

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 381 of 2016

Gouri Singh S/o. Birbal Singh, aged about 45 years, resident of village Parsurampur, P.S. Ramanujnagar, Revenue and Civil District Sarguja (CG)

---- Appellant

Versus

State of Chhattisgarh Through Police Station Ramanujnagar, District
Sarguja (CG)

---- Respondent

For the Appellant :- Smt. Bulbul Agrawal, Advocate
For the respondent :- Mr. Lalit Jangade, Dy. GA

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgment on Board

By Manindra Mohan Shrivastava, J.

28.06.2021

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 30.09.2009 passed by the Second Additional Sessions Judge (FTC), Surajpur, District Surguja, in Sessions Trial No. 74/2009, wherein and whereunder the appellant has been held guilty for commission of offence under Sections 302 IPC and sentenced to undergo for life imprisonment and to pay fine of Rs. 1000/- with default stipulation.

2. The prosecution case, as unfolded from the record of the case and the impugned judgment is that on 13.09.2008, at about 12.00 PM in the afternoon, the appellant is alleged to have assaulted and killed Jagmohan (the deceased). FIR (Ex.P-8) was lodged at around 17.30 hours on the same day by Dularsai (PW-4). In the FIR, it was stated that while informant was sitting at home, he was informed that Jagmohan was assaulted by appellant Gouri. When he reached the spot, he found that Jagmohan was laying injured, there was injury of axe on his neck and blood was oozing out. The father of the deceased states that he does not know why the appellant murdered his son. After recording of FIR, the police proceeded to the place of occurrence and inquest over the dead body, in presence of witnesses, was prepared vide (Ex.P-2). Dead body of the deceased was sent for postmortem to CHC Ramanujnagar. Dr. D.K. Vishwakarma (PW-22), conducted postmortem over the dead body and prepared postmortem report in (Ex.P-17). In the opinion of the doctor, cause of death was coma due to head injury. The axe allegedly used in commission of offence was also seized and a query report in (Ex.P-15) was given that the injury could be caused by the said axe. Articles seized during the course of investigation were also sent for FSL and a report (Ex.P-19) was received from the FSL proving blood spot on the axe allegedly seized from the possession of the appellant. Upon completion of investigation, the police filed charge sheet. The appellant was subjected to trial on the allegation that he murdered Jagmohan. In order to prove its case, prosecution

examined as many as 22 witnesses. Thereafter the appellant was examined under Section 313 Cr.P.C. in respect of incriminating circumstance and evidence led by the prosecution against him. No defence witnesses were examined. The trial Court relying upon the evidence stated by the prosecution, found the appellant guilty for commission of offence of murder.

3. Learned counsel for the appellant would argue that the judgment of conviction and order of sentence suffers from gross illegality and perversity inasmuch as, the learned trial Court has ignored the prosecution evidence that deceased Jagmoha himself was the aggressor, he had come to the house of the appellant and he was holding an axe in his hand and beating the door, thereafter, he caught hold of the wife of the appellant and when attempt was made to rescue her, there was some scuffle and Jagmohan fell down and sustained injuries by the axe which he was holding in his hand. It is argued that this specific evidence of Kiran (PW-14) and Sanmat (PW-15) has been disbelieved by the trial Court only because they happen to be the wife and the daughter of the appellant. Learned counsel for the appellant would submit that the story of Jagmohan (the deceased) coming to the house of the appellant is also supported from the evidence of other prosecution witnesses who have seen Jagmohan in front of the house of the appellant, meaning thereby that Jagmohan had actually come to the house of the appellant and therefore, the evidence of the prosecution itself gives rise to a very possible and plausible defence that the deceased was the aggressor, he had come with a

weapon and during scuffle, he fell down and sustained injuries though there was no assault given by the appellant on him.

The alternate submission of learned counsel for the appellant is that even if, it is held that the appellant had assaulted the deceased, in the circumstance of the case, it is a case of exercise of right of private defence and therefore, not an offence in view of provision contained in section 96 of the IPC. Learned counsel for the appellant would further argue that the prosecution evidence, overwhelming in nature, is that the deceased had come to the house of the appellant and kicked the appellant and thereafter, he went back and came back along with an axe which, if used as a weapon, is deadly. He was beating the door and he caught hold of the wife of the appellant and starting dragging her and he had warned the appellant to come out otherwise he would be killed. It is argued that in these circumstances which are proved from the evidence of the prosecution witnesses do make out case and create reasonable apprehension in the mind of the appellant that if the deceased is not counter attacked, he may kill the appellant or his wife or may even cause grievous hurt to any of them and may be that he could rape the wife of the appellant. There was no time left to seek any help from anyone and at the spot itself, the appellant had to do something. If in such an incident, some injury was caused to the deceased, all that was done was only in exercise of right of private defence.

4. Further submission learned counsel for the appellant is that even if, it is held that in the circumstance the appellant exceeded his

right of private defence by causing harm more than what was necessary for the purpose of defence, at the most, it would be a case of exceeding right of private defence, which would amount to culpable homicide not amounting to murder punishable only under section 304 IPC and not under Section 302 IPC and the appellant has already undergone 12 years and 9 months of jail sentence by now, the conviction of the appellant may be altered to under section 304 IPC and sentence for the period already undergone by him. In support of submission learned counsel for the appellant placed reliance upon **Puran Singh and others vs. State of Punjab AIR (1975) SC 1674.**

5. On the other hand, learned State counsel would submit that the prosecution witnesses particularly Kiran (PW-14) and Sanmet (PW-15), the daughter and wife of the appellant only to the extent, regarding scuffle between the appellant and the deceased, have supported the version of the defence. However, the other part of their evidence has rightly been disbelieved by the trial Court as improbable and contrary to the evidence of other prosecution witnesses who have stated regarding appellant having assaulted the deceased without stating anything with regard to background of the incident as stated by PW-14 and PW-15, the daughter and wife of the appellant respectively. He would argue that the witnesses have stated that it was the appellant who had assaulted the deceased with the help of an axe and thereafter, he ran away. It is further contended that the story of exercise of right of private defence is an after thought. Such story has been built up only to

save the appellant from the punishment of murder. Statement of Kiran (PW-14) and Sanmet (PW-15) do not make out any case of reasonable apprehension of death, grievous hurt to the person or property. Therefore, in any case, right of private defence could not extend to the extent of causing death. Learned State counsel would submit that the right of private defence which is provided under Section 96 IPC, to the extent of causing death is not unqualified and even in the cases covered under section 100 IPC, the defence has to prove that in the situation and the circumstance of the case, in exercise of right of private defence, the accused has a right to even cause death of aggressor. He would submit that such an extreme circumstance as contemplated under the law is not made out from the evidence of the prosecution and the accused, on whom lies the burden to prove the case of private defence, has neither led any evidence nor has stated anything in his examination under Section 313 Cr.PC nor contemplated from any evidence nor emerging from his examination under Section 313 CrPC. Learned State counsel relied upon the Supreme case decision in the case of **State of Uttar Pradesh vs. Gajey Singh and another 2009 (11) SCC 414.**

6. We have heard learned counsel for the parties and carefully gone through the judgment and records of the case.
7. The FIR (Ex.P-8) lodged by the father of the deceased namely Dularsai has been duly proved not only from his own evidence but from the evidence of Investigating officer K.S. Painkara (PW-21). While Dularsai (PW-4) has stated that he lodged FIR in police

Station and proved his signature. K.S. Painkra (PW-21) has recorded the FIR and also proved his signature. To this piece of evidence, there is no substantial challenge.

The contents of the FIR reveal information that the appellant had killed the deceased with the help of an axe. The evidence of the Doctor D.K. Vishwakarma (PW-22), who conducted the postmortem and gave his opinion could not be impeached and is fully reliable. In his statement, he stated that he conducted the postmortem of the dead body of Jagmohan and submitted his report. In his evidence, the doctor has deposed that he found two cut injuries on left and right side of the parietal region of the head and internal examination disclosed that left and right parietal bone were fractured, blood vessels were cut and blood clot was present. His opinion is that the cause of death was head injury. He has also proved his query report in which he examined and opined regarding the weapon stating that the injury could be caused by the said weapon. In the cross-examination doctor has denied suggestion that the injury, which the deceased suffered could be sustained during scuffle and attempt to snatch away the weapon by the quarreling person.

8. The evidence of this witness could not be controverted therefore, it is proved that the deceased died due to serious cut injury on the head which resulted in fracture of the bone and damage of brain matter. This clearly shows that much force was used on the head by sharp edged object/weapon not once but twice. Moreover, the doctor has also stated in his cross-examination that such injury

could not be caused during scuffle or attempt to snatch the same from the hand. That means, the deceased died because of an assault given on his head.

9. As to how the incident happened and who assaulted the deceased, the prosecution has examined number of witnesses to prove alleged criminal overt act on the part of the appellant.
10. Jagsai @ Khufiya (DW-1) has deposed in the examination-in-chief that while he was taking goat for grazing, he saw the appellant coming out of his house and he assaulted Jagmohan with the help of *tabble* (axe). It is proved that at that time Jagmohan was standing on the road near his house and thereafter, appellant run towards forest. This witness has also stated that while appellant was running away, he was holding *Farsa* in his hand. However, in the cross-examination this witness has resiled and not remained firm, because in para-8, he admits that he had seen the person running with the help of axe, from behind and he looked like Gaouri. He admits that he guessed that it was Gaouri. On question being put to him by the court, this witness says that he had seen the person from behind and therefore, could not identify. The evidence this witness cannot stand alone to say that the prosecution has succeeded in proving its case beyond doubt.
11. Kusum Singh (PW-11) has deposed that on the date of incident, at about 12.00 in the afternoon, when she was standing in front of her house, she saw appellant Gauri Singh running away with an axe in his hand. She later on came to know that appellant had killed Jagmohan.

12. Vifaiya (PW-12) is another prosecution witness who also deposes that at about 12 to 01 in the afternoon, while she was in her house, she came out hearing the noise of assault and saw that the appellant had assaulted the deceased with the help of an object looking like a club due to which, Jagmohan fell down and then the appellant ran towards jungle. This witness also deposes that the appellant ran away along with the club like weapon in his hand. This witness however, states that when she heard the noise she came out and at that time, Jagmohan had already fallen down because of assault given by Gouri.

The evidence of the aforesaid witnesses proves that it is the appellant who had assaulted the deceased with the help of an axe due to which, the deceased fell down and thereafter the appellant, holding axe in his hand, ran away and probably went towards the forest as stated by the some of the witnesses.

13. One more prosecution witness, Son Kunwar (PW-13) has also deposed that while she was plucking vegetables near her well at about 12 to 01 in the afternoon, he saw Jagmohan going towards his house and at that time, appellant assaulted Jagmohan with the help of an axe in front of her house. In the cross-examination, the suggestion that Jagmohan had gone to the house of Gouri has been denied but stated that Jagmohan was coming towards his house. She states that she did not know why Jagmohan was assaulted by appellant Gouri and she did not see any quarrel at the spot.

14. The prosecution has examined two more important prosecution witnesses who state regarding the genesis of dispute culminating in death of Jagmohan. These witnesses are Kiran (PW-14) and Sanmet (PW-15). Kiran is the daughter of the appellant and Sanmet is the wife of the appellant.

Kiran (PW-14) who is a child witness, aged about 9 years has deposed that on the date of incident at about 12.00 hours, while she was at her home, her father (the appellant) was sleeping, Jagmohan (the deceased) came to their house and kicked her father three four times, at this stage, her mother pushed Jagmohan away from the house. Thereafter, Jagmohan again came and insisted to open the door failing which, dire consequence was declared to follow. This witness stated that thereafter, Jagmohan brought an axe from his house and challenged appellant Gouri to come out otherwise he would kill her mother. Her mother asked the deceased to go away, he did not hear and started dragging her mother by catching hold of her arm. According to this witness, the appellant came there and started making an attempt to rescue his wife (PW-15) from the clutches of Jagmohan and in this scuffle, the axe fell on the temporal part of Jagmohan and thereafter, her father ran away with the axe.

According to this witness, her father had not assaulted Jagmohan. At this stage, this witness was declared hostile by the prosecution.

15. Sanmet (PW-15) is the wife of the appellant who has been examined as prosecution witness. This witness deposed that on the date of incident, Jagmohan had come in intoxicated condition, got the door of the house opened then he kicked her husband. Thereafter, her husband went inside the house and she pushed Jagmohan away from the house. After about one hour, Jagmohan again arrived with an axe in his hand and started knocking the door. When she opened the door, Jagmohan caught hold of her hand and at that stage, her husband came there and rescued her from the clutches of Jagmohan. Thereafter, Jagmohan fell down there and sustained injuries by axe on the temporal part. This witness having not fully supported the case of the prosecution, insofar as, assault by the appellant is concerned, she was declared hostile and suggestion that while Jagmohan was dragging her way, her husband had come out with axe in his hand and then he assaulted Jagmoah has been denied.
16. Kiran (PW-14) and Sanmet (PW-15) who have been examined as the prosecution witnesses are the daughter and wife of the appellant and therefore, their evidence has to be scrutinized carefully to find out whether the entire evidence is reliable or only a part or whether these witnesses are attempting to save the appellant and not telling the truth and the manner in which the incident happened, leading to injuries caused to Jagmohan. While these witnesses have come out with the story of Jagmohan arriving in their house in intoxicated condition, kicking the appellant, pushed away from the house and then again returning

back to the house with an axe, challenge the appellant to come out else he will be killed and then catching hold wife of the appellant and dragging her way, how Jagmohan sustained injuries, their version contradict each other.

17. As far as other prosecution witnesses, who claimed to have seen the incident of assault, as referred to in paragraph herein above, all of them state regarding the incident to the extent they saw the appellant assaulting the deceased with the help of an axe. However, in respect of the genesis of dispute and the background in which the appellant assaulted the deceased, all those prosecutions witnesses have not stated anything. This apparently is for the reason that the incident happened in front the house of the appellant. Even the independent prosecution witnesses have stated that the incident happened in front of the house of the appellant. The inquest prepared over the dead body and all the witnesses of inquest have also confirmed that the deadbody of Jagmohan was found in front of the house of the appellant. The evidence of Kiran (PW-14) and Sanmet (PW-15) therefore, to the extent, they say that the Jagmoah had come to the house of the appellant is reliable. Therefore, it can certainly be said that the prosecution has succeeded in proving and it also proved from the overwhelming evidence on record that the incident in which Jagmohan sustained injuries happened in front the house of the appellant. However, for that reason alone it cannot be said that Jagmohan was the aggressor. In the case of **Dashrath @ Jolo vs State Of Chhattisgarh AIR 2018 SCC 1133**, it has been held

that merely because occurrence happened in front of the house of the appellant, it cannot be said that the complainant party was the aggressor. It has been further held that in order to find out as to who were the aggressors, the entire incident must be examined with due care in its proper setting.

Applying the aforesaid principle to the evidence of all the prosecution witnesses, the daughter and wife of the appellant and all other witnesses who claimed to have seen the incident is concerned, the incident happened in front of the house of the appellant but except Kiran (PW-14) and Sanmet (PW-15), no other witnesses has been able to state the circumstance preceeding the incident of assault by the appellant on the deceased. Therefore, for that purpose, it is required to be seen whether the evidence of PW-14 and PW-15 regarding what happened just before injury sustained by Jagmohan renders probable and plausible, the defence version.

18. The evidence of PW-14 and PW-15, with regard to what happened before Jagmohan sustained injuries is almost identical. Jagmohan come to the house of the appellant. He was drunk. The deceased had kicked the appellant and then he was pushed away from the house of the appellant by his wife. The evidence of aforesaid two witnesses is that later on, Jagmohan came back with an axe in his hand and started to challenge Gouri to come out otherwise he would be killed. When door was again opened, the deceased started dragging the wife of the appellant namely Sanmet (PW-15). The evidence of these two witnesses to extent of this story

has not been controverted in their cross-examination but after declaring these two witnesses hostile, the prosecution has confronted the witnesses to the extent to elicit that the appellant had actually assaulted the deceased. Though these witnesses do not support such suggestion, but with regard to what happened prior to assault the evidence these witnesses is reliable.

19. It would thus be seen that the evidence regarding circumstance preceding assault, as stated by PW-14 and PW-15, though reliable, these two witnesses have attempted to save the appellant by stating that Jagmohan sustained injuries by axe not because of the assault but because of fall on the axe. This part of the evidence of these witnesses is not reliable in view of what has been stated by Dr. D.K. Vishwakarma (PW-22) in his evidence wherein he states that the kind of injuries sustained by the deceased on either part of parietal could not be sustained due to mere fall or scuffle in attempt to snatch away the axe. He has remained firm in the evidence including the postmortem report. It shows that there were cut injuries on the parietal part of the head on both the side and the injuries shows that it had cut the bone and also cut the brain matter. That much of injury could be caused only when there is great force in the impact of axe on the head. Merely because, attempt was being made to snatch away the axe, such type injuries could not be caused. Moreover, to say that such injuries could be caused due to fall on the axe is also not probable because according to doctor, in such an eventuality, one injury could be caused. The other reason is that there one or two cut

injuries on the head on the either side. If at all there was fall on the axe and hit on the face during the course of snatching, there would have been single injury on either side and not on both the side of parietal part of the head. Therefore, the version of other prosecution witnesses that the appellant had axed the deceased on his head is much more reliable than what has been stated by the PW-14 and PW-15 and therefore, to that extent, the evidence of PW-14 and PW-15 has to be rejected and what has been stated by the other prosecution witnesses deserves to be relied upon.

21. From the evidence of the aforesaid prosecution witnesses, Jagmohan first came to the house of the appellant in intoxicated condition and he kicked the appellant number of times. Thereafter, he was pushed out of the house by PW-15. Thereafter, he again came back with an axe in hand and started knocking the door and challenging the appellant to come out otherwise he would be killed, thereafter PW-15 opened the door and then the deceased, holding an axe in his hand, started dragging PW-15 who was none other than the wife of the appellant.
22. In these circumstance, proved from the evidence of the prosecution, can it be said that it was a case for exercise of right of private defence to the extent of causing death as argued by learned counsel for the appellant and if so, whether the appellant is entitled to be acquitted by holding that whatever was done by the appellant, was only in exercise of right of private defence or is it a case where though exercise of right of private defence was

justified in the circumstance but the appellant exceeded in exercise of right of private defence.

23. Section 96 of the IPC provide that nothing is an offence which is done in the exercise of right of private defence.

In the case of **Rizan & Another vs State Of Chhatisgarh AIR 2003 SC 976**, it has been held by the Hon'ble Supreme Court that 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 ward off the attack or for forestalling 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.

24. In another case of **Arjun vs State of Maharashtra AIR 2012 SC 2181**, Hon'ble Supreme Court has held that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Injury which is inflicted by a person exercising the right should be commensurate with the injury with which he is threatened. It is also held that right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence.

In another decision in the case of **Ranjitham vs Basavaraj & Ors 2011 (2) SC 260**, it has also been held that right of private defence cannot be weighed in a golden scale and even in absence of physical injury, in a given case, such a right may be upheld by the court provided there is reasonable apprehension to life or reasonable apprehension of a grievous hurt to a person.

25. While section 99 IPC carves out certain exception when the right of private defence is not available, at the end it has been also stated 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.

Taking an eve from this provision, an argument has been developed by learned counsel for the State that in the present case, even if what PW-14 and PW-15 have stated is accepted, instead of going ahead with an assault, the appellant could have taken recourse to the protection of the public authorities by complaining to the police regarding criminal overt act of the deceased.

26. This argument of learned counsel for the appellant does not impress us because the circumstance as spelt out by PW-14 and PW-15, were imminent in nature. The deceased was in drunken state. He had come in the second round holding an axe in his hand and he was calling to open the door otherwise appellant would be killed. When door was opened, he started dragging the wife of the appellant away. With such a situation faced by anyone, it cannot be said there was sufficient time for the appellant to call

for the protection of public authorities by going to police station leaving his wife in the clutches of drunken man giving all kind of threat and holding an axe. This certainly was a situation when the appellant was left with no option but to exercise right of private defence to rescue his wife.

27. Section 100 IPC provides as to when the right of private defence of the body extend to causing death. It provides that the right of private defence of the body extends, under the restriction mentioned in the preceding sections, 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 as stated thereafter under clauses ' *Firstly*' up to '*Seventhly*'. First, second and third restrictions are reasonable apprehension that death is otherwise is a consequence or grievous hurt is otherwise consequence of assault or an assault with intention of committing rape.

At this stage, we must refer to the provisions as contained in section 97 IPC that the right of private defence is inclusive and not only to extent of private defence of own body but the body of any other person, apart from protection of property. In the present case, situation was such that the appellant had no remedy but to exercise his right of private defence to save not only his own body against possible assault by the deceased but also to save his wife who was otherwise caught hold of by the deceased. In these circumstance, the assault given by the appellant even if, the

evidence of prosecution witnesses is accepted, would be certainly an act of right of private defence.

28. The Hon'ble Supreme Court, in the case of **Puran Singh and other vs. State of Punjab AIR 1975 SC 1674** examined scope and ambit of the provisions relating to the right of private defence as below:-

20. It was, however, contended by counsel appearing for the State that on the allegations made by the prosecution the accused had mercilessly assaulted the prosecution party including the Sulakhan Singh and Baj Singh and, therefore, even if they had the right of private defence they had exceeded the same. We are, however, unable to accept this contention. In the first place as the prosecution has deliberately suppressed the very material part of the origin of occurrence, we do not know as to how the occurrence started. Secondly when two persons on the side of the accused were injured by gun-fire it was not possible for the appellants to weigh their blows in golden scales in order to assault the prosecution party. As held by us this was a case where the appellants were fully entitled to the exercise of the right of self defence of their property and person both because their persons had been attacked and their property had been trespassed upon and damaged. It is manifest that after the two persons on the side of the accused received gunshot injuries as found by the High Court and by us, the accused party would have undoubtedly a reasonable apprehension that either death.

grievous hurt could be caused to the appellants or one of them. This being the position they were fully justified in causing the death of the deceased persons in the exercise of their right of private defence of person. Such an apprehension could not be said to be hypersensitive or based on no ground and it will be idle to contend that accused should have waited until one of their party members would have died or received serious injuries before acting on the spurt of moment, nor can one expect a person who is attacked by an aggressor to modulate his blows in accordance with the injuries he receives. In these circumstances, therefore, it cannot be said that the accused had in any event exceeded their right of private defence. If the prosecution did not come out with the true version of the nature and origin of the occurrence, they cannot blame the Court if the entire version presented by them is rejected, as held in the recent judgment of this Court in (AIR 1975 SC 1478 = 1975 Cri LJ 1079). For these reasons, therefore we are clearly of the opinion that the accused are protected by the right of private defence of their property and person and the prosecution case against the appellants must fail. In any event, the prosecution case has not been proved beyond reasonable doubt.

It is therefore, clear from the aforesaid decision that the situation where a person is required to exercise of right of private defence to save either himself or any other person death or of grievous hurt, it cannot be weighed on golden scales.

29. In another pronouncement in the case of State of **Uttar Pradesh vs. Gajey Singh and antoher 2009(11) SCC 414** also, the Hon'ble Supreme Court laid down the following principle:-

29. It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

30. Apparently in the present case, the situation certainly warranted exercise right of private defence and the prosecution evidence that Jagmohan was holding axe in his hand which in all probability was snatched away by the appellant and then appellant assaulted on Jagmohan, was possibly an attempt made by appellant to disable the deceased so that he could not either assault the appellant or the wife of the appellant.
31. However, the question is whether the assault given by the appellant on the head of the deceased was in excess of exercise of right of private defence in the given circumstance. It is not a case where the wife of the appellant or the appellant has already

sustained certain assault. True, it is that Jagmohan was holding an axe in his hand, but the prosecution story shows that though Jagmohan had come with axe, it is a case where the appellant snatched away the axe from the hands of Jagmohan. Thereafter, Jagmoah was left with no arms in his hand. In such a situation, the appellant could, at the most have used lessor force to disable Jagmoah so that he was not in position to harm the wife of the appellant or the appellant. It is not a case where appellant was surrounded by a mob and he had no option except to give lethal blow to whoever comes in the front nor a case where somebody has been surrounded in his house with number of persons holding dangerous weapon or that the appellant had threat of he or his wife being shot dead by a firearm or a like situation. The appellant gave two lethal blows on the head of Jagmohan with the help of axe which so much force that it cut the brain and damaged brain matter.

32. The expression contained in section 100 IPC which provides for right of private defence of the body to the extent of causing death is subject to restrictions which are mentioned in section 99 IPC. Therefore, even in a case where there is reasonable apprehension that grievous hurt or death would otherwise be the consequence, the extent to which the right could be exercised, must be commensurate and to the extent necessary for the purpose of defence. We are therefore of the opinion, that though the evidence led by the prosecution proves that it is the appellant who assaulted the deceased, in the circumstance, the appellant

exceeded, in exercise of right of private defence. As a result, the criminal overt act of the appellant would not travel beyond culpable homicide not amounting to murder by virtue of application of exception. Moreover, the act of giving more than one assault on the head of the deceased with the help of axe was certainly with the intention of causing death. Therefore, the case will fall under first part of section 304 IPC. The appellant has undergone more than 12 years and 9 months jail sentence. Considering the totality of the circumstance of the case, we alter the conviction of the appellant to that under Section 304 Part-I IPC with sentence for the period already undergone by the appellant.

33. The appeal is accordingly partly allowed in the manner and to the extent referred above. The appellant be released forthwith.

Sd/-

Manindra Mohan Shrivastava
Judge

Sd/-

Vimla Singh Kapoor
Judge