

**Jacob @ Jaimon Vs. State of Kerala, Represented by the Public Prosecutor,
High Court of Kerala**

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Court : Kerala

Decided On : Mar-07-2012

Judge : R. Basant & K. Vinod Chandran

Appeal No. : CRL.A. No. 1476 of 2007

Appellant : Jacob @ Jaimon

Respondent : State of Kerala, Represented by the Public Prosecutor, High Court of Kerala

Judgement :

Basant, J.

(i) In having returned to the scene of the crime with MO1, a dangerous weapon, within a short span of time after the initial incident, in an obvious attempt to defend his possession of the autorikshaw, against the attempt of the deceased and PW2 to take away the autorikshaw by force (or to cause mischief to the same), did the appellant forfeit his right of private defence?

(ii) Did he have the right of private defence of his person and/or property against the deceased?

(iii) Did he exceed such right of private defence?

These, precisely, are the questions that are raised for our consideration in this appeal by Shri S.Rajeev, the learned counsel for the appellant.

2. The appellant has been found guilty, convicted and sentenced under Section 302 of IPC and he faces a sentence of imprisonment for life and to pay a fine of Rs.50,000/-, and in default of payment to undergo rigorous imprisonment for a further period of three years. He is alleged to have caused the death of deceased Sudhakaran, a person aged about 42 years, by inflicting multiple stab injuries on him with MO1, a dangerous weapon. The motive, as alleged by the prosecution, is disputes following the failure/refusal of the appellant to return an amount of Rs.40,000/- borrowed by the appellant from the deceased. The alleged incident took place at about 9.15 pm on 27.10.2002 on the public road near Thidampoor Temple.

3. Investigation commenced with the registration of Ext.P1(a) FIR on the basis of Ext.P1 FI statement lodged before the police by PW1 Surendran, brother of the deceased, who had not witnessed the occurrence. Investigation was completed and final report was filed by PW23. The learned Magistrate committed the case to the Court of Session observing all legal formalities. The learned Sessions Judge framed charges against the appellant, and the appellant denied the same. Thereupon, prosecution examined PW1 to PW23 and marked Exts. P1 to P20. MOs1 to 12 were also marked.

4. In the course of cross-examination of the prosecution witnesses and later when examined under Section 313 of Cr.PC and in the statement filed, the appellant took up the plea of private defence. According to him, he was only exercising the legitimate right to defend his person and property. He examined DWs 1 and 2 and proved Exts.D1 to D6(a).

5. The learned Sessions Judge, on an anxious evaluation of all the relevant inputs, came to the conclusion that the prosecution has succeeded in proving the offence of murder punishable under Section 302 of IPC against the appellant. Accordingly, the learned Sessions Judge proceeded to pass the impugned judgment.

6. Before us, Sri. S. Rajeev, the learned counsel for the appellant and the learned Public Prosecutor have advanced their arguments. The learned counsel for the appellant argues that the oral evidence of PW2 should not have been accepted and acted upon. The learned Sessions Judge ought to have held that the versions of the appellant competes in probabilities with the version of the prosecution and at any rate the right of private defence must have been conceded to him. The learned counsel for the appellant further argues that at any rate, conviction under Section 302 of IPC is not justified.

7. The learned prosecutor, Sri. Giku Jacob, on the contrary, contends that the prosecution had placed absolutely convincing and acceptable evidence before the learned Sessions Judge. The appellant has not succeeded in discharging his burden under Section 105 of the Evidence Act to show that he is protected by his right of private defence. The impugned judgment does not warrant any interference, contends the learned prosecutor.

8. We have considered all the relevant inputs. We do not think it necessary in this appellate judgment to re-narrate the oral and documentary evidence placed before the learned Sessions Judge. This judgment must be read in continuance of the judgment of the trial court. We need only mention that we have been taken in detail and meticulously through the oral evidence of PWs 1 to 23 and Dws 1 and 2. We have also been taken through the contents of Exts.P1 to P20 and Exts.D1 to D6(a). The charge framed against the appellant by the Court below and the answers given by the appellant in the course of his examination (including the written statement filed at the end of such examination) under Section 313 of Cr PC have also been read to us in detail.

9. We deem it appropriate that the case of the prosecution and the defence version must be ascertained and understood clearly before we proceed to consider the challenge raised in this appeal. Precise ascertainment of the respective stands of the prosecution and the appellant appear to be essential for a proper disposal of this appeal.

10. According to the prosecution, the appellant had availed for himself a loan of Rs.40,000/- from the deceased. He had not repaid the said amount of Rs.40,000/-.

On the night of 27.10.2002, at about 9.15 p.m., PW2 and deceased Sudhakaran were available on the road leading from Chunkam towards north. They found an autorikshaw coming towards north. They stopped the autorikshaw and they wanted to get into the autorikshaw to proceed to their houses situated further northwards. In that autorikshaw, DW2 was already traveling as a passenger. After PW2 and the deceased got into the autorikshaw, and the autorikshaw proceeded for sometime, according to the prosecution, PW2 and the deceased realised that it was the autorikshaw of the appellant. There was exchange of words between the appellant and the deceased about the amount which the appellant was bound to return. The autorikshaw, in the meantime, reached the scene of occurrence where DW2 who was already in the vehicle, had to terminate his journey and get out. PW2 had placed himself in the seat of the driver of the autorikshaw; whereas the deceased had got into the autorikshaw and had shared the passenger's seat in the autorikshaw with DW2. After DW2 got out of the autorikshaw, paid the hire and left, there was wordy and physical altercation between the appellant and the deceased. The bone of contention, according to the prosecution, was the inability/refusal of the appellant to return the money due to the deceased. The appellant moved a little away from the scene of the crime and allegedly threw a stone at the deceased. The stone hit the deceased and he suffered an injury. At that point, the appellant went away from the scene of the crime to return after a short span of time. When he so returned, he was having MO1 in his possession. After he returned, he allegedly inflicted injuries on the deceased with MO1. The deceased was shifted from the scene to a doctor and he succumbed to the injuries later, on the same night. According to the prosecution, the appellant was guilty of the offence of murder - he having intentionally caused the death of the deceased by inflicting injuries on him.

11. The appellant took up a fairly specific and definite version in the course of the trial. Borrowal of amounts from the deceased was not disputed. However, according to the appellant, the deceased was making a very tall and unjustified claim. Only an amount of Rs.20,000/- had been borrowed and only an amount of Rs.5,000/- remained to be paid. According to the appellant, he was returning after the day's work to his residence situated further northwards from the scene of the crime. He got a passenger, DW2, who also wanted to go in the same direction.

After DW2 got into the vehicle and the appellant started driving northwards, according to the appellant, PW2 and the deceased forcibly obstructed the further movement of the autorikshaw. Both of them forcefully entered the autorikshaw. Deceased occupied the passenger seat of the autorikshaw; whereas PW2 occupied the front seat along with the driver/appellant. At the spot, where the deceased and PW2 were to get down to proceed to their houses, the vehicle was stopped, but PW2 and the deceased did not get down. The appellant drove the vehicle further northwards and stopped the vehicle at the place where DW2 was to get down. After DW2 got down at the scene of the crime and proceeded towards his house, the appellant was allegedly attacked by the deceased. The deceased was a person proficient in martial arts. He had with him PW2, admittedly a paid employee. In, sheer helplessness, the appellant proceeded towards his house to seek assistance of his father. But, his father was not there. He returned to the scene of the crime. He was assaulted. He somehow extricated himself and went away. He does not know how the deceased had suffered injuries. This, in a nutshell, is the version advanced by the appellant.

12. The learned counsel for the appellant, first of all, contends that the investigation and prosecution have not been fair and just. The learned counsel for the appellant, further points out that the prosecution had, with malicious intent, not made the evidence of DW2 available before the Court. DW2 was cited as a witness for the prosecution as CW5. For reasons which are not obviously fair, the prosecution gave up CW5. Even, admittedly, there were only four persons who were available in the journey - the deceased, the appellant, PW2 and DW2. DW2, accepting any standards, was the most independent witness, who was in a position to enlighten the Court of what really had happened and the true genesis of the incident. The prosecution with malafide intention had kept DW2 away from the Court, obliging the appellant to examine him as a defence witness.

13. The learned counsel for the appellant further points out that going by the evidence of PW3, who has been declared hostile, the mother of PW3 had allegedly witnessed the occurrence. The case diary statement of PW3 (refer D3 case diary contradiction) had clearly shown that the mother of PW3 had implored that the autorikshaw may not be set fire to. That witness, surprisingly is not seen

questioned, cited and examined by the investigator.

14. The learned counsel for the appellant, at the outset, argues that in a case like the instant one, the prosecutor could not and should not act as a mere agent of the prosecution party or the police. The public prosecutor is a functionary for justice and he should not have withheld DW2 from the Court. The malafide withdrawal of DW2 from Court by the prosecution has substantially prejudiced the defence of the appellant, contends the learned counsel for the appellant. We have no hesitation to agree that any prosecutor worth his salt and interested in justice could not have withheld DW2 from the Court. The position of DW2, in the scheme of things, certainly enables the appellant to contend that he was a most vital and crucial witness whose evidence must have been placed before the Court by the prosecution itself.

15. We have no hesitation to agree that DW2 was a very important witness whose evidence was absolutely essential for a proper disposal of the case. DW2 has not been examined by the prosecution and we are unable to find any acceptable reason for the prosecutor not examining DW2 as a prosecution witness.

16. At any rate, DW2 has been examined as a witness. His evidence was made available to the Court though, at the instance and initiative of the defence. In these circumstances, the defence cannot be said to be prejudiced by the non-examination of DW2, contends the learned prosecutor. We are unable to agree. We find merit in the submission of learned counsel for the appellant that the non-examination of DW2 as a prosecution witness has virtually fettered the option of the appellant to make use of the case diary statement of DW2/CW5 and that in the circumstances of the case, has resulted in material prejudice.

17. We are in agreement with the learned counsel for the appellant. The mere fact that consequent to the refusal of the prosecution to examine a charge witness, the defence had taken up on its shoulders the responsibility of examining that witness, does not obliterate the criticism that the prosecution has not shown fairness and that the defence has been prejudiced. We do, in this case, note that material aspects were revealed from the case diary statement of CW5/DW2 and the unjustified withdrawal of DW2 from the array of prosecution witnesses has virtually

deprived the appellant of the opportunity to make use of significant admissions made in such case diary statement of DW2.

18. We do, of course, note that when a witness is examined as a Court witness or defence witness, though his case diary statement cannot be made use of by the parties for any other purpose, in view of the bar under Section 162 of Cr PC, the jurisdiction of the Court under Section 165 of the Evidence Act to put questions to such witness on the basis of such case diary statement is not fettered. The decision of the Supreme Court in *Raghunandan v. State of U.P. and Ganga Sahai and others v. State of U.P.* (1974 SCC (Cri) 355) makes the position crystal clear. Of course, the defence, if they wanted, could indirectly, have made use of such case diary statement by persuading the courts (if the Court were inclined) to use the same for the purpose of putting questions suo moto under Section 165 of the Evidence Act. But the mere fact that such option was available, does not militate against the criticism that the prosecution has not been fair in withholding DW2 as a prosecution witness or that the accused had suffered prejudice because of such conduct of the prosecution.

19. We deem it necessary and appropriate in this case to consider the evidence available afresh to decide what had actually transpired. The prosecution version and defence version have substantial common features and it is important that the Court tries to correctly ascertain the genesis of the incident and the progress towards the final infliction before attempting to decide whether the appellant is entitled to the right of private defence as claimed by the learned counsel for the appellant.

20. We, first of all, look at the alleged financial liability. Only PW5, the wife of the deceased, has been examined on this aspect. According to her, an amount of Rs.40,000/- was borrowed by the appellant a couple of months earlier and there has been no substantial repayment towards that liability. She relied on Ext.P3, which is said to be a copy of the demand promissory note, executed by the appellant. One fails to understand why the original was not traced and produced. It is the admitted case of the appellant that the said financial transaction was not on the basis of any promissory note. According to him, vehicle documents etc. were

available with the deceased. Ext.D4 case diary contradiction marked when PW5 was in the witness box, is in this context certainly relevant. Learned counsel for the appellant points out that in Ext.D5 remand report, the investigating officer himself had stated that the liability was only Rs.20,000/- and after the discharge of Rs.15,000/-, the balance alone was payable. Be that as it may, we look into this aspect only to appreciate the contention of the learned counsel for the appellant that the deceased was a money lender; that he was making exorbitant demands and that he along with his employee PW2 was engaged in a despicable attempt to forcibly take away the vehicle or cause damage to it on that night as a retaliation against the inability of the appellant to discharge the liability. It is in this context that the financial transaction becomes relevant.

21. Going by the case of the prosecution or by the version of the defence, it is evident that the appellant on that night was proceeding towards the direction of his house, northwards, with DW2 as a passenger in that autorikshaw. On this aspect, not a trace of doubt survives. He had no premeditation or intention to indulge in any criminal conduct that night. This is evident from this admitted circumstance.

22. It is also evident that while they were so proceeding, they were stopped and the deceased and PW2 got into the autorikshaw. It is the case of PW2 that they were bonafide passengers who wanted to go to their houses in the autorikshaw. According to PW2, when they stopped the autorikshaw and later got into the autorikshaw, they did not know that the appellant was the driver of the autorikshaw. Only after the vehicle travelled for a kilometer did it dawn on them that the appellant was the driver of the autorikshaw. This is the version advanced by the prosecution through PW2.

23. We find it difficult to swallow this version. The version cannot be swallowed without tons of salt. We take note of the material omissions and discrepancy on this aspect in the statement made by PW2 before the police. The conclusion appears to be irresistible that PW2 and the deceased were waiting for the autorikshaw of the appellant and they got into the autorikshaw with clearly objectionable motive. The fact that PW2 sat along with the appellant in the driver seat and the deceased got into the rear of the autorikshaw notwithstanding the

objections of DW2, conveys eloquently their questionable motives. It is in this context that we look at certain portions of the case diary statements of PW2 and DW2. PW2 when asked whether it was not the intention of the deceased to take away the autorikshaw for non-discharge of liability, stated that he did not know about that. Ext.D1 contradiction reveals that PW2 had stated to the investigating officer that the deceased had told the appellant that they were proceeding to the house of the appellant on that night. That evidently does not picture them as bonafide passengers.

24. The learned counsel for the appellant points out a crucial statement in the case diary statement of DW2 which the appellant could not make use of, because DW2 was examined only as a defence evidence. DW2 had stated to the police that when PW2 and the deceased stopped the vehicle, the appellant asked them where they have to go, and in reply it was stated that they were taking the appellant to do away with him. We are conscious of the fact that this case diary statement of DW2 to the police officer cannot be reckoned as substantive evidence. We cannot take cognizance of the same. We look at this only to correctly understand the significance and the implication of the prosecution withholding DW2 as a witness for the prosecution.

25. The sequence is important. When PW2 was in the witness stand, it can be seen that he was cross-examined with reference to this statement of DW2 before the police. PW2 was specifically asked whether the deceased had not told the appellant that he was being taken so that he can be done away with, PW2 denied the suggestion. The learned prosecutor, evidently, it appears to us, realising that such a statement is already there in the case diary statement of DW2 chose to frustrate the attempt of the accused/appellant to make use of this circumstance by giving up DW2/CW5 as a prosecution witness.

26. We do also note that PW2 had admitted that after DW2 got out from the autorikshaw, the deceased had caught hold of the appellant on his shirt and that was how the altercation started. This evidently suggests that the deceased and PW2 had waited for DW2, the passenger, who had already got into the vehicle to alight to commence their improper activities. That crucial admission made by PW2

is, according to us, significant.

27. According to the case diary statement of PW2, the deceased had pushed the autorikshaw and the autorikshaw had fallen on its side. During the cross-examination of PW2, though he denied this aspect initially, he had to admit the same when he was confronted with the case diary statement. That again indicates the real motives of PW2 and the deceased when they got into the autorikshaw.

28. The fact that the deceased and PW2 did not get down from the autorikshaw near the Believer's Church from where they had to proceed to their house, is again in the context relevant while attempting to ascertain the true motives of the deceased and PW2 who got into the autorikshaw.

29. Two more convincing indications are available to suggest that the deceased and PW2 were not bona fide passengers as now claimed by PW2. Evidence indicates clearly that the deceased and his paid employee were waiting at the place where they got into the autorikshaw for a long period of time from 6 p.m. to 8.45 p.m. before they saw the appellant proceeding in the direction of his house (as they must have anticipated).

30. We also note that PW2 did not get into the rear passenger seat, but by the side of the driver. This throws light on their purpose. That DW2 objected and against his wishes, the deceased and DW2 got into the vehicle, knocks the bottom out of the prosecution theory that they got into the vehicle as bona fide passengers.

31. That private money lenders defying the rule of law indulge in anti social, violent acts of enforcing money claims is known to the polity. That has no legal sanction, but money power and clout emboldens money lenders to indulge in such conduct is well known. While assessing the state of mind of the appellant of his apprehension and suspicions, no prudent mind can afford to ignore these social realities.

32. We have indications to suggest that there was a push and pull after DW2 got out and went away from the autorikshaw at the scene of crime. We have already

noted the admission of PW2 that it was the deceased who started the altercation by catching hold of the shirt of the appellant. We get the further indication from the evidence that the appellant had to move away from the autorikshaw and the appellant had thrown a stone at the deceased. According to the learned counsel for the appellant, this also indicates the attempt of the helpless appellant to defend his possession of the autorikshaw and does not at all indicate any aggressive conduct on the part of the appellant against the deceased. We feel that this submission deserves careful consideration.

33. The evidence of PW2 as well as the 313 statement of the appellant clearly reveals that at that point of time, the appellant had retreated from the scene of the crime. He returned immediately, thereafter. There is some dispute between the parties as to the precise time within which the appellant returned to the scene. A total and holistic reading of the evidence clearly suggests that the appellant had returned with MO1 without much delay - within a span of about 5 minutes as we can see from the reexamination of PW2. That can be safely reckoned as the most authentic assessment of the time gap by PW2.

34. The appellant does not in terms admit that he had returned with MO1. The evidence clearly shows that he must have returned with MO1 as deposed by PW2. The appellant has no case that PW2 or the deceased were having MO1 with them when incident commenced or till its completion. If MO1 was used in the course of the incident, we find it easy to come to the conclusion that it must have been brought to the scene by the appellant when he returned after he initially retreated from the scene of crime.

35. The appellant had suffered injuries in the course of the incident. On that aspect there is absolutely no doubt in our mind. We have the evidence of PW16 and Ext.P14 wound certificate to throw light on this aspect of the case. Ext.P14 shows that the appellant had the following injuries on his person.

"1.) Small abrasions 1 x 0.2 cm on the top of right shoulder with moderate swelling on and around.

2.) Abrasions 0.5 x 0.2 cm on the back of right hand over the root of thumb with moderate swelling on and around the above injury. Both injuries showed early healing."

36. It is significant that the prosecution has no explanation for these injuries on the appellant. The injuries are not too significant certainly, but all the same we do note that except the theory of wordy and physical altercation after the vehicle stopped at the scene of the occurrence to enable DW2 to get out of the autorikshaw, there is no case for the prosecution as to how the appellant could have suffered the injuries; whereas the appellant has a definite case that after he returned to the scene of the crime, there was a further altercation and it is in the course of such altercation that he was assaulted by the deceased and he suffered those injuries. At this juncture, we only note that the injuries on the accused are not explained by the prosecution.

37. There can be no semblance of doubt that the deceased had suffered the injuries described in Ext.P13 postmortem certificate, at the hands of appellant with a weapon like MO1. On that aspect, we find it absolutely safe to rely on the testimony of PW12 notwithstanding the fact that he was interested in the deceased and happened to be an employee of the deceased.

38. It will now be apposite to refer to the law relating to the burden of proof in a case where the accused advances a plea of the right of private defence. Section 96 to 106 of the Indian Penal Code deal with the right of private defence available to a citizen in defence of a charge of culpability.

39. The burden rests always on the prosecution to prove its case beyond reasonable doubt. In every indictment, from the beginning to the end of the trial, that burden continues to rest squarely and heavily on the shoulders of the prosecution. Whatever be the nature of the evidence relied on by the prosecution or the defence set up by the accused, this burden continues to rest with the prosecution.

40. An accused, who wants to take up the defence of any of the general exceptions to criminality, has the burden under Section 105 of the Evidence Act to

establish such special defence. Section 105 of the Evidence Act mandates that a presumption contra can be drawn by the adjudicator - that circumstances do not exist bringing the case within the sweep of any of the general exceptions to criminality. But that is only a rebuttable presumption of fact. It is open to the accused to rebut this presumption. This, he can, we do note, not necessarily by adducing defence evidence. He can rely on the broad probabilities of the case advanced by the prosecution, answers elicited in the course of cross-examination, stand taken by the accused in the course of 313 examination, and also the defence evidence if any. It is not incumbent that an accused must adduce evidence of his own to successfully claim the benefit of any of the general exceptions.

41. It must straight away be noted that the burden on an accused is qualitatively different in nature from the initial paramount burden on the prosecution. The prosecution must prove its case beyond doubt. But, an accused need establish his claim for protection of any of the general exceptions only by the test of probabilities. It is trite and it is unnecessary to advert to specific precedents on this aspect. The trial Court has adverted in detail to the law on this aspect.

42. Even if an accused does not succeed in establishing his plea for protection of any of the general exceptions to criminality, he may successfully avoid indictment, if, in the course of his attempt to establish such general exception, he succeeds in generating any reasonable doubt on any material aspect of the prosecution's case. In such event also the accused will succeed, not because he has succeeded in establishing any general exception to criminality, but because in the course of his unsuccessful attempt to claim the protection of the general exception, he has succeeded in generating a reasonable doubt on any material aspect of the prosecution case.

43. We shall now have a look at Sections 96 to 106 of the Indian Penal Code. The learned counsel for the appellant contends that in this case the accused is protected both by his right of private defence of his body and of property. Section 96 declares that nothing is an offence which is done in the exercise of a right of private defence. Section 97 declares that a person has a right, subject to

restrictions, to defend his body as well as property against specified offences. Section 100 deals with the circumstances under which private defence of the body extends to causing death of the aggressor. Section 101 deals with cases where such right does not extend to causing of death. Section 103 of the IPC deals with cases where right of private defence of property extends to the causing of death. Section 104 deals with cases where such right does not extend to causing death. Sections 102 and 105 respectively deal with the commencement and continuance of the right of private defence of person and property.

44. The first question to be decided is whether the appellant had a right of private defence in this case. The learned counsel for the appellant argues that the appellant had a right of private defence of both body and property. The materials available in the case clearly suggest that the deceased and P.W.2 did entertain the intention of enforcing the claim for return of money by taking law into their hands by proceeding against the property of the appellant. Obviously the intention was to use force to take away the property, viz., the autorickshaw. The sequence of events in this case clearly suggest that the deceased and P.W.2 had questionable intent on this aspect. Their intention obviously was to enforce the claim for money, either by taking away the property (autorickshaw) or by causing damage to the autorickshaw. What exactly was the intention cannot correctly be ascertained. Even P.W.2 was not able to assert specifically what the precise intention was. At any rate, the fact remains that the intention was either to take away the autorickshaw by force or to cause mischief. In either case, the appellant certainly had a right of private defence to defend his property. They evidently had the intention to act physically against the appellant if he objected to their scheme. There can be no element of doubt on that aspect.

45. At the scene of the crime, there evidently was a wordy and physical combat. The deceased had commenced that quarrel and combat. The appellant in turn had attempted to throw a stone at the deceased and obviously the totality of inputs suggest that it was a defensive attempt on the part of the appellant to deter the deceased from attempting to take away the autorickshaw or to cause mischief to it. The appellant, at that point of time, definitely had the right of private defence of property and body.

46. The appellant had retreated from the scene of the crime and had come back with a dangerous weapon (M.O.1). If the appellant had a right to defend his property, certainly it cannot be held that he does not have a right to collect requisite strength to defend his property. Reckoned as an attempt to defend the property, the conduct of the appellant returning with M.O.1 cannot be held to be an act of aggression and must certainly be reckoned as a bonafide attempt to defend his property. Even when he returned with M.O.1, his property was under danger. The evidence clearly suggests that the deceased had pushed the autorickshaw and it had fallen on its side when the appellant returned. His right to defend his property was certainly available to him even when he returned with M.O.1. The mere fact that he returned with M.O.1 cannot, in these circumstances, justifiably lead to a conclusion that the appellant did not have the right of private defence of property under Section 97 of the IPC.

47. It is not the law that the rightful owner in peaceful possession of an item of immovable property must run away if there be an invasion of his right to possess the property. Such person is entitled and is clothed with requisite right and power to defend his lawful possession of property. He is entitled to defend his property with the physical force at his command. It is trite that he is entitled to collect men and material as required to defend his lawful possession against unlawful invasion. If a person is physically powerful, he may defend his possession himself. If he is physically weak or powerless and his adversary is stronger and more powerful, nothing prevents him from collecting the requisite men, material and arms to defend his possession - provided he does not cross the rubicon and only defends his possession; and does not use the opportunity as an excuse for illegal aggression. A person does not forfeit his right of private defence merely because he has collected men and materials before hand or does the same after he is confronted with the situation. As early as in *Summa Behera v. Emperor* (AIR 1945 Patna 283), this position of law appears to have been accepted and recognized. In having come back to scene with M.O.1, we are unable to hold that the appellant has lost/forfeited his right of private defence of property.

48. We have also looked at the question whether the appellant has a right of private defence of person after he returned to the scene of the crime with M.O.1.

Reckoned as the right of private defence of person, certainly the appellant, who had moved away from the scene of the crime, cannot possibly claim a right of private defence of person. He had already extricated himself and had run away from the scene of the crime and he cannot thereafter be held to entertain any reasonable apprehension of danger to his person. Reckoned as the right of private defence of person, the appellant cannot be held to be having the continued right after he retreated from the scene and later came to the scene again with M.O.1.

49. However, we take the view that the appellant had the right of private defence of property from the moment the deceased and P.W.2 got into the autorickshaw. It continued at the scene of the crime when the appellant was assaulted and pushed away from his autorickshaw. The right further continued even when the appellant returned to the scene of the crime with M.O.1. In any view of the matter, therefore, the appellant was protected by the right of private defence to defend his possession of the autorickshaw and to prevent mischief being committed to the autorickshaw.

50. Did he have time to take recourse to the protection of public authorities? In having returned to the scene with M.O.1 and in not having run to the police or other public authorities to complain against the illegal action of the deceased, we are of opinion that the appellant has not lost his right of private defence. Section 99 of the Indian Penal Code stipulates:

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

That the appellant's movable property was facing threat of illegal removal from his possession and/or unjustified damage is established. The property had not been removed. It was still available at the scene. He could not defend his possession with his physical power and had returned from the scene only to collect men and material to defend his possession. It cannot possibly be contended that he had "time" to approach the public authorities to protect his possession. If he had chosen to run to authorities with his grievance he could not have defended his possession effectively. His possession was not lost and the deceased had not retreated with his property. Nor had the deceased committed mischief when the

appellant retreated from the scene to come back immediately thereafter. Under Section 105 of the IPC his right of private defence of property was very much in existence and did continue to exist when he returned. The decision in Kumaran v. State of Kerala (1991 (2) KLT 679) makes the position crystal clear that he was not obliged to take recourse to the protection of public authorities. He had no "time", as contemplated by Section 99, to have recourse to public authorities for protection of his right.

51. Did this right extend to the causing of death? This is the next question that has got to be considered. Under Section 103 IPC circumstances are enumerated, under which the right of private defence of property extends to the causing of death. We must always remind ourselves of the mandate of Section 99 IPC that the right of private defence can in no case extend to the infliction of more harm than it is necessary to inflict for the purpose of defence. In the instant case, we note that the deceased and P.W.2 were not armed with any weapons. An apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised could not have been justifiably entertained. The case of the appellant does not certainly fall within Clause fourthly of Section 103 of the Indian Penal Code. Infliction of such serious injury with MO1 on the deceased does not appear to be justified in the given circumstances. We do, in these circumstances, take the view that the appellant's right to private defence did not extend to the causing of death of the deceased.

52. To sum up, we take the view that the appellant had the right of private defence of his property (autorickshaw). Such right continued till the very end when the injury was inflicted on the deceased. But, in inflicting such serious injuries with a dangerous weapon like M.O.1, the appellant had definitely exceeded the right of private defence which is available to him under law.

53. We are, in these circumstances, satisfied that the appellant is liable to be convicted under Section 304 Part 1 IPC by the play of Exception-2 to Section 300 IPC. He had the right of private defence, but he exceeded the right of private defence. The act was done without pre-meditation and evidently without any intention for doing more harm than it is necessary for the purpose of such defence.

In these circumstances we hold that the appellant is entitled to the mitigative protection of exception No.2 and he is liable to be convicted only under Section 304 Part 1 IPC.

54. We shall now come to the sentence that is liable to be imposed under Section 304 Part 1 IPC. Under Section 304 Part 1 IPC, the maximum sentence that can be imposed is imprisonment which may extend to 10 years and fine. In the facts and circumstances of this case, we are satisfied that the appellant, who has undergone imprisonment already for a period exceeding 4= years, can be sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.25,000/-. In default of payment of fine, he shall undergo rigorous imprisonment for a further period of six months. The fine amount, if realised, shall be released to P.W.5, as already directed.

55. In the result:

(a) this appeal is allowed in part.

(b) The verdict of guilty and conviction of the appellant under Section 302 IPC is modified and altered to Section 304 Part 1 IPC.

(c) in supersession of the sentence imposed on the appellant by the Court below, the appellant is sentenced under Section 304 Part 1 IPC to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.25,000/- (Rupees twenty five thousand only) and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months.

(d) It is directed under Section 357(1) Cr.P.C. that, the fine amount, if realised, shall be released to P.W.5.

56. The Registry shall forthwith communicate this judgment to the Court below. The Court below shall issue revised warrant of commitment.

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