

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 30th May, 2017
Decided on: 21st July, 2017

+ **CRL.A. 357/2017**

MADHU GUPTA Appellant
Represented by: Mr. Joginder Tuli, Ms. Joshini
Tuli, Advs.

Versus

STATE NCT OF DELHI Respondent
Represented by: Mr. Ravi Nayak, APP for State
with SI Ravinder, PS Bawana.

+ **CRL.A. 514/2017**

VIRENDER @ BIJENDER Appellant
Represented by: Ms. Rakhi Dubey, Adv.

Versus

STATE Respondent
Represented by: Mr. Ravi Nayak, APP for State
with SI Ravinder, PS Bawana.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Convicted for offences punishable under Section 302 read with Section 34 IPC and Section 201 read with Section 34 IPC, Madhu Gupta and Virender @ Bijender challenge the impugned judgment dated 18th March,

2017 and the order on sentence dated 21st March, 2017 sentencing them to life imprisonment and to pay a fine of ₹10,000/- each for the offence punishable under Section 302/34 IPC and rigorous imprisonment for a period of seven years and to pay a fine of ₹1,000/- each for offence punishable under Section 201/34 IPC.

2. Assailing the conviction, learned counsel for Madhu Gupta submits that even accepting the case of the prosecution having been proved beyond reasonable doubt, it can at best be held that the appellant caused an injury to the deceased in exercise of her right of private defence as laid down in clause thirdly to Section 100 IPC. It is further submitted that the appellant has discharged the burden as required under Section 105 of Evidence Act by proving the existence of circumstances bringing her case within the general exception laid down in clause thirdly to Section 100 IPC. The right of private defence of the body of a mother's daughter extends to voluntary causing of death, if the offence which occasioned the exercise of the right was an assault with intention of committing rape. The appellant in her statement under Section 313 Cr.P.C stated that only scuffle had taken place between her and the deceased. As per the post mortem report, cause of death was opined to be asphyxia due to manual pressure. Thus even as per the post-mortem report, no weapon of offence was used. The alleged offence if any occurred on the spur of the moment. Hence appellant cannot be convicted for offences punishable under Sections 302 or 201 IPC.

3. Learned counsel for Virender @ Bijender submits that even as per the case of prosecution, no intention to kill can be attributed to the appellants. Prior to the incident, Virender, Madhu and the deceased Satender @ Nanhe all had dinner together, there was no quarrel and no premeditation. There is

no other evidence against the appellant except the sole testimony of 'K' (PW-7) which proves that appellant committed no offence and acted in the defence of 'K'. He further submits that in the alternative since the appellant had already undergone approximately 8 years and 5 months, he be released on the period already undergone. In order to buttress his submissions, learned counsel relies upon the decision of Division Bench of this Court reported as 2016 IV AD (DELHI) 524 Anuj Kumar Tiwari v. State of The NCT of Delhi.

4. Learned APP for the State on the other hand submits that the prosecution has proved beyond reasonable doubt that the appellants not only committed murder of Satender @ Nanhe but also disguised the body to be of Vijender Gupta thus concealing the offence and destroying the evidence.

5. Process of law was set into motion on 12th September, 2008 when a PCR call was received at about 11:00 P.M. stating that "*A-14 Bajitpur Main stand kirayedar ka makkan do din se band hai darwaje se lal va kala pani nikal raha hai*". The aforesaid information was recorded vide DD No. 25A [Ex. PW-35/A] and assigned to SI Jai Kishan. He along with Ct. Rajender Singh reached the spot i.e. H.No. A-14, Village Bajidpur, Delhi. They found a crowd of people gathered along with Om Kumar. Blood was oozing out of a room situated on the first floor. When they entered the room, they found a pot, gadda and an iron box with "MANIPUR VOLUNTARY HEALTH ASSN." written on it. When they opened the box, a dead body of a male person aged 35 years was found lying in a pool of blood. Dead body was in decomposed condition and a foul smell was emitting from the dead body. Dead body was identified to be of Bijender @ Virender.

6. Statement of Om Kumar (PW-4) was recorded vide Ex. PW4/A

wherein he stated that he resided at H.No. 207, Village Bajidpur, Delhi with his family and worked as driver. He had another house in village Bajidpur bearing House No. A-14 which had 12 rooms and number of tenants were residing there. Virender Gupta (appellant herein) was residing in one of those rooms along with his two sons since last 2-2½ months. On 10th September 2008 around 9:00-10:00 P.M., when he went to the tenanted room for a surprise check, he met the son of Virender Gupta who told him that his mother Madhu Gupta (appellant), who had gone to the village, had come back. On 12th September, 2008 at around 10:30-10:45 P.M., his another tenant namely Dhirender came and told him that the room of Vijender Gupta was locked from outside, blood was coming out of the room from under the door and foul smell was also emanating. When he went to house number A-14, he saw that the door was locked from outside and red coloured blood and water was coming out from the room. Thereafter, he called the police and crowd also gathered there. In the meantime, PCR van came. The lock of the room was broken and it was found that blood was dripping from an iron box in which the dead body of his tenant Virender Gupta was lying in a pool of blood. However, Madhu Gupta and her children were not present at the spot. On the basis of the aforesaid statement, FIR No. 327/2008 [Ex. PW-11/A] was registered under Sections 302/201 IPC at PS Bawana.

7. Broken lock was taken into possession vide memo Ex. PW-4/B. Crime team reached the spot and further investigation was handed over to Insp. Ram Avtar. Site plan [Ex. PW-46/A] was prepared. Blood sample [Ex.P-2], bloodstained earth control [Ex.P-3], earth control [Ex.P-4] and iron box [Ex.P-1] were seized vide memo Ex. PW-4/C. Three empty mobile phone boxes [Ex.P-6], which were found in the room where the dead body was

lying, were also taken into possession vide memo Ex. PW-4/D.

8. On 14th September 2008, Insp. Ram Avtar met Smt. Bimla (PW-1), who had her plot in front of the house of Om Kumar, who told him that on the morning of 11th September, 2008, she had seen Virender along with his family leaving on bicycle with all his belongings. On the basis of the statement of Smt. Bimla, the dead body was identified to be not of Virender @ Bijender. Raj Kumar, brother-in-law of Virender, Prem Pal, brother of Virender, Om Kumar, owner of the house, Pankaj and Jatan Ram, tenants of Om Kumar and Dharampal (PW-2), resident of village Bajitpur were called at the mortuary of BJRM Hospital and were shown the dead body. The dead body was identified to be of Satender @ Nanhe who was resident of Virender @ Bijender's Village i.e. Sungarhi, Etah (U.P.) and lastly resided with Virender @ Bijender in the tenanted room. Relatives of Satender @ Nanhe were informed and called to Delhi for further identification of the dead body. Shyam Babu and Anil, brothers of deceased Satender @ Nanhe, identified the dead body as that of Satender @ Nanhe. Dead body identification statements of Shyam Babu [Ex. PW-21/A] and Anil [Ex. PW-24/A] were recorded. Insp. Ram Avtar prepared the inquest papers including request form for conducting autopsy [Ex. PW-46/B], brief facts [Ex. PW-46/C] and death report [Ex. PW-46/D].

9. On 25th September 2008, one gathri [Ex. PW-36/P-5] containing bags on which Goa Chai and Glori Chai was printed containing 58 garments, one school bag containing eight books of third standard and six copies, one school dress and one bicycle on which sticker of KW Engineering Works was affixed were produced by Bansi Lal, uncle of Virender @ Bijender, who stated that these items were left with him on 11th September 2008 by

Virender. These items were taken into possession vide seizure memo Ex. PW-27/A. On 6th October 2008, Gayadin, relative of Virender produced Sumit, son of Virender, whose statements were recorded under Sections 161 and 164 Cr.P.C. vide Ex. PW-46/F and Ex. PW-47/A respectively.

10. On 26th October, 2008, Virender and Madhu were apprehended from Mayur Vihar, Phase III, RTV Bus stand near Police Booth. Virender was arrested vide arrest memo Ex. PW-4/E and personal search was carried out vide memo Ex. PW-4/G. Madhu was arrested vide arrest memo Ex. PW-4/F and her personal search was conducted vide memo Ex. PW-22/A. Two SIM cards [Ex.P-7 and Ex.P-8], one belonging to deceased Satender @ Nanhe and other to Virender @ Bijender, were recovered from Virender which were seized vide seizure memo Ex. PW-37/A. Disclosure statements of Virender @ Bijender and Madhu vide Ex. PW-37/B and Ex. PW-37/C respectively were also recorded. On 29th October, 2008, supplementary disclosure statement [Ex. PW-37/A] of Virender @ Bijender was recorded wherein he offered to get recovered the mobile phone of deceased Satender @ Nanhe from Hadapsar, Pune, where he lived on rent.

11. On 31st October 2008, one mobile phone of make Indicom, black and grey colour [Ex.P-10] was recovered from the rented room in Pune where Virender @ Bijender and Madhu resided after commission of the offence and fleeing away from Delhi. The aforesaid phone was taken into possession vide seizure memo Ex. PW-36/B.

12. On 22nd January 2009, sample of Prema Devi, mother of deceased, was taken for DNA analysis vide proceedings Ex. PW-43/B. FSL report were proved vide Ex. PW-40/F and Ex. PW-40/G and the DNA report vide Ex. PW-43/A.

13. Appearing as PW-4 in Court, Om Kumar deposed in sync with his statement on the basis of which FIR was registered.

14. Rakesh Gupta (PW-3) deposed that he had married Madhu (appellant herein) about 17/18 years ago and two sons and one daughter were born out of the wedlock. Satender @ Nanhe was known to him as they were in the same business. Deceased started visiting his house and used to bring fruits for his children. Deceased used to visit his house even in his absence and he suspected his character. The words used by the witness are "*uska chaal chalan madhu ke saath thik nahi tha*". When he came to know about the relations between Satender @ Nanhe and Madhu, he restricted the visits of Satender @ Nanhe to his house and also asked Madhu to mend her ways but she could not resist herself and they started meeting in his absence. Thereafter, Madhu left him and started living with Satender @ Nanhe along with their daughter 'K'. Around 1 1/2 or 2 years ago, he came to know that Madhu was living with Virender @ Bijender who hailed from the same village as that of Satender @ Nanhe.

15. Master Sumit (PW-5), son of Virender, aged about 10 years, stated that he used to live in a tenanted accommodation having two rooms along with his father Virender only. His mother Neelam used to live at her parental house. He had a step mother but he didn't know her name. His step mother also resided with them but he could tell the tenure. 'K' was his sister. He did not know where 'K' used to reside when he along with his father was residing at Village Bajidpur. During his cross examination, he denied that he stated to the police that on 10th September, 2008, Madhu gave a telephone call on the mobile phone of his father and told him that she had taken into confidence the deceased Satender @ Nanhe and requested his father to reach

there wherein his father replied to stay there and he will reach within 1-2 hours. He also denied the suggestion that when they had gone to fetch cold drink, they met his uncle Sanju on their way or that his father told Sanju about the visit of Nanhe and further instructed Sanju to introduce Nanhe as the friend of his brother or that his uncle Sanju asked his father not to kill Satender @ Nanhe and to leave him unhurt or that after purchasing cold drink and rice, he along with his father and sister returned or that thereafter, they all drank cold drink and tea or that they were served dinner or that they were asked to sleep in other room or that Virender asked his uncle Sanju to sleep on terrace or that his sister 'K', Madhu, his father and Nanhe slept in one room or that he went to the room of his neighbour.

16. 'K' (PW-7), aged around 13 years, stated that the name of her mother was Madhu. She did not know anything about the present case. She did not know Virender or Satender @ Nanhe. She was not present at the time of incident. She was residing with her nani Urmila for the last two and a half year when her mother left her there. During her cross examination, she denied the suggestion that when she and her brother Sumit were of tender age, her mother Madhu had taken her to village Kisol at Ghaziabad to the house of deceased Satender @ Nanhe at Ghazaibad.

17. On further cross examination 'K' stated that the deceased and her mother lived together for about 10 years prior to the incident. She was living with the deceased in the absence of her mother Madhu as well. When she was a minor, she did not know if there was any quarrel between her mother and the deceased. Later on, there was quarrel between them. By later on, she meant when Nanhe tried to misbehave with her, then her mother started quarreling with him, "*Jab Nanhe ne mere saath galat harkat karne ki koshish*

ki tou meri ma ka uske saath jhagra hone laga". After the incident of misbehaviour, she along with her mother started living separately. When she along with her mother started living separately with Virender, Nanhe started visiting there also. She admitted that the last day Nanhe visited the said place i.e. Bazid Pur was when the present incident took place. On the date of incident, she with her mother, Virender, Sumit and another person whose name she did not know were present at the tenanted room. On the night when she along with her mother, Virender and Nanhe was sleeping in the room, *"Nanhe ne mere saath galat harkat ki aur chhed chhad karne laga"*. Her mother also woke up. Her mother and Nanhe started quarreling with each other. Nanhe caught hold of her mother from her neck and pushed her. The head of her mother hit the wall. Virender also woke up. Thereafter, Virender and Nanhe started grappling with each other (*haatha pai ho gayi*). Grappling continued for a considerable time, where after, Nanhe fell down on the floor and became unconscious. After that, they all left the room. Her parents dropped her at the house of her aunt.

18. Dr. Kulbhushan Goel (PW-10), CMO Aruna Asif Ali Hospital, deposed that on 16th September 2008, when he was working at BJRM Hospital, he had conducted post mortem on the dead body of Satender Kumar @ Nanhe. There were decomposition changes on the body with dark greenish discoloration all over the body. Cuticle was peeled off all over body at places. On external examination, there were diffuse coalesced pinkish area scattered over both sides front of neck, irregular in distribution. Skin around the pink area was dark greenish. Any other external injury was inconspicuous. On internal examination, there was subcutaneous and platysmal bruising seen over both side front of neck. Deeper neck muscles

were also bruised along with signs of decomposition. There was fracture subluxation of greater cornua of right side of hyoid bone with marked bruising around. He opined cause of death to be asphyxia as a result of pressure over neck. Pinkish area over neck was ante mortem in nature and consistent with manual grip by other party. Manual pressure over neck was sufficient to cause death in ordinary course of nature. Time since death was about 5 1/2 days. He exhibited the post mortem report vide Ex. PW-10/A. Thus, post mortem finding was consistent with manual pressure over neck (throttling).

19. Sh. A.K. Shrivastava (PW-43), Deputy Director, DNA Unit, FSL Rohini, stated to have received blood sample of Prema Devi and one forensic sample for DNA finger printing test. DNA from both exhibits was isolated and DNA finger printing profile was prepared. After examining the samples, he opined, "*the alleles of the source of Exhibit '1' (blood sample of Smt. Prema Devi) is accounted in the allelic data of the source of Exhibit '2' (two teeth)*". Thus the DNA profiling (STR analysis) performed on the exhibits was sufficient to conclude that source of Exhibit '1' was the biological source of Exhibit '2'. The DNA finger printing report was exhibited as Ex. PW-43/A.

20. Madhu in her statement recorded under Section 313 Cr.P.C. stated that she was falsely implicated in the present case and only scuffle had taken place between her and deceased Satender @ Nanhe as the deceased tried to misbehave and rape her daughter 'K'.

21. Virender @ Bijender also stated on the same lines as Madhu in his statement recorded under Section 313 Cr.P.C. that on the night of incident, deceased Satender @ Nanhe tried to misbehave and rape 'K', due to which

scuffle ensued between him and the deceased.

22. A perusal of the prosecution evidence itself reveals that when the deceased tried to sexually molest the daughter of appellant Madhu a scuffle ensued wherein Madhu received an injury, where after a further scuffle ensued between the deceased and Virender as a consequence whereof due to the grappling and manual strangulation of the neck, deceased fell down. In view of the nature of injury which was not pre-determined but on the spur of the moment, it cannot be held that there was common intention of the appellants Madhu and Virender to commit murder of the deceased. Therefore, the impugned judgment convicting the appellants for offence punishable under Section 302/34 IPC cannot be sustained.

23. Before this Court the appellants have taken the plea of self-defence which is also borne out from the prosecution case itself. Culling out the principles on the plea of self-defence, Supreme Court in the decision reported as (2010) 2 SCC 333 Darshan Singh Vs. State of Punjab & Anr. held:

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

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

24. Burden of establishing the plea of private defence is on the accused who can only prove same by preponderance of probabilities in favour of the plea on the basis of the material on record. It is not necessary for the accused to lead defence evidence in this regard and the plea of self defence can be established even from evidence of the prosecution witnesses. This view was expressed by Supreme Court in the decision reported as (2003) 2 SCC 661 Rizan v. State of Chhattisgarh wherein it was noted:

“13. Then comes the plea relating to alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression “right of

*private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence: he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See *Munshi Ram v. Delhi Admn.* [AIR 1968 SC 702 : 1968 Cri LJ 806] , *State of Gujarat v. Bai Fatima* [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 :*

AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows: (SCC p. 654, para 9)

“It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.”

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.”

[Emphasis supplied]

25. Appellants in their statements under Section 313 Cr.P.C. stated that they have been falsely implicated in the present case and only scuffle had taken place between them and the deceased Satender @ Nanhe as the deceased tried to misbehave and rape 'K'. Thus, the plea of private defence can be inferred from the statements of the appellants rendered under Section 313 Cr.P.C.

26. Supreme Court in the decision reported as (2005) 10 SCC 404 Babulal

Bhagwan Khandare v. State of Maharashtra held that it is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea.

27. Having accepted the plea of right to private defence, the next issue is whether the appellants can be convicted for the offence falling under exception 2 to Section 300 IPC punishable under Section 304 IPC or are entitled to be acquitted in view of general exceptions of right to private defence falling under Section 100 IPC.

28. Section 100 IPC provides that nothing is an offence which is done in exercise of the right to private defence, thereby meaning that acts covered under right to private defence as envisaged under Section 100 IPC are not offences. Section 100 IPC further classifies the categories whereby right to private defence extends to causing death. The present case squarely falls under clause thirdly to Section 100 IPC which notes as under:

“100. When the right of private defence of the body extends to causing death.—The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

(Thirdly) — An assault with the intention of committing rape;”

29. In AIR 1992 SC 1683 Yeshwant Rao Vs. State of Madhya Pradesh dealing with a similar situation where on seeing the minor daughter being sexually molested by the victim; the appellant therein assaulted the victim

resulting in his death due to internal injury caused by fall/blow, the Supreme Court held:

“4. The prosecution case was that on April 5, 1985 at about 11 o'clock in the night the appellant himself went and informed Dilip Singh, the brother of the deceased Lakhan Singh, that since Lakhan Singh was abusing him he had assaulted him by spade. The accused also asked the brother Dilip Singh to go and bring his brother. Dilip Singh started to see his brother, but on the way he found Bhola Singh (PW 7) and Yeshwant (PW 9) bringing his brother from the direction of the house of the appellant. Lakhan Singh was removed to hospital. When he was being taken from one hospital to another hospital, he died. Accordingly the appellant was prosecuted under Section 302 Indian Penal Code but, as stated above, convicted under Section 325 Indian Penal Code.

5. As per the medical evidence the cause of death was due to the injury of the liver. But for this injury no external injury was found nor the Doctor deposed that this could be caused by spade. The earliest defence is contained in police report filed as Annexure 'C' lodged by the appellant on April 5, 1985 in which he says that his minor daughter Chhaya had gone to latrine on the rear side of his house where the deceased had gripped her and having heard the disturbance when the appellant went to see, the deceased Lakhan Singh, in a bid to escape dashed against the wall and fell on the stony ground and sustained injuries.

6. Later in the case the appellant also took the plea of a right of private defence.

7. The Sessions Judge took the view that the minor daughter of accused aged 15 years was a consenting party to the sexual intercourse by the deceased Lakhan Singh when the appellant assaulted the deceased.

8. The Sessions Judge while dealing with the case had noticed Panchanama Ext. P-4 where it was stated that when the dead body of the deceased was rendered naked they found seminal emission from the penis of the deceased. The Sessions Judge believed the contents of this Panchanama and took the

view that the deceased Lakhan Singh was engaged in sexual intercourse with Chhaya daughter of the appellant. The Sessions Judge had also given a finding that the incident took place at about 10 o'clock in the night. It took place on the rear side of the house of the appellant close to the latrine which was engrossed in darkness. Half-an-hour before the incident Chhaya who was 15 years of age had gone to the house of the deceased to call him and for the same reason the deceased might have come to the house of the appellant and with the consent of Chhaya was doing sexual intercourse with her on the rear side of the house. The Sessions Judge also found that at the same time the appellant, who according to his own version, had returned at 9.30 p.m. from Shahpur and when he went to the back side of his house then he might have seen the deceased Lakhan doing sexual intercourse with his daughter and on seeing such an act being performed, any father could easily lose control of himself and assaulted the deceased due to grave and sudden provocation.

9. *It will be noticed that before the Sessions Judge the appellant had pleaded the right of private defence also but the Sessions Judge after noticing that the assault was an act of sudden and grave provocation did not pursue the matter further. It appears to us that it is a case where the right of private defence arises and the case is fully covered by Sections 96, 97 read with Section 100 of the Indian Penal Code. Whether it was a case of sexual intercourse with consent or without consent the fact remains that according to the case of the prosecution Chhaya was of 15 years of age and, therefore, the act of Lakhan Singh, deceased, would amount to rape within the meaning of Section 375 clause (6) of the Indian Penal Code. The Panchanama Ext. P-4 shows that the attempt of rape or actual sexual intercourse was not fully complete and it is in that state of affairs that the appellant is alleged to have assaulted the deceased with spade on his head. As per the medical evidence the cause of death is not by spade but it was due to the rupture of the liver which could be either by fall on hard object, as the appellant stated that the deceased tried to run away but hit against the wall and fell on the ground or it could be as a*

result of blow given by the appellant. The fact remains that the right of private defence is extendable to the facts of the present case when the daughter of the appellant was being sexually molested. It appears that this part of the case of the appellant was not brought to the notice of the High Court. The judgment of the High Court mainly deals with the prosecution case only. The right of private defence is fully applicable to the facts of the present case. We thus find that the appellant is entitled to acquittal. We would accordingly hold the appellant not guilty of the offence under Section 325 Indian Penal Code as well. The result is that the appeal is allowed and the conviction and sentence of the appellant is set aside.”

30. The Division Bench of Orissa High Court in the decision reported as 1988 SCC OnLine Ori 65 : 1989 Cri LJ 621 State of Orissa v. Nirupama Panda was dealing with a case where the deceased, on entering the house where the accused woman lived as mistress of another man, tried to commit rape on the accused, where after a scuffle ensued and the accused stabbed the deceased. It was held that the accused had every right to cause death of the deceased and she was acquitted.

31. The Division Bench of Rajasthan High Court in the decision reported as 1991 Cri LJ 2566 Prakash Chandra v. State of Rajasthan held that where the deceased intended to seduce the wife of one of the accused to sexual intercourse, the same would certainly be a circumstance which gave a right to the accused persons to inflict injuries on the person of the deceased and the accused persons were entitled to be acquitted.

32. Similar view was taken in the decisions reported as 2009 SCC OnLine Chh 129 Pramila v. State of Chhattisgarh and MANU/TN/0844/2003 Pushpam v. State by Inspector of Police.

33. Since the appellants have been acquitted for the offence punishable under Section 302 IPC and have been able to successfully establish their right of self defence covered under clause thirdly of Section 100 IPC, thus the appellants cannot be convicted even for offence punishable under Section 304 IPC. The next issue that now arises for consideration is whether the appellants can be convicted for offence punishable under Section 201 IPC for destruction of evidence. Section 201 IPC reads as under:

“201. Causing disappearance of evidence of offence, or giving false information to screen offender.—

Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false;

if a capital offence.—shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life.—and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment.—and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.”

34. The essential ingredient for an act punishable under Section 201 IPC is commission of an offence. Since no offence has been committed in the present case and the appellants have been acquitted for offences punishable under Section 302 IPC or any other minor offence thereof for causing death of Satender @ Nanhe, it cannot be held that the appellants have caused destruction of the evidence after committing the offence.

35. The three Judge bench of Supreme Court in the decision reported as AIR 1965 SC 1413 Roshan Lal v. State of Punjab, while culling out the necessary ingredients for offence under Section 201 IPC, noted as under:

“13. The first paragraph of Section 201 lays down the essential ingredients of the offence under Section 201. It must be proved firstly that an offence has been committed. See Palvinder Kaur v. State of Punjab [(1953) SCR 94, 102] and Empress of India v. Abdul Kadir [(1880) ILR 3 All 279] . Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have acted with the intention of screening the offender from legal punishment. By the second, third and fourth paragraphs, the measure of the punishment is made to depend upon the gravity of the offence. The word “offence” wherever used in the first, second, third and fourth paras means some real offence, which, in fact, has been committed and not some offence which the accused imagines has been committed. The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed. If an accused on seeing blood marks on the ground made as a result of an offence punishable under Section 323, erases the blood marks with the intention of screening the offender whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under Section 323 was committed and that he

acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months; but he could not be convicted on the basis of his having screened a murderer merely because he wrongly imagined that an offence of murder had been committed. If the contention of the State were to be accepted, the erroneous belief or delusion of the accused would furnish the measure of punishment, and he would be punishable under the second paragraph with imprisonment extending to seven years. It is difficult to impute such an intention to the legislature, and to hold that the minor offence of screening an offender under Section 201 is punishable more severely than the main offence committed by the main offender. It does not, in our opinion, stand to reason that Section 201 provides for punishing a minor offence more severely than the principal offence. ”

36. Similar view was expressed by the Supreme Court in the decision reported as (1979) 3 SCC 574 Nathu v. State of U.P. It was held that the prosecution must show to the satisfaction of the Court that the accused knew or had reason to believe that an offence had been committed and having got this knowledge, tried to screen the offender.

37. For the discussion aforesaid appellants are acquitted of the offences they are charged with i.e. 302/34 and 201/34 IPC. Appellants Madhu and Virender @ Bijender who are in custody be released forthwith if not required in any other case.

38. Appeals are disposed of.

39. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

40. Trial Court Record be returned.

(MUKTA GUPTA)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

JULY 21, 2017
‘ga’

