of assault. She stated to the police that the accused brought the deceased on the ground and then assaulted, but could not explain why it is not so mentioned in the complaint. She also did not state in the complaint that the deceased had kept the hammer and the screwdriver in the space in front of the door. She also stated that she shouted for help, when Joe and Casa came near her and then to the spot, though she had stated in her complaint that she screamed for help. She did not state that she came on the

road, screaming for help. When the accused was assaulting the deceased, she intervened at both places i.e. on the space in front of the door as well as on the ground. She had a fall, but on account of earlier burn injury to her leg, could not get up fast. She fell on the ground from the steps and then went to the road, screaming. The dead body of her husband was lying by the side of the septic tank, which is about 2 to 3 inches above the ground level. The ground near the septic tank was mashy type. The respondents accused did not come armed with any weapons. No one except herself saw the accused assaulting the deceased. She denied that the flats on either side of her flat, were occupied. She also denied that there are lot of houses in the vicinity, in which people reside. She states that there were only three houses, out of which, two were occupied, but the people used to go out for work during day time.

14. PW13, Dr. Andre Fernandes has conducted the Postmortem (PM) on the deceased and has also examined the respondents. PM report Exh.46 shows that there were as many as 16 injuries found on the person of the deceased. It has come in his evidence that the injury nos. 1 and 2 can be caused by medium weight blunt object and are necessarily fatal. Injury nos. 3 to 9 can be caused by forcible impact with a medium weight blunt object or blunt surface and are grievous in nature. Injury nos.10 to 16 are

caused by blunt object or surface and are simple in nature except injury no.15, which is caused by blunt front age of sole of shoe. He also identified the hammer.

In the cross-examination, this witness has stated that the graze abrasion is superficial injury and except injury nos.1, 2 and 9 other injuries were simple in nature. Graze abrasions are normal because of rubbing against rough surface, which are typically caused in a scuffle, when the body touches the ground. He states that out of 16 injuries, 10 were graze abrasions with bruises. There were four graze abrasions with bruises. Graze abrasions with bruises can be caused even upon the polished surface. Injury no.12 is caused on account of blunt surface, with a back portion of the head coming in contact with blunt surface. He denied that injury nos.1 and 2 can be caused if a person fell on the edge of the septic tank in the course of scuffle. He tried to explain because one can fall only on one place and not on both sides as also because there was an element of depressed fracture found. He also denied that injury nos.1 and 2 can be caused by banging against the edge of the septic tank more than once in the course of a scuffle. He claimed that injury no.1 is caused first and subsequently, the injury no.2 which was fissure fracture and cannot cross over the other side and there would not be continuity. He denied a specific suggestion that all the injuries found as noticed in the PM report

can be caused in a scuffle in the course of which, the body would brush against the rough surface with the head banging against an hard object.

15. This witness had also examined the respondent no.1 and found a solitary injury of about some linear scratch abrasion, dark brown hard scab on front aspect on the upper third of right forearm below from right elbow and fracture within 2 to 3 days prior to examination and simple in nature. He has also examined the respondent no.2 and there were no injuries found on his body.

16. The evidence of this witness would show that blood group of the deceased was AB +, while that of the respondent no.1 was B+ and that of the respondent no.2 was O+.

17. PW8, Ganesh Patil is the panch at the discovery panchanama. He states that the respondent no.1 gave a voluntary statement offering to produce the clothes from the room of one Mr. Rosario. These disclosures were made in Konkani language and were reduced into writing in Devanagari script. Thereafter, the respondent no.1 took them to Agacaim near Diya's Bar. Before that, the Sumo vehicle was stopped near the Neston Hair Cutting Saloon and they went on foot towards Diya's Bar. The respondent

no.1 pointed towards a room which the respondent no.1 informed that it belonged to one Philip Rosario, in which, one Prasad Kubal was staying on rental basis. The respondent no.1 took out the key on the electric meter outside the door of the house and handed over to PSI Brandon, who opened the lock, switched on light, where the respondent no.1 produced some clothes including 3/4 pant of cream colour, as detailed in evidence. Nothing significant has come in the cross-examination of this witness. It appears from the evidence of this witness that the disclosure is only by the respondent no.1. The CA report Exh. 37 also shows that the blood stains of the group AB + were found on these clothes.

18. It would now be necessary to briefly consider the reasons articulated by the learned Sessions Judge for disbelieving PW12.

19. The learned Sessions Judge has noticed that PW12 has stated that while the deceased was going with the hammer and screwdriver, she asked him where he was going and he told her that he was going to break the lock of the flat. PW12 asked the deceased not to go, but he did not listen and went to break the lock. The learned Sessions Judge has also noticed an omission in the complaint vis-a-vis the claim of PW12 that she was present at the

time of the incident as the complaint lodged by PW12 does not mention that she was present. The learned Sessions Judge has, thereafter, noticed that PW12 has given different versions, which are inconsistent and the version given in the examination-in-chief is also divergent to the version given in the cross-examination. The learned Sessions Judge, in this regard, has set out detailed reasons from para 11 onwards. This includes as to the manner, in which the two witnesses, namely, Joe Alpers PW1 and Casao Colaco had come on the spot as PW12 had improvised her earlier version, showing that she made a call to PW1 Joe Alpers and Casao Colao had come to the spot after hearing her screams. Except PW12, there is no other eye-witness to the incident as PW1 Joe Alpers and Casao Colaco had come on the spot after the respondents had fled from the spot. The learned Sessions Judge has also considered the evidence of PW12 in the context of the situation at the spot, in which PW12 had stated that the space in front of the rear door, is hardly sufficient for one person to stand. The Sessions Judge has also noticed that the screwdriver and the hammer were found near the dead body, which was lying near the septic tank, which was at some distance from the rear door. Ultimately, the Sessions Judge has concluded in para 40 of the judgment that it is possible that PW12 had reached the spot only after the incident and this could probably be the reason why the complainant did not speak of the

scuffle between the respondent no.1 and the deceased.

20. In this case, admittedly, there was a long standing dispute and enmity between the deceased on one hand and the respondent no.1 and his father Aloysius on the other. PW12 being the widow of the deceased, can also be said to be an interested/ related witness. Although the evidence of a witness cannot and need not be discarded merely on the ground of the witness being an interested/ related witness. However, at the same time, the evidence of such witness has to be scrutinised and appreciated with greater amount of circumspection. In an appropriate case, the Court would also make an attempt to find independent corroboration in the form of oral evidence or circumstantial evidence, in order to satisfy its judicial conscience while placing reliance on such a witness. As noticed earlier, except PW12, there is no other eye-witness to the incident. The incident is alleged to have happened at 5.45 p.m. in a complex having two residential buildings. There is also Mapusa-Aldona road nearby. Still there is no other witness forthcoming to the incident.

21. The prosecution case and the evidence of PW12 also becomes doubtful, as the prosecution has failed to explain the injuries on the person of the accused. In the present case, it has

come on record that respondent no.1 had suffered an injury, which was in the nature of a scratch, which the Medical Officer has opined to be possible due to a screwdriver. PW12 has not spoken about respondent no.1 having suffered any such injury. In so far as the discovery made at the instance of respondent no.1 is concerned, it is said to be from the house of one Philip Rosario, in which, one Prasad Kubal was staying and not from the house of respondent no.1.

22. We have carefully gone through the evidence of PW12 and the reasoning articulated by the learned Sessions Judge and we do not find any reason to take a different view in so far as the acceptability of the evidence of PW12 is concerned. In any event, we are of the opinion that PW12 has not come out with the truthful version as to what happened on the date and time of the incident and no implicit reliance can be placed on her version, so far as the claim of assault by respondent no.1 on the deceased by hammer is concerned.

23. We would now briefly deal with the reasons given by the learned Sessions Judge while granting benefit to the respondents of a right of private defence. It is now well settled that a right of

private defence, even if not specifically taken by the accused, if the Court finds that there are sufficient circumstances to indicate that the accused was acting in the exercise of his right of private defence, can always grant the benefit of the same. In the given case, the Court may come to a conclusion that the accused had exceeded such a right, where the accused can be found guilty of a lesser offence. The question depends upon facts and circumstances of each case.

24. A useful reference, in this regard, can be made to the decision of the Hon'ble Supreme Court in the case of **Moti Singh** (supra), in which it has been, *inter alia*, held that it would be quite unjust to deny the right of private defence to the accused, merely on the ground that he has adopted a different line of defence. It has, further, been held that if the evidence adduced by the prosecution would indicate that the accused were put in a situation, where they could reasonably have apprehended grievous hurt, even to one of them, it would be inequitable to deny the right of private defence to the accused. The crucial factor is whether there is a reasonable apprehension of such danger. It has been held that a different plea adopted by the accused, would not foreclose the judicial consideration on the existence of such a situation.

25. The learned Sessions Judge has considered this aspect from para 59 onwards. The learned Sessions Judge has noticed that admittedly, the relations between the deceased and his brother Aloysius i.e. the father of respondent no.1, were strained on account of the dispute as to the said flat. Admittedly, Aloysius had put a lock on the rear door of one of the bed rooms. PW12 states that the deceased had gone with a hammer and screwdriver to break open the lock. She also admitted that when the incident occurred, the deceased was in the process of breaking the lock and there were marks of hammer on the latch of the room. The learned Sessions Judge has, thereafter, noticed the Deed of Assignment Exh.43 to hold that Aloysius too had equal right with his mother Magdalena and the deceased in respect of the said flat. According to the prosecution, the respondents had reached the spot when the deceased was trying to break open the lock and respondent no.1 had accosted the deceased on his act of forcibly breaking open the lock, which was followed by an argument between them. The learned Sessions Judge has, thereafter, found that the evidence also suggests that there was scuffle between the two during which, the deceased was armed with screwdriver as well as with a hammer. Respondent no.1 had also suffered an injury, which according to the

medical opinion is possible due to a screwdriver. None of the accused were armed and there was no premeditation. It is in these circumstances that the Sessions Judge has come to the conclusion that there is every possibility that respondent no.1 was acting in exercise of right of private defence. It is now well settled that while the prosecution is obliged to prove the case beyond reasonable doubt, the accused can succeed if the defence is probalised. In other words, the standard of proof to prove the defence, (which would equally apply to a situation, where the Court is required to appreciate the evidence, in order to find out whether a case of exercise of right of private defence is made out), would proceed on preponderance of probability. It is further well settled that while appreciating the evidence in the context of a plea or possibility of the accused having acted in private defence, the evidence cannot be weighed in golden scales. The Court has to look to the broad probabilities and then to find out whether such a defence is probabalized.

26. It is true that the learned Sessions Judge has not adverted to the aspect whether this could be a case where the accused have exceeded the right of private defence in which case, the accused could have been found guilty of a lesser offence. We

have examined the circumstances and the evidence led from the point of view whether the accused can be said to have exceeded the right of private defence. Here again, looking from the point of the defence and the act, which is attributed to the accused, it has to be shown whether such a case of the accused, exceeding right of private defence, is made out or not. As noticed earlier, it has clearly come on record that it was the deceased, who can be said to be aggressor as he had gone to the room in possession of Aloysius with a hammer and screwdriver, in order to break open the lock. The deceased persisted in his effort to forcibly break open the lock in spite of being prevented and persuaded by PW12, his wife. It can, thus, be seen that it was the deceased, who was determined to break open the lock. No premeditation can be attributed to the accused, who had come on the spot, where the accused no.1 had accosted the deceased on his act. The deceased was holding a hammer and screwdriver and it has also come on record that the accused no.1 had sustained injury, which can be caused by a screwdriver, which injury has not been explained by the prosecution. The law requires and expects that the extent of right of private defence has to be commensurate with the apprehension. In other words, the accused cannot be permitted to take an undue advantage of the right of private defence by inflicting injury or causing harm more than what is necessary in response to the

apprehension, which should be real. The question essentially depends upon the inference, which needs to be drawn from the attending circumstances and the evidence taken as a whole. Having regard to the facts as noted above, we are unable to accept the submissions made on behalf of the appellant.

27. At this stage, a useful reference may be made to the decision of Hon'ble Supreme Court in the case of **Yogendra Morarji** (supra). The observations in para 16 of the judgment may be reproduced thus :

"16. Notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus, there may be cases where, despite the failure of the accused to discharge his burden under Section 105, the material brought on the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens rea requisite for an offence under Section 299 of the Code (See Dahyabhai v. State of Gujarat (ibid) State of U.P. v. Ram Swarup

MANU/SC/0218/1974, Pratap v. State of U.P.
MANU/SC/0181/1975.”

28. Considering the overall evidence, we find that a reasonable doubt with regard to the *mens rea*, requisite for an offence under Section 299 of the Penal Code, arises in this case.

29. The nature, scope and extent of the interference available in appeal against acquittal is now well settled. While examining a judgment of acquittal, the Appellate Court is not justified in substituting a view if two views are equally possible, out of which, the Trial Court has preferred one. In other words, unless and until the finding recorded by the learned Sessions Judge is found to be perverse or an impossible view, no interference is called for. (See ***Basappa vs. State of Karnataka***; [(2014)5 SCC 154]. Applying these principles, we are of the considered view that no interference is called for in the impugned judgment.

30. In the result, the appeal is hereby dismissed.

C. V. BHADANG, J.
SMA

F. M. REIS, J.