KASHI RAM & OTHERS

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 732 of 2008)

JANUARY 28, 2008

[S.B. SINHA AND DALVEER BHANDARI, JJ.]

Penal Code, 1860 – ss. 96 to 106 – Right of private defence – Exercise of – Accused proceeding to a definite destination with lethal weapons and thereafter, causing fatal injuries as well as serious injuries on unarmed complainant party – Courts below holding that accused exceeded the right of private defence – Conviction of one accused u/s 304 (Part II) and others u/s 304 (Part II) r/w s. 149 and s 323 – On appeal held: Accused were aggressors and they attacked the complainant party when they were totally unarmed – Thus, they did not have the right of private defence and could never claim the same – Hence, order of courts below with regard to exceeding the right of private defence not sustainable and set aside – ss. 304 (Part II), s. 149 & s 323.

According to the prosecution case, on the fateful day, the complainant party consisting of BS, PW 4- son of BS, PW1 and PW 17 were cultivating the disputed land. On learning about same, the accused persons along with others, armed with weapons went to the field and attacked the members of the complainant party and caused serious injuries to BS, PW 4 and PW 1. BS succumbed to his injuries. PW 4 lodged an FIR. Accused persons were apprehended and on their disclosure statements made weapons were recovered. They were charged u/s 302 r/w s. 149, 148 and 323 IPC. The accused-appellants denied all the incriminating evidence and pleaded that they were in possession of the said land and the complainant party wanted to dispossess them forcibly and in order to protect their land, they inflicted some injuries to the complainant

A party. The trial court accepted the prosecution case and held that the accused persons were guilty of exceeding their right of private defence of property It convicted accused K u/s 304 (Part II) IPC for causing fatal injuries to BS and four others u/s 304 (Part II) r/w s. 149 and also u/s B 323 IPC for inflicted serious injuries to the complainant party and sentenced all of them to 5 years rigorous imprisonment. The High Court upheld the order. Hence the present appeal.

Appellant-accused persons contended that their acts C were fully covered by the right of self defence; and that since they were in possession of the land in dispute, no offence under section 304 (Part-II) IPC could be made out against them.

D Dismissing the appeal, the Court

HELD: 1.1 The right of private defence cannot be claimed when the accused are aggressors particularly when the members of the complainant party were totally unarmed. The right of private defence is purely preventive E and not punitive. Private defence can be used only to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. This right is available only to ward off the danger of being attacked; the danger must be imminent and very real and F it cannot be averted by a counter-attack. (Paras 33, 36 and 45) [117-E; 118-B; 122-A]

Bishna alias Bhiswasdeb Mahato and Ors. v. State of West Bengal 2005 (12) SCC 657 – relied on.

G 1.2 The right of private defence is a very valuable right and it has been recognized in all free, civilized and democratic societies within certain reasonable limits. (Para 39) [119-G]

Gottipulla Venkatasiva Subbrayanam and Ors. v. The H *State of Andhra Pradesh and Anr.* 1970 (1) SCC 235–relied on.

2.1 In the instant case, the appellants were in possession of the disputed land and the appellants had gone to take back possession of the said land from the members of the unarmed complainant party. They inflicted fatal blow on BS and other serious injuries on the members of the complainant party. From perusal of the entire evidence on record, it is abundantly clear that the accused appellants were the aggressor and they attacked the complainant party when they were totally unarmed. Even if the case of the accused appellants is accepted *in toto* that in order to take back the possession of the disputed land some injuries were inflicted but the act of the appellants in causing death cannot be covered by the ambit of section 96 IPC. (Para 17, 24, 33 and 35) [111-C, D; 113-E, F]

2.2 Careful analysis of the right of private defence as codified in sections 96 to 106 IPC and the legal position as crystallized by a number of judgments leads to an irresistible conclusion that the findings of the Sessions Court as upheld by the High Court regarding the appellants' exceeding the right of private defence are wholly erroneous and untenable. In view of the facts of this case, the accused appellants did not have the right of private defence. Therefore, they cannot legitimately claim any benefit by invoking the principle of right of private defence. The acts of the accused appellants of proceeding to a definite destination with lethal weapons and thereafter causing serious injuries including fatal injuries on the unarmed members of the complainant party can never legitimately claim the benefit of the provisions of the right of private defence. Since the accused appellants did not have the right of private defence, therefore, the findings of the courts below regarding their exceeding the right of private defence cannot be sustained and are set aside. (Paras 44, 46 and 47) [121-G, H; 122-B, C, D]

A **2.6 On consideration of the peculiar facts and circumstances of the case the conviction and sentence of the accused appellants as recorded by the courts below does not warrant any interference. (Para 50) [122-F]**

B *Bishna alias Bhiswasdeb Mahato and Ors. v. State of West Bengal* **(2005) 12 SCC 657**; *The Munney Khan v. State of Madhya Pradesh* **1970 (2) SCC 480**; *Balmukund and Anr. v. State of Madhya Pradesh* **1981 (4) SCC 432**; *Dharam Pal and Ors. v. State of U.P.* **1994 Supp (3) SCC 668**; *Mahabir Choudhary v. State of Bihar* **1996 (5) SCC 107**; *Preetam Singh* C *v. State of Rajasthan* **2003 (12) SCC 594**; *Mohammad Khan and Ors. v. State of Madhya Pradesh* **1971 (3) SCC 683 – relied on.**

Queen v. Fuzza Meeah alias Fuzza Mahomed **1866 (6)** D **WR (Cr) 89**; *Queen v. Shunker Sing, Kukhoor Sing* **1864 (1) WR (Cr) 34**; *Browne* **1973 NI 96 – referred to.**

Criminal Law by **J.C. Smith & Brian Hogan**; *Crimes* **by Russel 11th Edn. p.491**; *Blackstone Commentaries* **Book 4; P. 185**; *Halsbury's Laws of England* **Fourth Edn, Vol.11** E **pp. 630-631 – referred to.**

CRIMINAL APPEAL LTE JURISDICTION : Criminal Appeal No. 732 of 2002.

From the final Judgment and Order dated 4.2.2002 of the F High Court of Judicature for Rajasthan at Jodhpur in S.B. Crl. A. No. 826/2001

Dr. Sushil Balwada for the Appellants.

Naveen Kumar Singh, Shashwat Gupta and Aruneshwar G Gupta for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. This appeal is directed against the judgment dated 04.02.2002 in Criminal Appeal H No.826 of 2001 passed by the High Court of judicature for

Rajasthan at Jodhpur. A

Brief facts, which are necessary to dispose of this appeal are recapitulated as under:-

The land measuring 21 bighas is located in village Bhinan, Tehsil Taranagar and the ownership of the same was recorded B in the name of Smt. Chhoti Devi w/o Budh Singh Rajput and after her demise, the land was transferred in the name of Balu Singh.

The accused, Nanuram submitted an application before the Tehsildar, Taranagar and disclosed that he had bought the C said land on the basis of agreement to sell from Smt. Chhoti Devi at a consideration of Rs.1200/- and he is in possession of the land and is cultivating the same. It was alleged that the transfer in the name of Balu Singh had been wrongly recorded in the revenue records. The Tehsildar, after some enquiry D cancelled the entry of transfer recorded in the name of Balu Singh.

On 13th June, 1999 at about 10 a.m., the complainant party consisting of Amar Singh PW4, his father Balu Singh (since E deceased), Bahadur Singh PW8, Nanuram Nai PW1 and Prithvi Singh PW17 went to cultivate Khasra No.512 situated in village Bhinan Tehsil, Taranagar District Churu. At that time, the accused persons were not there but on learning about the presence of the complainant party in Khasra No. 512 around 12 noon on the same day, the accused party consisting of Nanuram accused- F appellant along with the acquitted 6 persons came from the side of village, armed with gandasa, lathis and axes and attacked the members of the complainant party and caused serious injuries to Amar Singh PW4, Nanuram Nai PW1 and Balu Singh. Balu Singh succumbed to those injuries in the hospital on the G same day at 6 p.m.

Amar Singh PW4 lodged the first information report. The accused persons were apprehended and on their voluntary disclosure statements, lathis, gandasa and axes were H

A recovered and after usual examination, they were charged under section 302 read with sections 149, 148 and 323 IPC. The accused-appellants in their statements under section 313 of the Code of Criminal Procedure denied all the incriminating evidence and pleaded that they were in possession of the B agricultural land and the complainant party wanted to dispossess them forcibly. In the process of protecting the possession of their land, a scuffle between the parties took place. Amar Singh PW4 and Balu Singh from the side of the complainant party received injuries and Gopiram from the side of accused appellants also C received injuries.

According to the members of the complainant party, they were totally unarmed at the time of the incident and the accused persons who were armed with lathis, gandasa and axes had inflicted serious injuries on them. The injuries on the person of D Balu Singh were medically examined. The doctor found the following external injuries:

(1) lacerated wound – 6 cm x 1 cm x bone deep on vertex of skull,

E (2) lacerated wound – 5 cm x bone deep in the right frontal prominence region,

(3) lacerated wound – 3 cm x 1 cm x bone deep on occipital region of head and

F (4) four abrasions on right middle leg, left knee and posterior region of left leg.

All the aforesaid injuries were found to have been caused with blunt weapon and x-ray was advised in respect of three lacerated wounds.

G

On the post-mortem of Balu Singh's body, it was revealed that apart from abrasions, three lacerated wounds, haematoma was present and the fracture of bone was detected. The brain was squeezed. In the opinion of doctor, cause of death of Balu Singh was shock due to aforesaid three lacerated injuries on

H

his person.

On the head of Amar Singh four lacerated wounds on left parietal region, middle of forehead, right leg and two other lacerated wounds and middle region of left leg were found by the doctor. According to the doctor, these injuries were caused by a blunt weapon.

On Nanuram, lacerated wound on occipital region of head, upper left near ear region respectively and contusion on left shoulder were found. All the above three injuries were caused by a blunt weapon. Gandasa, lathis and other weapons of offence were recovered at the instance of the accused appellants. Blood-stained clothes of the deceased Balu Singh were seized by the police and clothes, earth etc. were sent to Forensic Laboratory for examination. In the serological examination human blood was detected in the blood-stained earth and on the deceased's shirt, dhoti and baniyan, however, no blood was found on the weapons recovered by the police. In the formal investigation of the case, no case was made out against Sri Chand, Dula Ram, Lilu Ram and Pappu and charge-sheet against the remaining 11 accused persons was filed in the court of the learned Judicial Magistrate, Taranagar. On committal, the case was sent to the Court of Sessions.

The prosecution, in order to support and strengthen its case has examined 25 witnesses and placed reliance on 78 documents on record. The statements of the accused persons were recorded under section 313 Cr.P.C. wherein the accused denied the prosecution version and claimed themselves innocent and asserted that a false case has been made out against them. It was asserted by the appellants that Nanuram and Kashiram bought the disputed land from Smt. Chhoti Devi through agreement to sell dated 23.4.1965 and since then Nanuram has been in possession and was paying land revenue. It was further submitted that on 13.9.1999, on the basis of the information received that Balu Singh and his sons along with other 15-20 persons went to their field (Khasra No. 512) on a

A tractor with the intention to take forcible possession of the field by cultivating it. About 100-150 people of village Bhinan went to stop them from doing so. They were armed with variety of weapons. They inflicted serious injuries on Amar Singh and Balu Singh.

B The defence has produced DW1 Dr. Haleef, DW2 Mahender Singh and DW3 Nanuram. In the documentary evidence, extracts of statements of witnesses Nanuram, Mohan Kunwar, Amar Singh, Bhawan Singh, Moti Ram Patwari, Bhanwar Singh and written report by Dr. Mahesh Panwar to the C SHO Police Station Taranagar, letter of SHO and injury report of Gopiram and copies of traced out site plans have been produced.

The prosecution mainly relied on PW2 Lal Chand, PW5 D Het Ram, PW6 Lilu Ram, PW7 Moman Ram, PW12 Gulab Singh, PW13 Moti Ram, PW14 Manohar Lal and PW23 Pala Ram, investigating officer.

According to the investigating officer, the accused-appellants were in possession of the field where the occurrence E took place. The complainant party went to this field with the intention to take its possession. The members of the complainant party were asked not to ply the tractor on the field. Despite the resistance the field was cultivated by the complainant party. On learning that the complainant party was F cultivating Khasra No.512, the accused appellants in a group of 15-20 people fully armed with different weapons, reached the said Khasra and attacked the complainant party. The case of the appellants as culled out from evidence is that the accused appellants were compelled to use force in order to protect the G lives and property and their case is fully covered by the right of private defence. In this view of the matter, presence of the accused appellants cannot be doubted.

The entire evidence on record had been scrutinized in detail by the learned Additional Sessions Judge. On evaluation of the H entire evidence it has been fully established by the learned

Additional Sessions Judge that the fatal injuries were inflicted by Kashiram and other serious injuries were caused by Dharam Pal, Jagdish and Rupa Ram on the persons of Balu Singh and Amar Singh in furtherance of their common object of killing the members of the complainant party.

The trial court acquitted six accused and convicted five accused appellants.

From the analysis of the evidence by the trial court, it is abundantly clear that the accused appellants were in possession of Khasra No. 512. The complainant party had gone to cultivate the said Khasra at 10 a.m. on 13th June, 1999. At that time, the accused appellants were not there but on learning that the complainant party was cultivating the field, they reached there armed with varieties of weapons and caused serious injuries on the members of the complainant party. Admittedly, the members of the complainant party were totally unarmed. The appellants were responsible for causing fatal injury on Balu Singh and other serious injuries on Amar Singh and Nanuram. According to the findings of the Sessions Court, the accused appellants had exceeded the right of private defence.

Kashiram was convicted under Section 304 Part-II and was sentenced to 5 years rigorous imprisonment. Other 4 accused, namely, Dharam Pal, Jagdish, Rupa Ram and Om Prakash inflicted injuries on Amar Singh and Nanuram were convicted under Section 304 Part-II read with section 149 IPC and they were also sentenced to 5 years rigorous imprisonment. They were also convicted under section 323 IPC.

The High Court again examined the entire evidence and came to a clear conclusion that the accused appellants had exceeded in their right of private defence. They caused serious injuries to Balu Singh which proved fatal. They also caused serious injuries to Amar Singh and Nanuram. Injuries of such serious nature were totally unwarranted because the members of the complainant party were totally unarmed.

A The finding of the High Court regarding accused appellants' private defence reads as under:-

> "Therefore, the learned trial court has rightly held that the accused persons have exceeded their right of private defence of property."

B

The High Court also came to the conclusion that in the facts and circumstances the trial court has correctly evaluated the entire evidence on record and has taken a very lenient view. The High Court did not find any mitigating circumstance to C interfere with the quantum of sentence.

The appellants aggrieved by the said judgment of the High Court have preferred this appeal before this court.

It was submitted by the learned counsel appearing for the D appellants that the High Court failed to appreciate that the disputed land was in possession of the accused persons and the complainant party came to their field to dispossess them and their acts, if any, are fully covered by the right of self defence. It is also submitted that the appellants had filed a suit against E the complainant party prior to this incident and an injunction was granted against the complainant party by the Revenue Court on 10.5.1999 and it was found that the accused appellants were in possession of the disputed land.

The appellants also submitted that it is a case of over F implication because of previous enmity. According to the appellants, since they were in possession of the land in dispute, therefore, no offence under section 304 Part-II IPC can be made out against them.

We have heard the learned counsel for the appellants and G the State. We have also perused the judgment of the trial court and the record of the case. The Sessions Court and the High Court found that the appellants were in possession of Khasra No.512 and the complainant party at about 10 a.m. on 13th June, 1999 went to cultivate Khasra No.512. The appellants were not H there. The appellants learnt that the members of the complainant

party were cultivating the said field, the accused appellants armed with gandasa, lathis and axes came to the field and assaulted the members of the complainant party when they were unarmed. Appellant Kashiram inflicted gandasa blow on Balu Singh from the reverse side and that injury proved fatal. The gandasa has been recovered at the instance of Kashiram. According to the report of the Chemical Examiner, human blood was detected from the blood-stained clothes of the deceased. The earth collected from the spot also contained human blood. Since the appellant Kashiram did not use the front side of gandasa, therefore, the trial court instead of convicting him under section 302 IPC convicted him under section 304 Part-II IPC. In view of our finding that the appellants were in possession of Khasra No.512 and the appellants had gone to take back possession of Khasra No.512 from the members of the complainant party, had inflicted fatal blow on Babu Singh and other serious injuries on the members of the complainant party.

The question which arises for our adjudication is that in the facts and circumstances of this case whether the accused appellants are protected by the right of private defence as enumerated by section 96 of the Indian Penal Code.

Sections 96 to 106 deal with various facets of the right of private defence. Before determining the controversy in this case, we deem it proper to deal with these provisions in brief.

Section 96 IPC reads as under:

> "**96. Things done in private defence.-** Nothing is an offence which is done in the exercise of the right of private defence."

Section 97 of IPC gives right to a person to defend his body and the property. But, this right is subject to restrictions contained in section 99. Section 99 IPC reads as under:-

> **"99. Acts against which there is no right of private defence.** - There is no right of private defence against an act which does not reasonably cause the apprehension of

A death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or
B of grievous hurt, if done or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

C There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised. - *The right of private defence in no case extends to the inflicting*
D *of more harm than it is necessary to inflict for the purpose of defence.*"

The main question that arises for adjudication in this case is whether the accused appellants had right of private defence and this is the case of exceeding the right of private defence
E meaning thereby, inflicting more harm than it was necessary for the purpose of defence.

Section 100 of the Indian Penal Code deals with a situation when the right of private defence of the body extends of causing
F death. The relevant portion of the section reads 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
G 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:-

First. – Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence
H of such assault;

Secondly. – Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. -	xxx	xxx	xxx
Forthly. -	xxx	xxx	xxx
Fifthly. –	xxx	xxx	xxx
Sixthly. -	xxx	xxx	xxx"

Section 103 IPC deals with a situation when the right of private defence of property extends to causing death. Section 103 IPC reads as under:-

> **"103. When the right of private defence of property extends to causing death.** - The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, ..."

Admittedly, the members of the complainant party were totally unarmed. Even if the case of the accused appellants is accepted *in toto* that in order to take back the possession of Khasra No.512 some injuries were inflicted but the act of the appellants in causing death cannot be covered by the ambit of section 96 IPC. According to the findings of courts below, it was clearly a case of exceeding the right of private defence. The appellants indeed inflicted more harm than it was necessary for the purpose of defence.

The right of private defence is codified in sections 97 to 106 of the Indian Penal Code and all these sections will have to be read together to ascertain whether in the facts and circumstances the accused appellants are entitled to right of private defence or they exceeded the right of private defence. Only when all these sections are read together, we get

A comprehensive view of the scope and limitation of that right. The position of law is well-settled for over a century both in England and India.

Almost 150 years ago in ***Queen v. Fuzza Meeah alias Fuzza Mahomed*** (1866) 6 WR (Cr) 89 because of exceeding
B the right of private defence, the appellants were convicted, but the sentence of imprisonment was reduced.

In another case decided during the same period in ***Queen v. Shunker Sing, Kukhoor Sing*** (1864) 1 WR (Cr) 34, the
C court for exceeding the right of private defence convicted the accused and reduced the sentence.

This court also on several occasions dealt with the cases of exceeding the right of private defence. In ***The Munney Khan v. State of Madhya Pradesh*** (1970) 2 SCC 480, this court for
D exceeding the right of private defence converted the sentence of the accused appellant from under section 302 IPC to section 304 IPC. The relevant portion of the judgment reads as under:-

> "Such a right of private defence is governed by Section
> E 101, I.P.C. and is subject to two limitations. One is that, in exercise of this right of private defence, any kind of hurt can be caused, but not death; and the other is that the use of force does not exceed the minimum required to save the person in whose defence the force is used. In these circumstances, in the present case, when Zulfiquar was
> F being given fist blows only, there could be no justification at all for the appellant to stab Reotisingh with a knife and particularly to give him a blow which could prove fatal by aiming it on his back. The use of the knife itself was in excess of the right of private defence and it became much
> G more excessive when the blow with the knife was given on a vital part of the body which, in the ordinary course of nature, was likely to cause the death of Reotisingh. From the fact that the blow was given in the back with a knife an inference follows that the appellant intended to cause death
> H or at least intended to cause such injury as would, in the

ordinary course of nature, result in his death. In adopting this course, the appellant would have been clearly guilty of the offence of murder had there been no right of private defence of Zulfiquar at all. Since such a right did exist, the case would fall under the exception under which culpable homicide does not amount to murder on the ground that the death was caused in exercise of right of private defence, but by exceeding that right. An offence of this nature is made punishable under the first part of Section 304, I.P.C. Consequently, the conviction of the appellant must be under that provision and not under Section 302 I.P.C.

As a result, the appeal is partly allowed, the conviction under Section 302, I.P.C. is set aside, and the appellant is convicted instead under the first part of Section 304, I.P.C. In view of the change in the offence for which the appellant is being punished, we set aside the sentence of imprisonment for life, and instead, award him a sentence of seven years' rigorous imprisonment."

In ***Balmukund & Another v. State of Madhya Pradesh*** (1981) 4 SCC 432 this court while dealing with the facts of similar nature converted the conviction from section 302 IPC to section 304 IPC. Relevant observations of the court reads as under:-

"In rural landscape even today dispute as to possession of agricultural land is a part of life. Occupancy of land being the only source of survival, emotional attachment apart, the struggle for survival leads to fierce fight and resort to arms to protect possession because in the context of tardy slow moving litigative process actual possession has ceased to be mere nine point in law but it has assumed alarming proportions. Years upon years spent in legal conundrums moving vertically through hierarchy of courts coupled with the cost and time to throw out a trespasser or even a rank trespasser provides occasionally provocation to resort to physical violence. The use of the

A firearm used to be spasmodic but it has started becoming a recurring malady. But right of private defence cannot be judged step by step or in golden scales. Once we accept the finding of the High Court that the appellants had the right of private defence of person and property meaning B thereby that the appellants were the victims and the complainants were aggressors, but in the facts of the case they exceeded the same by wielding a firearm, a sentence of 10 years' rigorous imprisonment would appear to us in the facts and circumstances of the case to be a little bit C too harsh.

Having given our earnest consideration to the question of sentence alone in this case, we are of the opinion that Balmukund, Appellant 1, should be sentenced to rigorous imprisonment for five years, and simultaneously the sentence D of seven years under Section 307, Indian Penal Code awarded to Appellants 1 and 2 both be reduced to three years each. The substantive sentences should run concurrently."

In another case, while dealing with a case of self defence in ***Dharam Pal & Others v. State of U.P.*** 1994 Supp (3) SCC E 668, this court for exceeding the right of private defence instead of convicting the accused appellant under section 302 read with section 149 IPC, converted the sentence under section 304 Part-I IPC.

F In ***Mahabir Choudhary v. State of Bihar*** (1996) 5 SCC 107, this court held that the High Court erred in holding that the appellants had no right of private defence at any stage. However, this court upheld the judgment of the Sessions Court holding that since the appellants had right of private defence to protect G their property, but in the circumstances of the case, the appellants had exceeded their right of private defence and were, therefore, rightly convicted by the trial court under section 304 Part-I. The court observed that the right of private defence cannot be used to kill the wrongdoer unless the person concerned has a reasonable cause to fear that otherwise death or grievous H

hurt might ensue in which case that person would have full measure of right of private defence including killing. A

We have examined the cases of exceeding of the right of private defence. In the instant case, both the Sessions Court and the High Court came to the conclusion that the accused appellants were guilty of exceeding the right of private defence and instead of convicting them under section 302 convicted them under section 304 Part-II along with 149 IPC. B

Both the Sessions Court and the High Court clearly came to the conclusion that the accused appellants in a group of 15-20 people armed with variety of weapons had gone to Khasra No.512 where the complainant party was cultivating. The accused appellants in order to dispossess the members of the complainant party attacked them and caused serious injuries to the members of the complainant party in which Balu Singh died. Admittedly, the members of the complainant party were totally unarmed. From perusal of the entire evidence on record, it is abundantly clear that the accused appellants were the aggressor and they attacked the complainant party when they were totally unarmed. It is settled legal position that the right of private defence cannot be claimed when the accused are aggressors particularly when the members of the complainant party were totally unarmed. This Court in the recent judgment in ***Bishna alias Bhiswasdeb Mahato & Others*** *v.* ***State of West Bengal*** (2005) 12 SCC 657 exhaustively dealt with this aspect of the matter. The facts of this case are akin to the facts of the instant cases. In this case, the Court while relying on the earlier judgments of this Court, clearly came to the conclusion that the right of private defence cannot be claimed when the accused is an aggressor. C D E F

In the said case, this Court relied on ***Preetam Singh*** *v.* ***State of Rajasthan*** (2003) 12 SCC 594. In this case, the Court clearly held that the appellants were the aggressors, therefore, the question of the appellants having the right of private defence or exceeding it does not arise. The plea of private defence is G H

not at all available to the appellants.

In the instant case, the appellants were the aggressor. They inflicted serious injuries on the unarmed complainant party by a variety of weapons causing the death of Balu Singh and also inflicted serious injuries on other members of the complainant party.

Private defence can be used only to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention as held by this court in ***Bishna's case*** (supra). In the said judgment the relevant portion of Kenny's Outlines of Criminal Law and Criminal Law by J.C. Smith and Brian Hogan have been quoted. We deem it appropriate to reproduce the same.

> "It is natural that a man who is attacked should resist, and his resistance, as such, will not be unlawful. It is not necessary that he should wait to be actually struck, before striking in self-defence. If one party raises up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak)."

The learned author further stated that self-defence, however, is not extended to unlawful force:

> "But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery. The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely

applications of this simple principle. Thus, as we have already seen, where a person is attacked in such a way that his life is in danger he is justified in even killing his assailant to prevent the felony. But an ordinary assault must not be thus met by the use of firearms or other deadly weapons....." A B

In ***Browne*** 1973 NI 96 (NI at p. 107] Lowry, L.C.J. with regard to self-defence stated:

"The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need." C

As regards self-defence and prevention of crime in *Criminal Law* by J.C. Smith & Brian Hogan, it is stated:

"Since self-defence may afford a defence to murder, obviously it may do so to lesser offences against the person and subject to similar conditions. The matter is now regulated by Section 3 of the Criminal Law Act, 1967. An attack which would not justify *D* in killing might justify him in the use of some less degree of force, and so afford a defence to a charge of wounding, or, a fortiori, common assault. But the use of greater force than is reasonable to repel the attack will result in liability to conviction for common assault, or whatever offence the degree of harm caused and intended warrants. Reasonable force may be used in defence of property so that *D* was not guilty of an assault when he struck a bailiff who was unlawfully using force to enter *D* 's home. Similar principles apply to force used in the prevention of crime." D E F

The right of private defence is a very valuable right and it has been recognized in all free, civilized and democratic societies within certain reasonable limits (see ***Gottipulla Venkatasiva Subbrayanam & Others v. The State of Andhra Pradesh & Another*** (1970) 1 SCC 235. G

Russel in his celebrated book on *Crimes* (11th Edn.) p.491 H

A has stated:-

> "A man is justified in resisting by force any one who manifestly intends and endeavours by violence or surprise to commit a known felony against his person, habitation or property. In these cases he is not obliged to retreat and
B not merely to resist the attack where he stands but may indeed pursue his adversary until the danger is ended. If and in a conflict between them he happens to kill his attacker such killing is justifiable."

C Blackstone [Commentaries Book 4; P. 185] also observed as under:-

> "The party assaulted must, therefore, flee as far as he conveniently can either by reason of some wall, ditch, or some other impediment; or as far as the fierceness of the
D assault will permit him; for it may be so fierce as not to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantaneously. *And this is the doctrine of universal justice, as well as of the municipal law.*"
E (Emphasis supplied).

Halsbury's Laws of England, Fourth Edition, Vol.11 pp. 630-631 dealt with self-defence and defence of property. The relevant portion in paras 1180-1181 reads as under:-

F > "**1180. Self-defence**. A person acting in self-defence is normally acting to prevent the commission of a crime, as is a person acting in defence of another. The test to be applied in such cases is now established to be the same as for cases of prevention of crime, that is the force used
G in self-defence or in defence of another must be reasonable in the circumstances
>
> Provided the force used is reasonable a person is entitled to defence not only himself or a member of his family, but even a complete stranger if the stranger is subject to
H unlawful attack by others.

In deciding whether the force used was reasonable, all the circumstances may be considered. The matter is one of fact and not one of law, hence it cannot be ruled that a person who is attacked must retreat before retaliating. A person's opportunity to retreat with safety is a factor to be taken into account in deciding whether his conduct was reasonable, as is his willingness to temporize or disengage himself before resorting to force. A man is not obliged to refrain from going where he may lawfully go because he has reason to believe that he may be attacked, and is not thereby deprived of his right of self-defence.

1181. Defence of property. Where a person in defending his property is also acting in the prevention of crime then he may use such force as is reasonable in the circumstances. Where no crime is involved, as where there is merely a trespass, the same rule of reasonable force in the circumstances is applicable. If in using reasonable force the defendant should accidentally kill another, the killing would not amount to murder or man-slaughter. It would not, in general, be reasonable to kill in defence of property alone, although it has been held that a man may lawfully kill, a trespasser who would forcibly dispossess him of his house."

In ***Mohammad Khan & Others v. State of Madhya Pradesh*** (1971) 3 SCC 683 in para 11, this court has rightly concluded that the right of self-defence only arises if the apprehension is unexpected and one is taken unawares. If one enters into an inevitable danger with the fullest intimation beforehand and goes there armed to fight out, the right cannot be claimed.

Careful analysis of the right of private defence as codified in sections 96 to 106 IPC and the legal position as crystallized by a number of judgments leads to an irresistible conclusion that the findings of the Sessions Court as upheld by the High Court in the instant case regarding the appellants' exceeding the right of private defence are wholly erroneous and untenable.

A The right of private defence is purely preventive and not punitive. This right is available only to ward off the danger of being attacked; the danger must be imminent and very real and it cannot be averted by a counter-attack.

In view of the facts of this case, the accused appellants B did not have the right of private defence. Therefore, they cannot legitimately claim any benefit by invoking the principle of right of private defence.

The acts of the accused appellants fully armed with variety C of weapons and proceed to a definite destination and thereafter causing serious injuries including fatal injuries on the unarmed members of the complainant party can never legitimately claim the benefit of the provisions of the right of private defence. Since the accused appellants did not have the right of private defence, D therefore, the findings of the courts below regarding their exceeding the right of private defence cannot be sustained and are accordingly set aside.

Since there is no appeal by the State against acquittal of the accused appellants under sections 302 IPC, therefore it is E not necessary for us to deal with the aspect whether their acquittal under section 302 was justified or not.

The Sessions Court convicted accused Kashiram under section 304 Part-II and the other appellants under section 304 Part-II read with section 149 IPC. In the impugned judgment the F High Court has upheld their conviction.

On consideration of the peculiar facts and circumstances of the case the conviction and sentence of the accused appellants as recorded by the courts below do not warrant any G interference. The appeal being devoid of any merit is accordingly dismissed.

The accused appellants are directed to surrender forthwith to suffer the remaining sentence.

N.J. Appeal dismissed.

H