

Alamkhan Umarbhai Vs. the State

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Court : Gujarat

Decided On : Sep-16-1960

Reported in : (1961)2GLR70

Judge : N.M. Miabhoy and; N.B. Raju, JJ.

Appellant : Alamkhan Umarbhai

Respondent : The State

Advocate for Pet/Ap. : Mr. Shah

Judgement :

N.M. Miabhoy, J.

1. Appellant Alamkhan Umarbhai has been convicted for the offence under Section 304, Part I, Indian Penal Code, and sentenced to rigorous imprisonment for four years by the learned Additional Sessions Judge, Surat.
2. The appellant was tried for the offence under Section 302, Indian Penal Code on the allegation that on or about 26th of November 1958 at Olpad, he committed the murder of one Hussein alias Kalu Mahomed by causing him injuries with knife with the intention of causing him injuries sufficient in the ordinary course of nature to cause death.

3. The prosecution evidence was that the deceased had four anti-mortem injuries. The corpse of the deceased was examined by Dr. Pesh Imam on 27-11-1958 at about 10-00 A.M. and the Doctor noticed the following injuries on the person of Kalu:

(1) Horizontal stab wound $1 \times 1\frac{1}{2}$ x wall deep in the epigastna region with signs of bleeding:

(2) One superficial incised wound $\frac{1}{2} \times \frac{1}{4} \times \frac{1}{4}$ on the right side of umbilicus about 3 away from the first wound:

(3) A stab wound $1 \times \frac{1}{2} \times 3$ deep on the right upper and outer side of the thigh; and

(4) A stab wound in the right lumber region $1 \times \frac{1}{2}$ x wall deep. In addition to this the Doctor also found abrasions on the right knee left knee and right elbow on the deceased. The prosecution case was that the first four injuries were caused on the deceased by the appellant Alamkhan and that the abrasions were the result of a fall which the deceased had received at the time when the incident took place. On the other hand the appellant Alamkhans contention was that one of the aforesaid four wounds was received by the deceased in the course of a struggle which ensued between him and the deceased under the circumstances presently to be mentioned and that he had caused one of the other three injuries on the deceased with a knife which the deceased intended to use against him and which he succeeded in depriving the deceased in the course of the struggle. Appellant did not state in specific terms one way or the other as to how the deceased received the other two injuries. The case which was set up by the appellant was that whatever injuries he had inflicted on the deceased on the day in question was in the exercise of the right of private defence. The prosecution relied upon one version regarding the circumstance under which the injuries were received by the deceased. This version was derived from the evidence given by four eye-witnesses to be presently mentioned, on the other hand the defence put forward another version as to the circumstances under which the injuries attempted by the defence had happened to be caused. The learned trial Judge, after a consideration of the prosecution evidence as whole and the defence version carne

to the conclusion that the prosecution version was suffering from the infirmity of suppressio veri and that the true version as regards the inception of the incident was the one which was given by the appellant. On this view the learned Judge came to the conclusion that the appellant had the right of private defence and was acting in the exercise of that private defence on the date in question. But the learned Judge also came to the conclusion that the appellant had exceeded the power of private defence given to him by law and therefore appellant was not fully protected in respect of the acts which he had done on that day. In that view the learned judge came to the conclusion that the appellant was guilty of the offence under Section 304 Part I. Indian Penal Code and convicted him accordingly.

4. There is also very good evidence in the case to show that the accused received two injuries on his person at the same time when the incident took place. These two injuries were examined by Dr. Chimanlal Prabhulal Shah on 26-11-1958 at about 4-45 P.M. and according to the Doctor the injuries were as follows:

- (1) One superficial incised wound $\frac{1}{2}$ long on the front and upper part of the left leg; and
- (2) One trivial abrasion on the back of the proximal pan of the right little finger.

According to the Doctor the first injury could have been caused with a sharp cutting instrument and the second injury could have been caused with a hard and blunt substance.

5. Dr. Pesh Imam has expressed the opinion that all the four injuries on the deceased could have been caused with a sharp cutting instrument and that in his opinion the injury No. 1 in the epigastie region and injury No. 4 in the lumber region were fatal and that they necessarily resulted in death. He also deposed that these two injuries had pierced the abdomen and damaged blood vessels the liver and the kidney that the abdominal cavity was full of blood and blood clots that the heart vessels were empty and that the organs and face were pale In his opinion death was due to internal hemorrhage and shock due to the multiple injuries.

6. There is a controversy between the defence and the prosecution as to whether the deceased received only one injury in the course of the incident to be presently mentioned or whether he received more than one injury. We shall discuss this topic just in a moment and give our reasons for holding that the deceased had received all the four injuries in the course of the incident which took place on 26-11-1958 near the shop of witness Ramubhai. On that basis there is no dispute that the deceased died as a result of the two fatal injuries deposed to by Dr. Pesh Imam, and the main dispute between the parties turns on the question as to whether those injuries came to be received by deceased under circumstances which constituted a crime or whether they were caused on him in circumstances which gave a right of private defence to the appellant Alamkhan.

7. Before we set out the rival versions given out by the prosecution and the defence we may mention that there is clear evidence of motive in the case and that evidence has not been challenged by Mr. Shah the Learned Counsel appearing for the appellant Alamkhan in this Court. Briefly that evidence is that some time before the present offence took place there was an attempt to commit theft at the house of witness Maqbul Hussein who is the sister's son of the deceased Kalu. Maqbul Hussein's evidence is that appellant believed that he had mentioned appellants name as one of the suspects in that offence and consequently appellant had given him threats and therefore he had filed a criminal complaint against the appellant before the Police. Appellant has denied this suspicion but Maqbul Hussein's evidence is corroborated by the fact that the Police filed a complaint against the appellant based on the allegations made by Maqbul Hussein. There is also evidence to show that Maqbul Hussein and his friends had given evidence against the appellant in that complaint. There is also evidence to show that a second complaint was also filed by Maqbul Hussein against the appellant as a result of which a Chapter case was filed against the appellant and that Chapter case was pending at the time when the present offence took place. The evidence discloses that the deceased Kalu was a well-built man and had on some previous occasions been extorted by the Police authorities. Maqbul Hussein's evidence is that he had complained to the deceased Kalu about the conduct of the appellant and his friends. Thus the evidence establishes that there were stained relations between Maqbul Hussain on the one hand and the

appellant on the other and that Maqbul Hussain had conveyed to the deceased Kalu the threats which he received from the appellant and complained against appellants conduct. The present offence is alleged to have taken place in this background. The aforesaid evidence supported as it is by documents of complaint has been accepted by the learned judge and we do not see any good reason for taking a different view. In our judgment the aforesaid evidence is quite clear and does furnish both evidence of motive and the background in which the incident took place on 26-11-1958.

8. The incident took place near the Pan shop of the witness Ramubhai. There is no dispute that Ramubhai was at his shop when the incident took place. The prosecution case is at this time witness Razak Karim was at the shop of Ramubhai settling an account with him. The defence challenges the presence of this witness. The challenge was based upon certain grounds which have been discussed by the learned trial Judge. The learned trial Judge has taken the view that the challenge was not effective and Mr. Shah the Learned Counsel for the appellant did not address us on this aspect of the case. We have gone through the evidence of Razak and we are satisfied that he was present at the time when the offence took place. His Police Statement was recorded on the day of the incident immediately after the Panchnama of the scene of offence was prepared. Witness Abdul Razak has a soap shop just by the side of the Pan shop of Ramubhai. His evidence is that he was sitting against a flap of the door of his shop with his back towards the Pan shop of Ramubhai. The defence does not challenge the presence of Abdul Razak. In fact as we shall presently show according to the defence Abdul Razak had intervened on behalf of the appellant to save him from the attack from the deceased. The prosecution case further is that the witness Amrit a boy of 11 years was also near the scene of offence playing the game of Gili Danda. The presence of this witness also has been admitted by the defence. Thus there is no doubt that it is common ground that at the time when the incident took place witnesses Ramubhai Abdul Razak and Amrit were present and our finding is that Razak Karim was also present at that time. It is also common ground that in the afternoon after about 4-00 P.M. appellant went in the normal course to the shop of Ramubhai and purchased a Pan and thereafter again in normal course he was standing near the shop chewing a Pan. There is evidence in the case to show that

the deceased Kalu had hired bicycle from the witness Ramubhai. The prosecution case is that Kalu was returning at about this time to the shop to give delivery of the cycle. All the aforesaid four witnesses do not claim to have seen the whole of the incident which took place near the shop of Ramubhai. The witness who claims to have seen the whole of the incident is Amrit and as regards the origin of the trouble the witness has given the following account partly in his examination-in-chief and partly in cross-examination. When Kalu was coming near the shop he got down from his bicycle and abandoned it near a Pipal tree. Then Kalu threatened the appellant by saying as to why he was threatening his nephew. Then Kalu went near the appellant caught hold of him by his Kafni near the throat. Thereupon the appellant caught hold of Kalu by his shirt near the throat. Then both of them came to grips and began to push at each other. As we shall presently show this version is more or less the same as the version which the appellant has given regarding the inception of the scuffle but the two versions differ as to what happened thereafter.

9. The prosecution version is that in the course of the scuffle the appellant took out a knife from his pant pocket kicked Kalu as a result of which Kalu fell down and then appellant inflicted four blows by bending on Kalu standing near his head.

On the other hand the defence version as to what happened after both of them came to grips was as follows:

10. So we came to grips and he (Kalu) took knife, Article 8 from his pocket and assaulted me with the knife so while catching his hand it struck me near my right small finger. I caught hold of his hand in which he had a knife at this time the blade of the knife was towards his stomach. In this scuffle the said knife struck me below my left knee and in that scuffle, knife which was in the hand of the deceased, struck on the stomach of the deceased Thereafter I snatched that knife from his hand. Thereafter Kalu clasped me with force So I was afraid that I would be killed. So I gave him one knife blow. I do not know where it struck him. Thereafter I went to the Police Station with the knife and gave a complaint there to the effect that Kalu had assaulted me and made an attempt to kill me Kalu was a Goonda and he was a murderer. He was externed thrice.

11. The learned trial Judge has taken the view that all the four prosecution witnesses have not told the truth regarding the origin of the incident that some of them have tried to suppress the true facts and that the witness Amrit has definitely told lies on a part of the incident. It is not necessary for us to discuss the evidence of all the four prosecution witnesses in detail because the learned Government Pleader very fairly conceded that the view which was taken by the learned trial Judge regarding this part of the evidence of these four witnesses was the correct view and he further conceded that he could not support the testimony of these witnesses in so far as they stated that the knife was of the appellant and the appellant was the aggressor on that day. The witness who states that the appellant had taken out a knife from his pocket is the witness Amrit. He has been contradicted with reference to his Police statement. Therein the witness had definitely admitted that it was the deceased Kalu who had in the course of the struggle taken out the knife from the hip pocket of his pant after threatening the appellant have you seen my knife? and that that knife was snatched away by the appellant from the hands of deceased Kalu. The witness is also falsified by the fact that the appellant had not put on pants on that day but he had put on trousers which had no hip pocket. The evidence of the witness that the knife was lying in the pocket of the appellant open appears to be highly improbable. Therefore there is no doubt whatsoever that the truth regarding the origin of the trouble is and that is conceded by the learned Government Pleader that after Kalu came on the bicycle and saw appellant standing near the shop of Ramubhai he abandoned his cycle went to the appellant picked up a quarrel with him on the ground that appellant was threatening his nephew and caught the appellant at the neck by his shirt as a result of which the two persons came to grips with each other and that in the course of this scuffle Kalu whipped out the knife Article No. 8 from the hip pocket of his pant and assaulted the appellant with a knife. Therefore there is no doubt whatsoever that circumstances had arisen at that time which created a reasonable and imminent apprehension in the mind of the appellant that he was likely to be killed by Kalu unless he acted in self defense. The evidence which some of the prosecution witnesses have given is that the appellant had given a kick to Kalu as a result of which he fell down. We would require strong evidence in the case to hold this proved on the testimony of the aforesaid four witnesses

having regard to the fact that they have suppressed the true facts regarding the origin. The learned Government Pleader had no objection to holding that the version which the appellant gives as to what happened immediately after this may be accepted as the truth in the matter and that version appears to be a natural version. When the deceased whipped out the knife the appellant tried to snatch away the knife from the hand of the deceased. This is exactly what the appellant states. His statement is that he tried to catch Kalus hand which held the knife and in that action he received an injury on his small finger. This latter part is corroborated by the medical testimony which says that the appellant had such an injury on his finger. Then the appellant states that he caught hold of Kalus hand which held the knife and that at this time the blade of the knife was towards Kalus stomach and whilst this struggle for the deprivation of the knife was going on the appellant received an injury below his left knee and the deceased received an injury on his stomach. The appellant is corroborated in the former part of this version by the fact that he had an injury on his left knee. If the blade was towards the stomach of the deceased and the appellant was trying to hold the hand of the deceased down it is probable that Kalu would receive an injury on the stomach and the appellant would receive an injury on his knee. The defence suggestion is that the injury which the deceased Kalu received at this time was the fatal injury which was deep to the abdominal cavity. We are unable to accept this part of the defence version.

12. In our judgment having regard to the depth of that injury it is extremely improbable that that injury could have been caused on the deceased in the course of this struggle. The medical evidence shows that there was a slight superficial injury near the umbilicus. In our judgment this injury is more likely to be caused on the deceased in a kind of struggle described by the appellant rather than the other injury on the stomach. Thus so far in our judgment the defence version appears to be true that a struggle was going on between the appellant and the deceased in the course of which two injuries were received by the appellant one on the finger and the other on the knee and the deceased received an injury near the umbilicus. The appellant then states that he snatched away the knife from Kalus hand. The learned Government Pleader does not dispute this part of the defence version also. Then the appellants version is that Kalu clasped him with force. The learned

Government Pleader challenged this part of the defence version and the challenge was based upon a previous version which the appellant had given before the Police immediately after the offence took place and that version is Exhibit 44 in the case. The admissibility of this document was challenged in the Trial Court on the ground that it fell within the mischief of Section 25 of the Indian Evidence Act and Section 162 of the Criminal Procedure Code. The Learned Counsel for the appellant did not address us on this aspect of the case. The version which we have mentioned as the version of the appellant as given in the Sessions Court is practically the same except the last portions thereof as the version given in his first complaint to the Police by the appellant. But in that complaint the appellant has not stated that after he had deprived the deceased of the knife the deceased had clasped him with force. We do not think we can attach any importance to this omission. The appellant must have been in an excitement at the time when he gave the first complaint. He had just been out from the clutches of an externee and had luckily escaped from being killed. The main object of the appellant in going to the Police was not to render an explanation for the death of the deceased. One does not know whether he knew that the deceased had expired or not. But his main object was to file a complaint about the assault which the deceased had made on him. Under the circumstances it would be unwise and imprudent to expect the appellant to give a connected and sustained story of the events which took place in its proper sequence and without omitting any part of the struggle which had taken place between the two. In our judgment therefore this part of the defence version also cannot be rejected on the aforesaid ground. The appellant then states that thereafter he gave one knife blow and he does not know where it struck Kalu. There is some controversy as to where this blow struck the deceased and whether it was given whilst both of them were in a standing position. We have already held in a previous part of the judgment that the injury which the deceased had received at a previous stage of struggle was the one on the umbilicus and not the fatal injury in the stomach. Therefore we have no doubt whatsoever that the injury which was caused at this stage of the struggle must be one of the other three injuries two of which were undoubtedly fatal and the third of which was also a serious injury. The statement given by the appellant in the Sessions Court is not clear as to whether this injury was caused whilst in a standing position or after the

deceased had fallen down. But the lacuna is supplied by the suggestions which were made by the defence in the cross-examination of the witness Amrit.

13. The suggestions were in the following terms: It is not true that in the struggle the knife had pierced the stomach of Kalu. It is not true that Kalu was standing when he received knife injury. It is not true that he fell down after getting knife blows. It is not true that I have not stated in my Police statement that how many knife blows were given and where they were given. From these suggestions it is quite clear that the case of the defence was that the first injury was caused on Kalu whilst he was in a standing position. These two are the only injuries which the appellant has admitted in his version. The appellant stops short after admitting the two injuries. There is some variation between his version in the Sessions Court and the version in his complaint to the Police as to what happened after the first blow given by him. At the stage of the complaint the appellants case was that Kalu first fell down and he snatched away the knife from him thereafter and he had caused injuries on the deceased in self-defence. At that stage also he did not admit having caused all the four injuries but his statement is consistent that he had caused only one injury and the other was accidentally received by Kalu during the course of struggle. The contention of Mr. Shah was that the deceased had only two injuries on his person and not four and this contention was based upon the testimony of Dr. Chimanlal Shah the Doctor who examined Kalu soon after the commission of the offence. It appears that from the shop of Ramubhai Kalu was straight taken to a local dispensary. According to the Doctor he noticed only one injury on the stomach and treated the same. The Doctor does not mention any other injuries having been observed by him on the deceased Kalu. The evidence shows that Doctor advised the relatives of Kalu that he should be removed immediately to the Surat Hospital which is about 11 miles away as in his opinion the stomach injury which he had noticed was a serious one. The evidence discloses that Kalu was immediately taken to Surat Hospital where he was admitted at about 6-00 P.M. But when he was examined by Dr. Pesh Imam he found him to be dead. As we have already stated Dr. Pesh Imam noticed four injuries on the person of the deceased. The doctor is quite definite that all the four injuries were ante-mortem. There was some cross-examination of the Doctor on this topic. But Mr. Shah has not challenged this part of Doctors evidence in this

Court. The version however which was propounded by Mr. Shah was that the probability of the deceased having received the other three injuries on the way from Olpad dispensary to the Surat Hospital cannot be excluded and that it was extremely improbable that if the deceased had the other three injuries on his person specially the two major ones the same could be omitted to have been noticed by Dr. Chimanlal Shah. Dr. Shah admitted that as a Medical Officer it was his duty to notice all the bleeding injuries and to render first aid to them. This is certainly a circumstance to be taken into account but having regard to the admissions made by Dr. Shah it is impossible for us to hold that the other injuries were not there at the time when Kalu was taken to the hospital. Even according to the defence version Kalu had received two injuries in the course of the struggle. Dr. Shah admitted that he had not made any attempt to see whether there were other injuries on the person of Kalu and he gives as his ground that the injury which he had noticed was a serious one. In the face of this testimony it is difficult to accept the defence version that the other injuries must have been received during the course of the transit. It is true that none of the persons who carried Kalu to the hospital has been examined in the case but the probability is that he was carried by either the Police or his relatives and there is hardly any probability of any of these persons causing any injury on the deceased. There is no doubt that the conduct exhibited by Dr. Shah prima facie appears to be inhuman and unworthy of the medical profession and his conduct in not examining all the injuries on the person of the deceased and his omission to give first aid to those injuries before sending him on to the hospital deserves not only to be denounced but it is such as deserves to be enquired into by the superior officers of Mr. Shah. But that is entirely another aspect. On the whole we have come to the conclusion that all the injuries which were on the person of the deceased were received by him during the course of the struggle. That part of the prosecution story which is deposed to by the aforesaid four witnesses in our judgment represents the truth in the matter. Therefore the statement of the appellant and the prosecution version and the probabilities so far discussed leads us to the conclusion that after the appellant had deprived the deceased of the knife Kalu had clasped him and thereafter appellant had given one knife blow to him. This is all that the appellant states in his statement before the Sessions Court and he stops short at that stage.

But for the reasons already given and from the evidence and from the prosecution and the defence versions as a whole in our judgment there is no doubt that the appellant was the author of the other two injuries which were found on the person of the deceased.

14. Therefore in order to make good the right of private defence the appellant must explain the circumstances under which the other two injuries were caused. Even if we assume in favour of the appellant that the injury which he had caused on Kalu whilst he was in a standing position was one of the two fatal injuries there is no doubt that after causing this fatal injury the appellant caused the other two injuries one of which was a fatal wound and the other also a very serious wound and in order to make good his plea of self-defence the appellant must also render an explanation as to under what circumstances those two injuries came to be given. In our judgment the appellant has made no attempt to do this either in his statement in the Sessions Court or in his complaint before the Police. But one thing which appears to us to be crystal clear both from the previous statement of the appellant and the prosecution evidence as given by the aforesaid four witnesses is that at one stage Kalu did fall down as a result of the struggle. All the four witnesses are unanimous in stating that Kalu dashed against the Thada of Ramubhais shop and then he fell down on the ground. According to the three witnesses Kalu had fallen down flat on the ground and according to Amrit he had fallen down with his face downwards. In the previous complaint before the Police also appellant had admitted that Kalu had fallen down. There is also no doubt that the appellant gave some knife blows to the deceased after he had fallen down. This is the unanimous evidence of all the four witnesses. It is true that having regard to the fact that these witnesses have told lies on other parts of the incident one would be reluctant to accept this part of the evidence also. But as there is nothing concrete on this subject in the version of the appellant and the appellants version is completely silent as to how the other two injuries were received by the deceased we do not see any harm in accepting that part of the evidence of the aforesaid four witnesses that knife blows were given to the deceased after he had fallen down on the ground. This part of the prosecution version derives support from the previous complaint of the appellant wherein he had admitted that he had given knife blows after the deceased had fallen down. In the previous complaint

the appellant had stated that the deceased fell down because he was in a drunken state. This part of the defence version also appears to us to be untrue. There is nothing on the record to show that the deceased was intoxicated. On the contrary in our judgment there appears to be a strong probability that the deceased fell down as a result of one of the three other injuries which he received in a standing position. Having regard to the fact that the defence version is absolutely silent as to what happened after the first knife blow was given by the four prosecution witnesses that the appellant stood near the head of the deceased had bent over him and given blows must he accepted. There is difference amongst these witnesses as to how many blows were given. One witness says that he had seen three blows and the other witnesses say that they had seen four blows. This appears to be exaggeration. The truth appears to be that two blows were given by the appellant after the deceased fell down near the shop of Ramubhai.

15. Under the aforesaid circumstances our findings as to under what circumstances the deceased received his injuries are as follows. When deceased came on the bicycle and saw the appellant he abandoned the bicycle rushed at the appellant giving abuses and threats, caught hold of his Kafni by the neck which became torn, and then there was a grappling between the two in the course of which Kalu whipped out a knife from his hip pocket. Then there was a struggle between Kalu and appellant in the course of which appellant received an injury on his finger and on his knee and Kalu received an injury near the umbilicus. Then appellant succeeded in depriving Kalu of the knife and caused one of the other three injuries on Kalu as a result of which Kalu staggered dashed against the Thada of Ramubhai and fell on the ground. There is no doubt that upto this stage the appellant had the right of private defence and the injury caused by him on Kalu was justified by the law of private defence. But at the same time it is also crystal clear that after Kalu fell down after receiving one of the other three injuries the appellant went near the head and bending over gave the other two injuries one of which was fatal and the other a serious one. The question for consideration in the present case is whether these other two injuries inflicted by the appellant were justified by the law of private defence or whether in inflicting those injuries as held by the learned Additional sessions Judge he had exceeded the right of private defence. It is true that when applying the law of private defence we must make all

reasonable allowances in favour of the accused and not apply the law in such a manner that persons fighting for their lives would become cowards. It is also true that in deciding cases of this type the mental condition of the assailant must be taken into account and not the views which are formed by the bystanders or in the cool atmosphere of the court room. It is also true that the action of the accused must not be weighed in golden scales nor should we assess the actions of the accused step by step in the course of the struggle. We must bear in mind the fact that Kalu was an extortee reputed to be a goonda and a very well built man. We must also bear in mind that he was armed with a dangerous weapon that he had whipped it out that he had not only threatened to make use of the same but actually had made use of it. But in applying all these principles and facts the central point which must be borne in mind is that the right of private defence continues only so long as a reasonable apprehension of the danger persists. Whenever a number of injuries come to be inflicted by an accused person in the exercise of the right of private defence the important point which has got to be determined is as to whether in the circumstances in which the accused was placed the apprehension had persisted in his mind when he inflicted a particular injury or injuries that his life was in danger and whether under the circumstances in which he was placed that apprehension was a reasonable one. In this connection Mr. Shah relied upon a passage in Rajus Indian Penal Code at page 367. The passage is as follows:

In considering whether one is entitled to exercise right of private defence of body one has to place himself in the position of the accused in the midst of the circumstances in which he stood and to form his opinion whether for him or her in those circumstances it was not fairly wise to apprehend such an injury to the body as would entitle him to her to exercise the right that he or she claims to have done. Where a defendant charged with murder asserts that he killed in self-defence his state of mind at the time of the killing becomes material and an important element in determining his justification for his belief in an impending attack by the deceased for a violent dangerous or turbulent disposition is thus a circumstance which would cause such a belief.

16. We are in agreement with these observations. But the question for consideration whether bearing in mind the aforesaid tests and facts when the appellant inflicted the further two knife blows a reasonable apprehension was still in his mind that his life was in danger. The contention of Mr. Shah is that there was no time for reflection whatsoever that the injuries were given on the spur of the moment and that these injuries must be taken to have been inflicted under the impulse of self-preservation. He contended that there was no time for any other feeling to intervene. It is true that one of the tests which may be safely and usefully applied in circumstances of the present kind would be to discover whether the accused was still acting under the instinct of self-preservation or whether other feelings such as those of an anger malice and reprisals had intervened. In the former case the accused would be entitled to right or private defence but not in the latter cases. The learned Government Pleader contended that in view of the fact that one of the other three injuries inflicted on Kalu was a dangerous one the appellant should have known that no further action was necessary and there was no likelihood of the deceased snatching back the knife from him This may not be always a true or proper test. Though on the evidence we may be able to say that the injury was a fatal one it is likely that under a given set of circumstances the accused may not know that the injury was a fatal one. The real point which has got to be ascertained is as to what was the state of the knowledge of the accused and what a reasonable man acting under the circumstances without any malice would reasonably come to know when he was fighting to save his life. Now in our judgment on the facts of the present case there is no doubt that after Kalu received one of the other three injuries he staggered and fell down on the ground. At that stage there is no doubt that there was no interlocking between the appellant and Kalu and the two were separated from each other. The knife was no longer in the hands Kalu and it had come into the hands of the appellant. Kalu lay flat on the ground. Even if we proceed on the assumption that one of these three injuries was thigh injury only it is hardly probable that any movement could have been made by Kalu thereafter which would suggest that he was making an attempt to get up and to carry on the battle further. After the separation the appellant went near Kalu stood near his head and caused the other injuries in a bending position whilst Kalu was laying flat on the ground. In our judgment having regard to these

facts we are unable to hold that the appellant was acting under the instinct of self-preservation. In our judgment the appellant was acting out of malice and anger and feelings of retribution and therefore the learned Judge was right in holding that the appellant had exceeded the right of private defence. Consequently his conviction under Section 304 Part 1 Indian Penal Code was justified.

17. As regards the sentence the learned Government Pleader states that having regard to all the circumstances of the case he had no objection if the sentence is suitably reduced. In awarding the sentence in a case of this type we must bear in mind that the appellant was involved just a moment before he inflicted the impugned injuries in a mortal conflict with a dangerous character. We must also bear in mind that the appellant must have been in considerable excitement and the fact we are dealing with a citizen who though he had right of private defence had exceeded the same and not with a person who was out to commit a crime in the first instance. We must also take into account the fact that the appellant was an under-trial prisoner for a period of nearly one year before he was convicted. Having regard to all the circumstances of the case a sentence of two years rigorous imprisonment will meet the ends of justice. Therefore we confirm the conviction of the appellant for the offence under Section 304 Part I Indian Penal Code but reduce the sentence from four years rigorous imprisonment to two years rigorous imprisonment. Subject to this the appeal is dismissed.