

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.27 OF 2017

- 1 Manik Hanmant Mote,
 Age 68 yrs., Occ. Agri.,
 R/o Shivankhed, Tq. Chakur,
 Dist. Latur.
 (Abated as per order dated 28.08.2023)

- 2 Mahesh Manik Mote,
 Age 29 yrs., Occ. Agri.,
 R/o as above.

- 3 Siddheshwar Manik Mote,
 Age 39 yrs., Occ. Agri.,
 R/o as above.

... **Appellants**

... **Versus** ...

The State of Maharashtra
Through the Police Station Officer,
Police Station, Chakur,
Tq. Chakur, Dist. Latur.

... **Respondent**

...

Mr. R.S. Deshmukh, Senior Counsel a/w Mr. G.A. Kulkarni, Advocate i/b Mr.
D.R. Deshmukh, Advocate for appellant Nos.1 to 3

Mr. A.M. Phule, APP for the respondent

Mr. P.P. More, Advocate for assist to PP

...

WITH

CRIMINAL APPEAL NO.883 OF 2018

The State of Maharashtra
Through the Police Station Officer,
Police Station, Chakur,
Tq. Chakur, Dist. Latur.

... **Appellant**

... **Versus** ...

- 1 Manik Hanmant Mote,
Age 68 yrs., Occ. Agri.,
R/o Shivankhed, Tq. Chakur,
Dist. Latur.
(Abated as per order dated 28.08.2023)
- 2 Mahesh Manik Mote,
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R/o as above.
- 3 Siddheshwar Manik Mote,
Age 39 yrs., Occ. Agri.,
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... **Respondents**

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Mr. A.M. Phule, APP for the appellant

Mr. P.P. More, Advocate for assist to PP

Mr. R.S. Deshmukh, Senior Counsel a/w Mr. G.A. Kulkarni, Advocate i/b Mr.
D.R. Deshmukh, Advocate for respondent Nos.1 to 3

...

**CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 14th SEPTEMBER, 2023

PRONOUNCED ON : 11th OCTOBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Both the criminal appeals are arising out of the same judgment and, therefore, those are proposed to be disposed of by this common judgment. Criminal Appeal No.27 of 2017 is filed by the original accused convicted by learned Additional Sessions Judge, Latur in Sessions Case No.3/2013 on 02.12.2016, thereby convicting them for the offence punishable under Section 302, 324 read with Section 34 of the Indian Penal Code, 1860, whereas the prosecution has come in appeal i.e. Criminal Appeal No.883 of 2018 to challenge the acquittal of the original accused persons in the same case from the offence punishable under Section 307, 341 read with Section 34 of the Indian Penal Code, 1860. [Original accused No.1 Manik Hanmant Mote is reported to be dead and, therefore, by order passed by this Court on 28.08.2023 both the appeals were disposed of as against him as abated.]

2 Accused No.1 (now deceased) is the father of accused Nos.2 and
3. He is the owner of land bearing Gat No.299 in village Shivankhed (Bk).
(The parties are referred to by their nomenclature before the trial Court.) On
09.09.2012 one Vyankatrao Apparao Mote resident of village Shivankhed, Tq.
Chakur, Dist. Latur was admitted in Government Medical College & Hospital,
Latur. His statement was recorded by PSI attached to Chakur Police Station
between 10.30 a.m. on 08.09.2012. He himself, his son Shankar, cousin
brother Bhagwan and cousin brother's son Bhimashankar were proceeding in
bullock cart for sprinkling insecticides in his field. They were proceeding
from an old road i.e. vahiwat road, which was near the field of accused No.1
(now deceased). Around 11.00 a.m. they were at that place and at that time
all the three accused came, obstructed their way and told that the cart should
not be taken from their field. The informant and persons along with him told
the accused that they should allow them to go as the way is old and they
(accused) should not obstruct them and thereby Bhimashankar took the cart
just ahead, at that time, all the three accused persons attacked him with axe.
When Vyankatrao went to rescue him, accused Mahesh i.e. accused No.2
assaulted Vyankatrao with axe on his head and on right side of the chest as
well as on both the hands with handle of the axe. Accused No.1 (now
deceased) assaulted Bhagwan with axe and the injury was caused to his head

and other parts of the body. When Shankar came to rescue them, he was also assaulted with axe. Vyankatrao felt giddiness and fell down. All the four of them had received severe injuries and fell down and thereupon the accused persons fled away from the spot. After hearing the hue and cry the neighbouring farmers Narayan Kolgave and Ankush Walakate came running. All the four injured persons were kept in bullock cart and brought to village and from village they were shifted to hospital in jeep. In jeep Vyankatrao regained consciousness and came to know that his cousin brother Bhagwan has expired while undergoing the treatment.

3 On the basis of said statement recorded the said First Information Report came to be registered vide Crime No.166/2012 and investigation was undertaken.

4 The inquest panchnama came to be executed prior to the registration of the offence that was under Section 174 of the Code of Criminal Procedure and the dead body was forwarded for postmortem. After the registration of the offence panchnama of the spot was carried out, clothes of the deceased were seized, statements of the witnesses were recorded, accused came to be arrested, accused Nos.1 to 3 discovered separate axes on different date and time after their arrest, memorandum panchnama to that

effect has been executed, medical papers were collected and after the investigation was over charge sheet was filed.

5 After the committal of the case, charge came to be framed against all the accused and when they pleaded not guilty prosecution has examined in all 19 witnesses to bring home the guilt of the accused persons. The defence of the accused persons is that there was no such road available for Vyankatrao or his brothers to go to their field, but the informant and the injured persons were interfering with the possession of the accused persons over land Gat No.299 and they wanted to create a new path way. It was their deliberate and intentional act to use the portion of the field of accused No.1 (now deceased) to cause damage to the crops. In fact, the informant and the injured had attacked them with axe and in that event even they have sustained injuries. They had right to protect the property and whatever they had done was by way of private defence. Cross complaint was filed and the copy of the evidence of the Medical Officer in that case has been produced on record along with the written say filed as part of their statement under Section 313 of the Code of Criminal Procedure.

6 After the evidence was over, taking into consideration the evidence as well as the submissions made, the learned trial Judge has held all

the three accused persons guilty of committing offence under Section 302 read with Section 34 of the Indian Penal Code and have been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand only) each, in default to suffer simple imprisonment for one month. It was held that prosecution has failed to prove that the accused persons have committed offence under Section 307 of the Indian Penal Code, but it was held that offence that has been proved as regards the injured persons are concerned, it is under Section 324 read with Section 34 of the Indian Penal Code and, therefore, by acquitting them under Section 307 of the Indian Penal Code conviction has been awarded for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code and they have been sentenced to suffer rigorous imprisonment for two years each and pay fine of Rs.1,000/- (Rupees One Thousand only) each, in default to suffer simple imprisonment for one month. All of them have also been acquitted under Section 341 of the Indian Penal Code. All the sentences were directed to run concurrently. Hence, both these appeals.

7 Heard learned Senior Counsel Mr. R.S. Deshmukh instructed by learned Advocate Mr. D.R. Deshmukh for appellants in Criminal Appeal No.27 of 2017 as well as for respondents in Criminal Appeal No.883 of 2018 and learned APP Mr. A.M. Phule for State well assisted by learned Advocate

Mr. P.P. More.

8 It has been vehemently submitted by learned senior counsel Mr. R.S. Deshmukh instructed by learned Advocate Mr. D.R. Deshmukh for appellants that the learned trial Judge has not appreciated the evidence properly. Here, in this case, after the trial commenced informant Vyankatrao Apparao Mote expired, but it appears to be a natural death because prosecution has not tried to establish the nexus between his death and the incident and under the said circumstance, the First Information Report was not proved. It was got proved through the API and the endorsement thereof by the Medical Officer. Such proof cannot be accepted and, therefore, exhibit number is given to the First Information Report is immaterial. It cannot be said that by any means the First Information Report has been proved in this case. The prosecution has relied on the evidence of PW 9 Bhimashankar Vasantrao Mote, PW 10 Shankar Vyankatrao Mote, who are the injured witnesses and further reliance is on PW 12 Prashant Kashinath Deokate and PW 13 Narayan Dhondiram Koulgave, who had allegedly seen the accused persons taking the weapons i.e. axes with other from their house towards field and then PW 13 Narayan allegedly witnessing the incident. If we consider the testimony of PW 13 Narayan, then it can be said that he has materially improved his statement before the Court. His statement under

Section 161 of the Code of Criminal Procedure would show that he was not present and had no idea as to who has done the act. But in the substantial evidence he has tried to pose himself as an eye witness. His testimony is, therefore, required to be discarded in toto. According to PW 9 Bhimashankar and PW 10 Shankar, they all were proceeding in bullock cart and when they were near the field of accused No.1 (now deceased), they were obstructed by the accused. They were saying that it is their usual way from the time of their forefathers. But in the cross-examination both of them have admitted that there is no documentary evidence to support their contention that such path way was available to them. It is also seen from the cross-examination of these two witnesses that the accused persons had raised objection for use of their land as path way. It appears that intentionally the spot was shown on the bandh, but in fact, the incident had taken place in land Gat No.299 belonging to accused No.1 (now deceased). Therefore, the accused persons had every right to protect damage to their property. It was the informant's side, who had attacked the accused persons with axe and in order to save themselves the accused persons have reacted. The prosecution has not explained injuries on the persons of the accused persons, but it has been brought on record by way of filing the certified copy of the deposition of PW 5 Dr. Shaikh Husain, the Medical Officer, who was examined in Sessions Case

No.2/2014, in which these injured witnesses and the deceased persons were accused to prove that accused No.1 (now deceased) had sustained head injury.

9 It has been further submitted by learned senior counsel appearing for the appellants that the Investigating Officer has taken the relatives of the informant as panch witnesses to the discoveries. By no stretch of imagination it can be said that those memorandum panchnamas Exhs.68, 69, 71, 72, 77 and 78 are admissible in evidence. Evidence of PW 11 Dr. Dharmaraj Dudde, who conducted the autopsy, would also show that what he had found on the person of deceased Bhagwanrao was the sutured wound over left parieto temporo occipital region. PW 14 Dr. Sudhir Fattepurkar is the Medical Officer from Ashwini Hospital, Latur, who had examined Bhagwanrao and Bhagwanrao was admitted there for treatment and expired there in that hospital only. What was found at the time of admission of Bhagwanrao in the said hospital is that he had sustained incised wound of size 20 c.ms. x bone deep on left temporo parietal region extending up to occipital region. He has admitted in his cross-examination that incised wound can be caused by a light weapon with sharp cutting edge, however, in the present case it was axe and according to him, axe is categorized in heavy weapon with sharp cutting edge. A sharp cutting weapon would result into

chop wound. He had not found any chop wound on the person of Bhagwanrao. Therefore, the connection between the incident and the weapon has not been proved at all.

10 It cannot be said that there was any intention to kill on the part of the accused persons as the informant's side had in fact, entered into the property belonging to the accused persons and, therefore, they were the aggressors. This aspect has not been considered by the learned trial Judge and, therefore, in all the conviction of the accused persons cannot be alleged to be sustained.

11 Learned APP has supported the reasons given by the learned trial Judge to the extent of convicting the accused Nos.1 to 3 for the offence under Section 302 read with Section 34 of the Indian Penal Code. He submitted that the testimony of PW 9 Bhimshankar and PW 10 Shankar corroborates each other. They have assigned role to each accused and the sequence in which the accused persons had assaulted them. The First Information Report has been proved through Investigating Officer as Vyankatrao has expired. The said proof through Investigating Officer was sufficient for proof of First Information Report. The testimony of the injured eye witnesses is also supported by PW 12 Prashant Deokate, who had seen the accused persons

proceeding towards field with axe. It is also supported by testimony of PW 13 Narayan Koulgawe, who had also seen the accused persons with axe and sticks proceeding from their house to field. He had also heard the accused persons saying that they would eliminate whoever comes between. This shows that the accused persons had intention to kill. The medical evidence would clearly show from the testimony of PW 11 Dr. Dharmaraj Dudde and PW 14 Dr. Sudhir that Bhagwanrao had sustained injury with the axe on his vital part i.e. head. Rather testimony of PW 14 Dr. Sudhir would show that since prior to admission Bhagwanrao's condition was critical. The difference between light and heavy object will not make difference, when no other weapon is involved in the case. The three axes were discovered by all the three accused persons one by one and in order to prove those memorandum and panchnama prosecution has examined PW 2 Chandrakant Jadhav, PW 3 Kashinath Gawre and PW 4 Dipak Kamble. The clothes of the accused persons have also been seized in presence of PW 8 Sayyad Babu and the spot panchnama has been shown by the witness and the panchnama is proved by PW 6 Devanand. PW 15 Bhagwat Aradwad was the then President of the Tantamukti Yojana, with whom a complaint about the path way was given by Vyankatrao. It was stated in the said application also that Vyankatrao and his family members were using the said path way since the time immemorial but

the accused persons had started obstructing it recently. The injuries on the person of Vyankatrao, Bhimashankar and Shankar are proved by examining PW 16 Dr. Sadashiv Dhanve. His testimony would show that injuries were sustained on the vital part and when three persons were attacking with the help of axe, then it can be gathered that they had intention to kill Vyankatrao, Bhimashankar and Shankar. The acquittal of the accused persons from the offence under Section 307, 341 of the Indian Penal Code is illegal and, therefore, deserves to be set aside. They are required to be punished for those sections also.

12 In reply, learned senior counsel replying the appeal filed by the prosecution challenging the acquittal of the accused submitted that part of judgment holding that prosecution has failed to prove offence under Section 307 of the Indian Penal Code is correct. The medical evidence does not support the prosecution evidence and, therefore, there is no need to set aside the acquittal of the accused persons from the offence punishable under Section 307, 341 of the Indian Penal Code.

13 Before we proceed to assess the evidence of the eye witnesses to know as how the incident had taken place, we would like to take account of the medical evidence in respect of charge under Section 302 of the Indian

Penal Code. PW 11 Dr. Dharmaraj Dudde has deposed that on 08.09.2012 dead body of Bhagwanrao was referred to him around 8.00 p.m. for postmortem and he started the postmortem at 9.00 p.m. and concluded it by 10.00 p.m. He found a sutured wound over left parieto temporo occipital region. In all 16 sutures with fracture to parietal temporal bone was seen and then there was contusion with right wrist joint of size 4 x 5 c.ms. and there was fracture over left parietal and temporal bone. On internal examination he had seen in all six injuries. After considering the injuries, he has opined that the probable cause of death was due to head injury. He was not able to tell the nature of weapon and size of the injury as the injury was sutured. In the cross-examination he opined that looking to the size of the haematoma it would have developed pressure over the brain. A question regarding diabetic patient not treated on that count and results hyperglycemia. What would be the effect of the same on the brain was also be asked. But we were not concerned with the same. Though he has stated that the fracture of bone can be possible by forcible fall, it appears that it was a question regarding fracture to the wrist joint. Certainly, his testimony is required to be appreciated with the testimony of PW 14 Sudhir Fattepurkar, who had examined Bhagwanrao around 2.15 p.m. at Ashwini Accident and Neuro Care Center, Latur on 08.09.2012. He has stated that after he

examined the patient he found there was head injury due to assault and there were two injuries – one was incised wound of size 20 c.ms. x bone deep in the left temporal parietal region extending up to occipital region and second was contusion over right wrist 3 x 4 c.ms. He has stated that injury No.1 was sutured as the blood was oozing and then the patient was put on ventilator and all life resuscitative measures were taken. In spite of all those measures the patient expired around 5.15 p.m. on the same day. According to him, the case of death was due to head injury due to assault. In examination-in-chief he has stated that the assault might have been by sharp weapon like axe. In the cross-examination he has categorized axe into heavy weapon with sharp cutting edge. He has also stated that a heavy cutting weapon with sharp edge would cause chop wound and incised wound would be possible by light weapon with sharp cutting edge. No concession can be given to the accused for the simple reason that it was not ruled out by the medical expert that heavy cutting weapon with sharp edge cannot cause incised wound or axe cannot cause incised wound. Questions were also asked, as to why the haematoma was not removed, but then he had answered to that and says that there is no necessity to remove haematoma by clinical examination and clinical condition of the patient is the guideline for associated radiological investigation. Thus, the cross-examination has not paved way to come to a

different conclusion that death of Bhagwanrao is not homicidal. In other words, prosecution has proved that Bhagwanrao's death is homicidal.

14 At this stage itself, we would like to consider the other medical evidence in respect of injured witnesses. PW 16 Dr. Sadashiv Dhanve had examined Vyankatrao, Bhimshankar and Shankar.

Following injuries were found on the person of **Vyankatrao**

Apparao Mote :

- i) Laceration over mid fronto parietal region, size 6 x 1 x 1 c.ms.
- ii) Incised wound over right middle of chest on anterior aspect, size 10 x 2 x 2 c.ms.
- iii) Abrasion over right shoulder, size 2 x 1 c.ms.
- iv) Contusion over right arm of size of 5 x 4 c.ms.
- v) Contusion over right calf of size of 8 x 4 c.ms.
- vi) Contusion over right forearm of circumference
- vii) Swelling over left forearm
- viii) Fracture of left radius
- ix) Fracture of right side radius

Following injuries were found on the person of **Bhimashankar**

Vasantrao Mote :

- i) CLW over left forehead, size 7 x 1 x 1 c.ms.
- ii) Laceration over middle parietal region, size 10 x 1 x 1 c.ms.
- iii) Abrasion over left elbow of 5 x 3 c.ms.
- iv) Swelling over left elbow circumference
- v) Head injury

Following injury was found on the person of **Shankar Vyankatrao**

Mote :

- i) CLW to his right hand of size of 5 x 1 x 1 c.ms.

In the examination-in-chief the said Doctor has said that the injuries were simple in nature except one injury of Bhimashankar. At no point of time he says that the injuries those were caused to these three witnesses were sufficient to cause death. Merely because a simple injury is to the vital part of the body it cannot be said that Section 307 of the Indian Penal Code would then be attracted. It would be the intention to kill that is important and even when there may not be injury still there can be intention to kill. But, here, in this case, there were injuries and the prosecution ought to have then extracted from the medical expert as to whether the said injuries would have been sufficient to cause death in ordinary course. As per the prosecution story, those injuries were caused due to axe which can be said to

be an instrument of cutting and, therefore, the learned trial Judge has rightly invoked Section 324 of the Indian Penal Code, the acquittal of the accused persons from the offence punishable under Section 307 of the Indian Penal Code was justifiable.

15 Now, it is to be noted that PW 9 Bhimashankar and PW 10 Shankar both injured eye witnesses have corroborated each other. They have specifically stated that Bhimashankar went to Bhagwanrao's house at Shivankhed and thereafter they proceeded in bullock cart. He has stated that they wanted to spray fertilizers and, therefore, they were carrying the spray pump and fertilizers along with them. Bhimashankar was driving the bullock cart. They both have stated that they proceeded through the old path and reached near the field of Bhagwanrao. At that time, all the accused persons came in front of their bullock cart and restrained them from proceeding further by that way. They claimed that the said path way was old and used since the time of their forefathers. They were not allowed by the accused and then when PW 9 took the bullock cart little bit ahead, the accused persons initially assaulted him by axe on his head, back and hands. The testimony of PW 16 Dr. Sadashiv Dhanwe corroborates the same. Then accused No.2 assaulted Vyankatrao on his chest and head by axe. Those injuries are also matching. Accused No.3 is stated to have assaulted Vyankatrao by stick of

axe on his hand, accused No.2 and accused No.1 (now deceased) assaulted Bhagwanrao by axe on his head and back. Accused No.2 assaulted Shankar with axe on right hand and accused No.3 assaulted Shankar on his back with axe. No doubt, there are one or two contradictions and not supported by PW 16 Dr. Sadashiv Dhanwe, but as regards the injuries are concerned; yet, it is certain that all the three injured persons have sustained the injuries and deceased had also sustained injuries as a result of blows given by accused No.2 and accused No.1 (now deceased). The testimony of both these witnesses would show that they had common intention and that common intention can be gathered from the testimony of PW 12 Prashant, who had seen all of them carrying weapons and going towards their field.

16 A thorough cross-examination has been taken on behalf of accused to all these witnesses and it was tried to be brought on record that the situation at the field is different and there is no field of Bhagwanrao near the field of accused No.1 (now deceased). Important point to be noted is that even if it would have been shown that his land is not near, but if it is beyond and still that road was available that was sufficient. There was no documentary evidence, as admitted by PW 9 Bhimashankar, to prove that such road existed since time immemorial. This point requires to be discarded for the simple reason that many times no documentary evidence is available

for the easements, but the easements are there which are used by the farmers since time immemorial. Further, from the testimony of PW 15 Bhagwat Aradwad, who was then Chairman of Tantamukti Yojana, would show that Vyankatrao had given a complaint against accused No.1 (now deceased) stating that he is obstructing their way. It was much prior to the incident and, therefore, there is substance in the say of the witnesses that since they were using that road on that day also, they attempted to go further by using that road. The accused have now come with a case that actually PW 9 Bhimashankar had taken the bullock cart from their field and not from the bandh, but except their written say to the statement under Section 313 of the Code of Criminal Procedure, there is nothing. Neither any of them has entered the witness box nor they have examined nearby villager to support their contention.

17 Another aspect i.e. also required to be considered is that at one place the accused persons are taking the defence of total denial and at another breath they want to take the defence of right of private defence. No doubt, right of private defence extends to right of protecting the property, but when such defence is taken, the presence of the accused is required to be presumed. The accused are coming with a case that accused No.1 (now deceased) lodged First Information Report against the deceased persons as

well as PW 9 and PW 10, wherein he contended that he was assaulted. The learned trial Judge has rightly said that the evidence in the cross case cannot be readily read in an another cross case. There are methods and procedure laid down under the law as to how and in which circumstances evidence in the cross case can be read in the another cross case. That procedure has not been adopted. Mere filing of the copy of the evidence of the Doctor in another case to bring it on record that accused No.1 (now deceased) had sustained injury on the same day, it is not sufficient to hold that the said injury was in respect of the same incident or arising out of the same incident. No efforts were taken by accused No.1 (now deceased) to enter into the witness box nor accused Nos.2 and/or 3 led the evidence. As the plea of right of private defence has been raised, in this connection, we would like to consider the legal position on this point. In **Raj Singh vs. State of Haryana and others**, [(2015) 6 SCC 268], the Hon'ble Apex Court, in paragraph No.16, has held as under -

“16. The right of private defence is codified in Sections 96 to 106 IPC. Sections 96 declares that “nothing is an offence which is done in exercise of the right of the private defence”. Section 97 states that every person has right of defence of person as well as of property. Section 100 describes the situations in which the right of private defence of body extends to the extent of voluntarily causing of death. To claim right of

private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The law of private defence does not require that the person assaulted or facing apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him right of private defence. There is no right of private defence where there is no apprehension of danger. Necessity of averting and impending danger must be present, real or apparent.”

17.1 Further, in the said decision note has been taken of the earlier decisions in paragraph Nos.17 and 18 as follows -

“17. Elaborating the scope of right of private defence, in **Dharam v. State of Haryana**, (2007) 15 SCC 241 in paragraphs (18) and (19) it was held as under:-

“18. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract

parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

19. It is trite that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus 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), *State of Gujarat vs. Bai Fatima* (1975) 2 SCC 7) and *Salim Zia v. State of U.P.* (1979) 2 SCC 648)."

18. In **Bhanwar Singh v. State of M.P.**, (2008) 16 SCC 657, in paragraphs (50) and (60) it was held as under:-

"50. The plea of private defence has been brought up by the appellants. For this plea to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. Such a ruling may result in the application of Section 300 Exception 2, which states that culpable homicide is not murder if the offender, in the exercise in good faith of

the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all.

60. To put it pithily, the right of private defence is a defence right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self-creation. Necessity must be present, real or apparent”. (emphasis added)

The same view is also expressed in the cases of Biran Singh v. State of Bihar [AIR 1975 SC 87], Wassan Singh v. State of Punjab [(1996) 1 SCC 458], Sekar v. State [(2002) 8 SCC 354], Buta Singh v. State of Punjab [AIR 1991 SC 1316] and James Martin v. State of Kerala [(2004) 2 SCC 203].”

18 The right of private defence should always be proportionate. If the other person is armed, then so much of the assault will be permitted which will disarm him. Here, it has not been cogently brought on record by the accused that the informant’s side was armed. Even if for the sake of argument it is accepted that there was one axe with them, which farmer may usually carry, still all the four persons i.e. one deceased, informant (now deceased), PW 9 and PW 10 were assaulted with axe or deadly weapon.

Under such circumstance, the question of right of private defence does not arise. This fact can also be considered from another angle in the written say which is part of statement under Section 313 of the Code of Criminal Procedure. The accused persons have stated that since last 4-5 months the informant and his relatives were trying to create the path way. Of course, it is tried to be contended that accused No.1 (now deceased) had filed an application before Tahsildar, but no documentary evidence to that effect has been produced. Accused No.1 (now deceased) had every right to file an application before Tahsildar to restrain Vyankatrao and/or Bhagwanrao and also he could have approached the Civil Court with a similar prayer in order to protect damage to his property, but without taking recourse to such relatives the accused persons cannot be allowed to take law in their hand. When three of them had gone with the axe and it has come on record that all the three of them have used those axes, then the case will not come within the exception to Section 300 of the Indian Penal Code. It cannot be said that the said dispute or incident was a result of sudden fight. Exception 4 to Section 300 of the Indian Penal Code can be invoked if death is caused, a) without premeditation, b) in a sudden fight, c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and d) the fight must have been with the person killed. To bring a case within Exception

4 of the ingredients mentioned in it must be found. This has been so held in **Pappu vs. State of Madhya Pradesh** [(2006) 7 SCC 391].

19 Objection has been raised as regards the fact that the First Information Report is not proved. No doubt, when the evidence began Vyankatrao was no more, but the prosecution has not come with a case that he died due to the injuries sustained by him on 08.09.2017. Prosecution has examined PW 19 Dr. Aditya Deshpande, who had given endorsement regarding the mental status of Vyankatrao, however, the said First Information Report cannot be considered under Section 32(1) of the Indian Evidence Act. Even if the First Information Report is not duly proved in this case; yet, it has no fatal effect on the prosecution story. The story has been proved through the other witnesses.

20 Prosecution has examined PW 2 Chandrakant Jadhav, PW 3 Kashinath Gawre, PW 5 Madhukar Aradwad to prove the discovery and recovery of the axe by each one of the accused. The testimony of these witnesses cannot be simply discarded on the ground that they are the relatives of the deceased. The information is stated to have been given voluntarily by the accused and, therefore, the discovery is under Section 27 of the Indian Evidence Act. They have been cross-examined at length and

their testimony has not been shattered. The C.A. report says that there was blood on all the three axes and it was human. That much evidence is sufficient. PW 1 Shivaji has proved the inquest panchnama Exh.63, PW 4 Dipak Kamble has proved the panchnama of seizure of dhoti of Vyankatrao, PW 6 Devanand has proved the spot panchnama Exh.84, PW 7 Basavraj has proved the panchnama of seizure of cloths of deceased, PW 8 Sayyad Babu has proved the seizure of clothes of all the accused persons and those panchnamas are separate panchnamas. Even if we raise doubt as regards testimony of PW 8 Sayyad Babu because arrest of accused Nos.2 and 3 is said to be on 11.09.2012, then why their clothes would be seized on 20.09.2012, is a question. Still, by keeping aside the said panchnama prosecution has proved its story.

21 Now, coming to the defence again it was tried to be submitted that the injuries to accused No.1 (now deceased) have not been explained by the prosecution. Questions were asked to PW 9, 10, 12 and 13, but here, in this case, as aforesaid, only the certified copy of the evidence in the cross case has been produced. Therefore, we cannot say that under these circumstances the prosecution was duty bound to explain the injuries on the person of accused No.1 (now deceased). When we cannot read the evidence of the Doctor, who was examined in the other case, we are unable to get the nature

of the injuries those were sustained by accused No.1 (now deceased). When such incidences take place, there would be certainly injury to the accused person also and, therefore, each and every injury is not required to be explained. Much less, as regards the simple injuries are concerned, those are not required to be *per se* explained.

22 Prosecution has examined PW 13 Narayan Koulgave. But taking into consideration his cross-examination and also his statement under Section 161 of the Code of Criminal Procedure, wherein he has specifically stated that he had not seen the incident, but then at the time of substantial evidence he was posing himself as an eye witness, his testimony deserves to be discarded in toto.

23 While going through the impugned judgment we found that four axes seized in the matter have been directed to be sent to District Magistrate for its disposal according to law, however, we would say that axe is not an arm defined under the Indian Arms Act, but it is an agricultural implement, which can be used by the farmers. Therefore, in view of paragraph No.81 of Chapter VI of Criminal Manual that is required to be put to auction and the sale proceeds are required to be credited to Government. Accordingly, we modify the said order in respect of disposal of muddemal property i.e. four

axes (Article B-1 to B-3 and Article 6).

24 Therefore, taking into consideration the above said reasons we hold that the prosecution had proved that the accused persons had committed offence punishable under Section 302, 324 read with Section 34 of the Indian Penal Code. Learned trial Judge was right in acquitting all the accused persons from the offence punishable under Section 307, 341 of the Indian Penal Code and, therefore, there is no reason to interfere with the decision of the trial Court, except the fact that the original accused No.1 i.e. appellant No.1 has expired during the pendency of the appeal. Hence, following order.

ORDER

1 Criminal Appeal No.27 of 2017 stands dismissed as against appellant No.2) **Mahesh Manik Mote** and appellant No.3) **Siddheshwar Manik Mote**.

2 In view of order passed by this Court on 28.08.2023 the appeal stands abated as against appellant No.1) **Manik Hanmant Mote**.

3 Criminal Appeal No.883 of 2018 filed by prosecution stands dismissed.

4 It is clarified that there is no change in respect of muddemal property i.e. disposal of clothes, soil, spectacle, soybean leaves, cap, stick, pair of chappal, shoe to be destroyed, however, muddemal property i.e. 4 axes (Article B-1 to B-3 and Article 6) be put to auction and the sale proceeds be credited to Government.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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