'C.R.'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 7TH DAY OF DECEMBER 2021 / 16TH AGRAHAYANA, 1943

CRL.A NO. 586 OF 2016

AGAINST THE ORDER/JUDGMENT IN SC 44/2012 OF ADDITIONAL DISTRICT & SESSIONS COURT, VATAKARA

APPELLANT/ACCUSED:

RAJEESH, AGED 25 YEARS
S/O RAVEENDRAN, KAYYANDATHIL HOUSE,
KAVILUMPARA AMSOM, POOTHAMPARA, MULAVATTOM.

BY ADVS.
SRI.P.VIJAYA BHANU (SR.)
SMT.MITHA SUDHINDRAN
SRI.M.REVIKRISHNAN

RESPONDENT/COMPLAINANT/STATE:

STATE OF KERALA
REP. BY SUB INSPECTOR OF POLICE, THOTTILPALAM POLICE STATION THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, COCHIN - 682 031.

OTHER PRESENT:

SRI.ALEX.M.THOMBRA, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05.11.2021, THE COURT ON 07.12.2021 DELIVERED THE FOLLOWING:

'C.R.'

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

Criminal Appeal No.586 of 2016

Dated this the 7th day of December 2021

J U D G M E N T

Jayachandran, J.

We commence with a Chinese proverb; apposite to the facts of this case:

> "If you are patient in one moment of anger, you will escape a hundred days of sorrow."

By sheer misfortune a son fell prey to his ungovernable passion upon witnessing an assault on his mother; but his irresistible impulse pierced the chest, involving the heart, of the assailant, his own paternal uncle. The son, sentenced to be imprisoned for life, assails the judgment of conviction for offence under Section 302 of the Indian Penal Code, in this appeal.

2. This Criminal Appeal stems from the judgment of conviction dated 28.04.2016 of the Additional Sessions Court, Vadakara in SC No.44/2012. The sole accused faced indictment for offence under Section 302 of the Indian Penal Code (I.P.C.). As per the judgment impugned, the learned Sessions Judge found that the accused is guilty of the offence alleged and sentenced him to undergo imprisonment for life, as also, to pay fine of Rs.50,000/- with a default clause to undergo rigorous imprisonment for one more year.

3. The prosecution case unfolds as follows: On 03.01.2010, by about 2 p.m., the deceased, who is the paternal uncle of the accused, reached the *Tharavadu* house, where the accused and his parents were residing, to remove certain timber logs kept in the *Tharavadu* property. The mother of the accused opposed removal of timber and sat on the timber logs. There was a heated exchange of words between the deceased and the mother of the accused. Thereafter, the deceased pushed the mother of the accused and she fell down. Infuriated by the same, the accused caught hold of the deceased and pushed him down. The deceased got up with a stick, so as to assault the accused. Thereupon, the accused stabbed the deceased on his chest by using MO1 knife, causing a fatal injury, to which the deceased succumbed.

4. PWs 1 to 25 were examined and Exts.P1 to P25 were marked on the part of the prosecution. MO1 to MO8 were also marked. The learned Sessions Judge essentially relied upon the evidence tendered by PW3 and PW17, the eye witnesses, to find that the appellant/accused is guilty of the offence under Section 302 of the I.P.C.

5. Learned Senior Counsel, Sri.P.Vijayabhanu, upon instructions, contended that the main witness of the prosecution, who had allegedly given Ext.P1 First Information Statement (FIS), turned hostile to the prosecution. He categorically deposed before Court that he had not witnessed the incident. Of the two other

witnesses relied upon by the Sessions Court, i.e PW3 and PW17, PW17 is a planted witness, who was introduced pursuant to the order for further investigation and whose presence in the scene of occurrence is highly doubtful. At the instance of the wife of the deceased, a Criminal M.P. was preferred before the Sessions Court. The same was allowed and further investigation was ordered. There is no reference to the name of PW17 in the original final report preferred by PW24. It is thereafter that his statement was recorded and he was introduced as a witness, which, according to learned counsel, is the result of a clear afterthought, to rope in the appellant/accused for the crime in question. Learned Counsel submitted that there is no reference about PW17, James, being present at the spot, going by Ext.P1-FIS preferred by PW1. His version before the Court also would not support the presence of PW17 at the place of occurrence at the relevant time. The name of PW17 is not referred in the former statement of PW3 and therefore, the presence of PW17 spoken to by PW3 before Court is nothing but an improvement, designed to suit the prosecution case, submits the learned counsel. Learned Senior Counsel took us through the evidence tendered by PW3 and PW17 to point out the inconsistency between the two versions.

6. As regards the evidence of PW3, learned Senior Counsel submitted that his very presence in the scene of

occurrence is not beyond the pale of doubt. Learned counsel pointed out that the question whether the incident was visible from the place where PW3 was standing has not been established by prosecution. Even according to PW3, PW1 (Narayanan), Suresh and Sreenu were standing in between the scene of occurrence and the place where PW3 was standing. The deposition of PW3 to the effect that he came running upon hearing the cry of the deceased would amplify that he was not present at the scene of occurrence and had not witnessed the assault to the deceased.

7. Learned Senior Counsel, thereafter, argued that the recovery of MO1 knife under Section 27 of the Indian Evidence Act is not proved by satisfactory evidence. MO1 knife was allegedly recovered as per Ext.P5 seizure mahazar. PW7, Rajan and PW9 Mathew, the attesters to Ext.P5, denied witnessing the seizure. That apart, MO1 knife was neither shown, nor identified by any of the witnesses, who were allegedly present at the scene of occurrence.

8. On the above premise, learned Senior Counsel contended that the prosecution had failed to establish the guilt of the accused and prays for reversal of the judgment, acquitting the appellant/accused.

9. Alternatively, learned Senior counsel submitted that the accused is entitled to exercise his right of private defence contemplated under Section 100, read with

Section 97 of the I.P.C, in case this Court finds that the accused had stabbed the deceased. He pointed out that deceased, who is the paternal uncle of the accused, was an able bodied man, with a height of 180 Cms and weight of 87 Kgs, as evidenced by Ext.P2 inquest report, Ext.P15 postmortem report and spoken to by PW17 (see page 6). Ext P9 series photographs of the deceased will also establish the fact that he was a well built man. As against the same, appellant/accused was a 19 year old boy, just moderately built, as could be seen from Ext.P6(a) photograph. Admittedly, the deceased came with a few persons (there exists dispute regarding the number of persons who accompanied him) to take the timber logs. Learned counsel would submit that MO4 stick, with which the deceased attempted an assault on the accused, was 133 cms long, with a girth of 5½ cms. It is a branch of a coffee tree; very strong and supple capable of being used fatally. Thus, according to learned Senior Counsel, there exists every circumstance for accused to apprehend an assault, which may either result in the death of the accused or grievous hurt, which compelled him to defend the assault against him. Learned Senior Counsel emphatically pointed out that there is only a single stab, that too with a knife (MO1) ordinarily used in the kitchen, which aspect would, unerringly, show that the appellant/accused had no intention, whatsoever, to commit the murder of his paternal uncle. Learned Senior Counsel

pleaded that, as a matter of fact, the appellant/accused was emotionally swayed, on seeing his mother being assaulted by the deceased. The above referred facts and circumstances would justify the conduct of the appellant/accused under his right of private defence as envisaged under Section 100 of the I.P.C. On legal premise, learned Senior Counsel submitted that a mere apprehension is enough to exercise one's right of private defence, in support of which contention, reliance was placed upon the judgment of the Hon'ble Supreme Court in **Darshan Singh v. State of Punjab and Another, [2010 KHC 4032].**

10. At any rate, in the absence of the requisite *mens rea*, the conviction under Section 302 of the Code is totally unsustainable is the final submission of the learned Senior Counsel for appellant/accused.

11. *Per contra*, the various points raised by the appellant/accused were refuted by the learned Public Prosecutor. Learned Public Prosecutor pointed out that the evidence tendered by PW3 and PW17 are quite convincing. As regards the guilt of the appellant/ accused, the judgment impugned cannot be faulted for placing intrinsic reliance upon the said witnesses to convict the accused. Learned Public Prosecutor would submit that no infirmity can be attached to the evidence tendered by PW17, only for the reason that he was made a witness pursuant to further investigation conducted vide

order in Crl.MP No.281/2015, so long as his version inspires confidence in the mind of the court. He also submitted that there is no evidence to show that MO4 stick is very strong, capable of inflicting a fatal injury.

12. As regards the right of private defence, learned Public Prosecutor submitted that the same was not canvassed before the Sessions Court and therefore, it is impermissible in law to raise such a defence, which is essentially rooted on facts, at the appellate stage. Secondly, the learned Public Prosecutor submitted that the fact situation in the instant crime was never as grave as to create a serious apprehension of death or grievous hurt in the mind of the appellant/accused, so as to exercise his right of private defence. The factual scenario would not justify a reasonable apprehension of an assault resulting in the death or grievous injury of the accused. Thirdly, the learned Public Prosecutor submitted that, if at all, the accused was entitled to the right of private defence, he had exceeded its legal limits by stabbing the deceased with a dangerous weapon like MO1 knife, which led to his death. The force exerted was not proportionate to the alleged danger/threat, if any. Fourthly, the learned Public Prosecutor submitted that the accused came armed with MO1 knife kept at his waist, which would surely point to his premeditation to commit the crime, even assuming that the

same was done out of grave and sudden provocation, emanating from the assault to his mother. He would conclude that the judgment impugned suffers no infirmity and the same is liable to be sustained in law.

13. Having referred to the arguments addressed by the learned counsel appearing on both sides, we will now address the core issue as to whether the prosecution had established the guilt of the accused beyond the pale of reasonable doubt. The prosecution, essentially, relies upon the evidence tendered by two eye witnesses, PW3 and PW17. It requires to be noticed at once that when the above Sessions Case was scheduled for trial, Criminal M.P.No.281/2015 was filed by the widow of the deceased seeking further investigation under Section 173(8) of Cr.P.C, and the same was allowed. Resultantly, the crime was investigated further by PW25. PW17 has been cited as a witness only in the final report submitted pursuant to further investigation. We will discuss the veracity of the evidence tendered by PW17 later.

14. PW3 deposed that on 3.1.2010 at about 2 p.m., he reached the *Tharavadu* house of the deceased, where the accused and his parents were residing. PW1, Suresh, Shaji, PW17 and one Janardhanan, along with 2-3 others, were also there and they went to take certain timber logs kept in the *Tharavadu* house of the accused. PW3 deposed that he heard some verbal altercation from the *Tharavad* and, when the same increased, he went near the house,

whereupon he saw the deceased pushing down the mother of the accused, who was sitting on the top of the timber logs. Seeing this, the accused came out and pushed the deceased and he fell down. The deceased got up, took MO4 stick and attempted to assault the accused, whereupon, the accused took MO1 knife from his waist and stabbed the deceased on his chest. PW3 took the deceased up to the road, after which, he was taken to the hospital in a jeep. He was referred to the Medical College Hospital, where he was declared dead.

15. In cross examination, it is brought out that PW3 was standing at a distance from the place of occurrence, and that PW1 Narayanan, Suresh and Sreenu were standing in between the place where PW3 was standing and the place of occurrence. Thus, according to the learned counsel, the place of occurrence is not visible to PW3, so as to witness the incident. Another inconsistency brought out is that in the former statement given by PW3, it is not stated that he saw the accused coming out from his house to the scene of occurrence. Finally, it is submitted that PW3 had not seen the incident, since he deposed in cross that Shaji, PW1, Suresh and Sreenu came running upon hearing the cry of the deceased, seeing which, PW3 also rushed to the spot.

16. Having bestowed our attention to the arguments touching the veracity of the evidence tendered by PW3, we find no contradiction worth the name, which would affect

the core of the prosecution case. Ext.P1 FIS would confirm the presence of PW3 at the scene of occurrence. Regarding the contention with respect to the visibility aspect, from the place where PW3 was standing, we cannot endorse the suggestion made by the learned counsel for the accused that the place of occurrence was not fully visible. As a matter of fact, nothing is seen elicited in cross examination in that direction. Merely because PW1, Suresh and Sreenu were standing at some place in between the place where PW3 was standing and the place of occurrence, it does not automatically follow that the place of occurrence was not visible to PW3. Such a suggestion is even not seen put to the witness during cross examination. The actual distance between the place where PW3 stood and the precise scene of occurrence is not elicited in cross examination, without which, it is not possible to infer that the place of occurrence was not visible to PW3, particularly when PW3 categorically deposed in chief examination that he saw the accused stabbing the deceased.

17. It is further argued that since it is stated by PW3 that he only saw the deceased lying stabbed, he would not have witnessed the incident. This contention also, in our opinion, cannot be accepted. The deposition of PW3 in this regard should have, in all probability, been given in answer to a leading question put by the cross examining Counsel, as permitted by law. It may be true

that upon hearing the cry, the witnesses, including PW1 and PW3, would have rushed to the specific place where the deceased was lying stabbed, but the same would not mean that the incident was not visible from the place where the witnesses were standing. PW3 has already deposed in chief examination that initially he was standing slightly away and when the sounds of verbal altercation increased, he went near the house. This aspect is not seen challenged in cross examination. Therefore, an answer which has been given in cross examination as stated above to a leading question cannot *ipsofacto* lead to the conclusion that PW3 has not seen the incident, but only came running to the spot, after the deceased fell down pursuant to the stab. We, therefore, conclude that the evidence tendered by PW3 is fully convincing as regards the fact that PW3 witnessed the incident, where accused stabbed the deceased.

18. This Court will now address the evidence tendered by PW17. PW17 deposed in chief examination that at the relevant time he used to engage himself in the job of loading timber and that he went to the Tharavadu house of the deceased on 3.1.2010 at about 2 p.m. Janardhanan, Shaji, Suresh, PW1 and PW3 were also there. They went to take timber logs for the deceased from his *Tharavadu* house. There, he saw the mother of the accused sitting over the timber log and there was a wordy altercation between herself and deceased. The deceased pushed down

the mother of the accused. Seeing this, the accused came and pushed the deceased, whereupon, he fell down. The deceased got up with a stick and attempted to assault the accused. Then, the accused took a knife from his waist and stabbed the deceased on his chest. They took the deceased to the Hospital at Kuttiyadi first and, thereafter, to the Medical College Hospital, where he was declared dead.

19. We are not in a position to reckon PW17 as a credible witness and to act upon his oral evidence. Firstly, we take stock of the fact that the presence of PW17 is not referred to in any document relied on by the prosecution or spoken to by any witness before the court, except PW3. To elaborate, it is noteworthy that there is no reference in Ext.P1 FIS about the presence of PW17. Albeit turning hostile to the prosecution, PW1 spoke about the presence of PW3 and one Suresh at the scene of occurrence, whereas, the name of PW17 is conspicuously absent. PW3 spoke about the presence of PW17 James in his chief examination, but it is brought out in cross examination that the presence of James is not referred to in his former statement given to the investigating officer. In the factual setting referred to above, this omission, amounting to contradiction, would impact the prosecution case adversely.

20. Coupled with the above reasons, we take stock of the fact that PW17 was not cited as a witness in the

original final report preferred by PW24. It was pursuant to the further investigation conducted as per order dated 13.11.2015 in Crl.MP No.281/2015 that PW17 was cited as an additional witness. The circumstances would not permit us to eschew in toto the allegation that PW17 is a planted witness, introduced in the further investigation to suit the prosecution case. We also reckon the fact that PW17 surfaces for the first time after 2015 (the order in Crl.MP No.281/2015 is dated 13.11.2015), in respect of a crime which took place on 3.1.2010.

21. In addition to the circumstances referred to above, there exist inherent inconsistency in the evidence tendered by PW17, as elicited in cross examination. PW17 would state that his statement was taken by the Police firstly after two days from the incident and then, after six months. In respect of the first interrogation, PW17 would maintain that the Police had not recorded his version. In respect of the second, PW17 deposed that the same was recorded and read over to him. However, no such statement is available on record. Instead, what is available on record is the former statement of PW17 along with the additional charge sheet, which is indisputably recorded after 2015. Again, PW17 would state in cross examination that he was questioned by the Police on two occasions referred above, which version would not account for his former statement recorded after 2015.

22. For the reasons aforesaid, we cannot place any reliance upon the evidence tendered by PW17.

23. However, it is important to analyse the evidence tendered by PW1, though he turned hostile to the prosecution before the court. PW1 would, at the first instance, deny that he had witnessed the incident leading to the death of the deceased. However, he specifically owned Ext.P1 FIS given by him before the Police by stating that Ext.P1 contains the statements given by him and that the same is true. He would state that it may be true, if he had given a statement to the effect that on 3.1.2010, the deceased was stabbed by the accused and that he came to report the same. He specifically confirmed his presence at the place of occurrence, along with the deceased, Suresh and PW3. He would refer to the specific purpose of their visit, namely, to take timber logs for the deceased. PW1 would state in the examination in chief that the mother of the accused obstructed the deceased taking the timber logs and that she climbed on the timber logs and sat there. PW1 specifically deposed that he saw the deceased pushing the mother of the accused and that there was a heated verbal exchange by and between them. As regards the rest of the prosecution case, to the effect that the accused stabbed the deceased, PW1 would disown his former statement, as also, the prosecution case. He would state that he had not seen any incident, where the accused had stabbed the deceased

causing his death. It is curious to note that the above aspects spoken to by PW1 in favour of the prosecution, even when he turned hostile, was not subjected to any cross examination. Thus, the fact that the deceased went to the house of the accused to take timber logs, that PW1 and PW3 have accompanied him and were present at the place of occurrence, that the mother of the accused obstructed the timber logs being taken by the deceased, that she climbed and sat on the top of the timber logs, that the deceased pushed her down and that there was a heated verbal exchange between them, stood proved through Ext.P1, despite his turning hostile. The law is settled that the evidence tendered by a hostile witness is not liable to be eschewed in toto. Instead, that part of his evidence which is found to be credible and trustworthy can be taken stock of and relied upon, more so when such part of the evidence is corroborated by the evidence tendered by other witnesses. [See in this regard the judgments of the Hon'ble Supreme Court in **Radha Mohan Singh v. State of U.P. [AIR 2006 SC 951]** and **Jodhraj Singh v. State of Rajasthan [2007 Crl.L.J. 2942 (SC)]**.

24. We would therefore conclude on the strength of the evidence tendered by PW3 and PW1 (to the extent it supports the prosecution) that the prosecution had proved beyond the pale of any reasonable doubt that the accused stabbed the deceased, which caused his death. This conclusion is amply supported by the evidence let in by

PW20, the Doctor who conducted autopsy and issued Ext.P15 postmortem report, to the effect that injury No.2 (stab injury) could be caused by MO1 knife.

25. For the sake of completion, we would also discuss the dying declaration alleged to have been made by the deceased to PW5 (Binu), as also, the recovery of MO1 knife under Section 27 of the Indian Evidence Act.

26. Dying Declaration:-

PW5 is the brother-in-law of the deceased. He was not present at the place of occurrence and he joined the vehicle, in which the deceased was carried to the hospital, at a place called *Thottilppalam*. PW5 deposed that the deceased told him that the accused stabbed him, which amounts to a dying declaration under Section 32 of the Evidence Act, according to the prosecution.

27. We are not persuaded to believe the dying declaration for the following reasons:

(a) Firstly, we note that the making of dying declaration is not spoken to by any other witness, despite the fact that there were other persons present in the jeep in which the deceased was carried to the hospital.

(b) The alleged dying declaration is not spoken to by PW5 when he gave statement at the time of the inquest, as could be seen from Ext.P2 inquest report.

(c) Finally, we are not satisfied of the physical and mental capacity of the deceased to make a dying

declaration. The incident leading to the death of the deceased commenced after 2 p.m, as brought out in evidence. The quarrel between the mother of the accused and the deceased took some time. After being stabbed, the deceased remained at the scene of occurrence for quite some time, whereafter only, he was carried to the hospital. The deceased reached the hospital at 3.05 pm, as per the time recorded in Ext.P14 wound certificate and he was unconscious then. Having regard to the time factor as we note above, it is difficult to believe that the deceased had the physical and mental capacity to make such a dying declaration while he was being carried to the hospital. It is imperative that the person should not only be conscious but should also be in a fit condition to make a dying declaration, which requirement is not satisfied in the given facts.

28. Therefore, we reject the prosecution evidence under Section 32 of the Evidence Act.

29. Recovery under Section 27:-

The same is the situation with respect to the recovery of MO1 knife pursuant to an alleged disclosure made by the accused under Section 27 of the Evidence Act. Firstly, we find that both the witnesses to Ext.P5 recovery mahazer, PW7 and PW9, have turned hostile to the prosecution by stating that they have not witnessed the recovery of MO1 knife. It is wholly unsafe to act upon a recovery under Section 27 depending on the sole testimony

of the Investigating Officer. The Investigating Officer, PW21, who effected the alleged recovery, has not spoken of the presence of the witnesses to Ext.P5 mahazar, when he gave evidence in the court. Secondly, MO1 knife was neither shown to, nor identified by any of the eye witnesses. We have to caution ourselves that the evidence in the form of recovery under Section 27 of the Evidence Act is a weapon in the armoury of the investigating agency, often misused, and such evidence can be taken stock of and relied upon only when clinching evidence is adduced as regards its requirements. We shall also remind ourselves that Section 27 is only an exception to the general rule under Section 25 of the Evidence Act and, therefore, liable to be analysed and appreciated strictly. Therefore, we repel the evidence regarding recovery of MO1 knife under Section 27 of the Evidence Act.

30. These findings regarding the perpetration of the death of the deceased at the hands of the accused would take us to the next question, in fact, the more important question as canvassed by the learned Senior Counsel, i.e. the right of private defence under the general exceptions coming in Chapter IV of the Penal Code.

31. <u>Right of private defence</u>:-

Sections 96 to 106 of the I.P.C. deal with the right of private defence. Section 96 declares that nothing is an offence which is done in the exercise of the right of

private defence. Section 97 specifically speaks of the right of private defence of the body and property of the accused, as also, others. Section 98 depicts the right of private defence against the act of a person of unsound mind. Section 99 delineates the acts against which there is no right of private defence, as also, the extent to which the right can be exercised. Section 100 deals with the right of private defence, which may extend to causing the death of the assailant, which is circumscribed by seven descriptions stipulated in the Section, of which we are concerned with the first two in the given facts. Section 101 deals with the right of private defence, which may extend to causing any harm other than death. Section 102 prescribes the commencement and continuance of the right of private defence of the body. Sections 103 to 105 deal with the right of private defence as against property. Section 106 spells out the right of private defence against a deadly assault, when there is a risk of harm to an innocent person.

32. In **Lord Macaulay's report**, the purpose behind the concept of private defence is seen explained, that is to say, to except from the operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In Note B, P-19 of **Lord Macaulay's report**, it is stated thus:

> "We are of opinion, that all the evil, which is likely to arise from the abuse of that right, is far less serious than the evil which would arise

> from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits."

33. The genesis of this right is seen depicted in the celebrated treatise on I.P.C. by Ratanlal and Dhirajlal [33rd Edition, 2016], thus:

> "**2. Right of private defence : Genesis**.- This right of private defence envisaged in Sections 96 to 106 I.P.C. is based on the instinct of self preservation. The instinct of self preservation is indomitable in a human being and this instinct has been recognized as a lawful defence in the laws of all civilized countries. It has been so recognized in Sections 96 to 106 of the Penal Code. If the danger to the body or property is there to a citizen, he need not flee away. He is entitled to hold his ground and strike back in defence. But he can do so within the limits prescribed by the aforesaid sections of the Penal Code. The gist of these sections, when read together, is that the apprehension of danger to life and property must be real and well-founded and the harm inflicted on the assailant should not be more than necessary demanded by a given situation. The apprehension must be imminent. It is the imminence of the danger-the urgency of the situation that is material. Whether the apprehension was real or not, is always a question of fact depending upon the circumstances and the background in which the incident had taken place. In evaluating the circumstances and background, one should place himself in the position of the accused and to assess how he would have reacted in that given situation and in face of that particular apprehension of danger. The situation should be viewed with the stand point of the accused and not with the spectacles of a cool by stander."

34. In order to protect himself from attack, as also to act in defence of others, one may inflict violence upon another without committing a crime, if no more force is used than is reasonable to repel the attack. The person about to be attacked need not have to wait for his assailant to strike the first blow or fire the first shot. Circumstances may justify a pre-emptive strike [See in this regard, **Backwford v. Queen (1988) 1 AC 130 PC per LORD GRIFFITHS at p.144**]. However, there is no lawful authority or reasonable excuse for carrying an offensive weapon in a public place for the purpose of self defence, unless there is an imminent particular threat affecting the particular circumstances in which the weapon was carried [**Evans v. Hughes, (1972) 3 All ER 412**].

35. In **Corpus Juris Secondum, Vol.57, p.107**, the doctrine justifying the right of private defence is contemplated thus:

> "The need of self preservation is rooted in the doctrine of necessity and it is the law of necessity to which a party may have recourse under certain situations to prevent greater personal injury which he may apprehend. Instantaneous defensive action means a degree of necessity. In other words, self defence is entirely a rule of necessity. Therefore, the right of self defence is based on necessity and without such necessity the right to resort thereto does not exist."

36. In the **Introduction to Criminal Law** by **CROSS & JONES, 9th Edn., Art 18.13, p.382**, the topic is dealt with as follows:

> "As with self-defence and prevention of crime we are concerned here with situations in which the accused is faced with a choice between two courses, either to allow some harm to occur to him, to another or to property, or to prevent that harm by committing that would otherwise be an offence, and he chooses the second course thereby averting a greater evil. The difference between this situation on the one hand and self-defence and the prevention of crime on the other is that the harm averted in this situation is not itself criminal and the person against whom, or against whose property, the otherwise criminal conduct is committed is an innocent party."

37. In **R. v. Rose** [**(1854) 15 Cox 540 (Oxford Assizes)**], the right of private defence was recognized in favour of an accused, who shot dead his father. The father was abusing and going to cut the throat of his mother. The verdict of not guilty was delivered as accused had, according to available evidence, acted without vindictive feeling towards his father and he had reasonable grounds for belief that his mother's life was in imminent danger and the fatal shot which he fired was absolutely necessary for protection of her life.

38. In **Munshi Ram v. Delhi Administration [AIR 1968 SC 702]**, the Hon'ble Supreme Court held that the right of private defence is recognized in all free, civilized and

democratic societies within certain reasonable limits and that the citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression; nor are they expected, by use of force, to right the wrongs done to them or to punish the wrongdoer for commission of offences. The right of private defence serves a social purpose and there is nothing more degrading to the human spirit than to run away in case of peril.

39. The Hon'ble Supreme Court cautioned in **Munney Khan v. State of M.P. [AIR 1971 SC 1491]** that the right of private defence is essentially a defensive right circumscribed by the statute, available only when the circumstances clearly justify it. It was held that the right should not be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. This right is available against an offence and, therefore, where the act is done in exercise of the right of private defence, such act cannot give rise to any right of private defence in favour of the aggressor in return.

40. In **Pleading, Evidence and Practice in Criminal Cases [(41st Edn.) p-1040, para 17-59] by ARCHBOLD**, it is explained that the doctrine of necessity implies that an act, which would otherwise be a crime, may, in some cases, be executed if the defendant can show that (i) it

was done only in order to avoid the consequences, which could not otherwise be avoided and which, if then had followed, would have inflicted upon him, or upon otherwise whom he was bound to protect, inevitable and irreparable evil; (ii) that no more was done than was reasonably necessary for that purpose, and (iii) that evil inflicted by it was not disproportionate to the evil avoided.

41. On the question whether the right of private defence is to be pleaded, the Hon'ble Supreme Court held in **Hafiz** v. **State of U.P. [(2005) 12 SCC 599]** that such right need not be specifically taken and the requirements of law is satisfied, if such a case is seen made out on the basis of the materials on record. As regards the nature of the burden of proof, it was held by the Hon'ble Supreme Court in **Krishnan v. State of Tamilnadu [(2006) 11 SCC 304]** that burden on the accused is not as onerous as that which lies on the prosecution. The accused can discharge his burden by establishing preponderance of probabilities.

42. The rule as to the right of private defence has been stated by **Russel on Crime (11th Edn., Vol.1, p.491)** thus:

> "....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack

> where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable".

In **Robert B. Brown v. United States of America, 1921 (256) US 335,** it is observed that a person in fear of his life in not expected to modulate his defence step by step or tier by tier. **Justice Holmes** in the aforementioned case aptly observed "detached reflection cannot be demanded in the presence of an uplifted knife". This dictum was adopted and followed by Indian Courts in a catena of cases.

43. In **Puran Singh and others v. The State of Punjab [1975(4) SCC 518],** the Hon'ble Supreme Court observed that right of private defence can be exercised in the following circumstances:

> "i. There is no sufficient time for recourse to the public authorities.
> ii. There must be a reasonable apprehension of death or grievous hurt to the person or danger to the property concerned.
> iii. More harm than necessary should not have been caused."

44. In **James Martin v. State of Kerala [2004 (2) SCC 203],** this Court again reiterated the principle that the accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

45. In **Mahabir Choudhary v. State of Bihar [1996 (5) SCC 107],** the Honourable Supreme Court observed that right to private defence cannot be used to kill the wrongdoer, unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue, in which case that person would have full measure of right to private defence including killing.

46. In **Darshan Singh v. State of Punjab and Ors [2010 (2) SCC 333],** the Honourable Supreme Court enumerated the principles of private defence thus:

> "(i) Self preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.
>
> (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self creation.
>
> (iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.
>
> (iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co – terminus with the duration of such apprehension.

> (v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.
> (vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.
> (vii) It is well settled that even if the accused does not plead self defence, it is open to consider such a plea if he same arises from the material on record.
> (viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.
> (ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.
> (x) A person who is in imminent and reasonable danger of losing his life or limb may in existence of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

47. Having scanned the niceties of this specie of defence, we need to juxtapose the facts of the case with the legal requirements culled out above, to find whether the accused was entitled to a right of private defence and if yes, whether he had exceeded the legal limits of the same. Inasmuch as the result of the crime is the death of the deceased, right of private defence can fall under Section 100 of the Penal Code, where the right of private defence can extend to causing death of the assailant. Section 100, insofar as it is applicable to the facts of the given case, is extracted hereunder:-

> "**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 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 of such assault;
>
> *Secondly*.-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
>
> xxx xxx xxx"

It is important to note that the requirements under Section 100 are in addition to the restrictions mentioned in Section 99, that is to say, the right should not extend to inflicting more harm than it is necessary to inflict for the purpose of defence.

48. For a correct appreciation of the right of private defence, let us juxtapose the mitigating circumstances in the facts at hand, with the aggravated ones.

	Mitigating circumstances		***Aggravating circumstances***
1	The circumstances established are capable of generating a reasonable apprehension of an assault by the deceased in the mind of	1	The accused was carrying MO1 knife with him when he came out seeing the assault on his mother, which may point to his premeditation to commit a

	the accused, leave alone the question whether death or grievous hurt will be the result of such apprehended assault.		grievous offence.
2	The deceased was a well built man, with a height of 180 Cms and weight of 87 Kgs, whereas the accused was a 19 year old boy who was just moderately built.	2	It is seriously at doubt whether the factual matrix admits of a reasonable apprehension of causing death or grievous hurt to the accused, as a consequence of the apprehended assault. The fact that the deceased is the father's brother of the accused would negate such apprehension of death or grievous hurt.
3	The reaction of the accused in pushing down the deceased cannot be treated as an aggression, since he was responding to an assault on his mother, which instinct, having regard to the common course of human conduct, is quite natural.	3	The deceased was not carrying any lethal weapon.
4	The accused had inflicted only a single stab injury on the deceased.	4	The accused stabbed the deceased on a vital part of his body, namely at his chest, which proved fatal.

49. Now we will examine in detail the effect of the aggravating circumstances, since the same is, *prima facie*, capable of tilting the balance, in our estimation.

50. Carrying MO1 knife – possibilities and legal implications:-

It is important to note that the accused was carrying MO1 knife when he came to repel the aggression of the deceased. It is not as if the accused took MO1 knife when he saw the deceased taking MO4 stick. Instead, the accused came to the spot armed with the knife, for which no lawful authority or reasonable excuse could be traced. [See **Evans v. Hughes** *(supra)*].

51. Let us now analyse the theoretical possibilities of carrying such a knife, for, we are not privileged to know the real intention of the accused in carrying MO1 knife. It is pertinent to note that the accused had not offered any explanation in this regard in his statement under Section 313 Cr.P.C.; nor did he canvass a right of private defence therein.

52. One possibility, which emanates from the facts is that the accused was carrying a knife only by way of abundant caution for self preservation, if he has to face a serious attack from the deceased. Here, we take into account the difference with regard to the physique of the accused and the deceased. We also reckon the financial transaction between the family of the accused and the deceased, as spoken to by PW8 and PW18, the mother and wife respectively of the deceased, pointing to a fear component in the mind of the accused that his able bodied

uncle (deceased) will remove the timber logs by force. The other possibility is that the accused had a premeditation to attack the deceased or to inflict upon him an injury by using MO1 knife. We prefer to keep both possibilities open for the time being.

53. <u>The deceased was not carrying any lethal weapon</u>:-

We note that the deceased was not carrying any lethal weapon. There is nothing to indicate that the deceased was apprehending a quarrel or an obstruction in taking timber from the house of the accused. He came to the spot with all preparations to take and remove the timber, which is established by the presence of PW1, PW3 and others. As per the case established in evidence, the deceased took MO4 stick from the scene of occurrence, only when he was pushed down by the accused. It is pertinent to note that MO4 stick was not brought by the deceased. No satisfactory evidence is forthcoming to show that MO4 stick is a dangerous or lethal weapon, except that it has a length of 133 cms. and girth of 5 ½ cms. It was argued by the learned Senior Counsel for the appellant/accused that MO4 stick, being the branch of a coffee tree, is very strong, capable of inflicting a fatal injury, but, we are not assisted with any supporting material in this regard.

54. Close relationship between the deceased and the accused:-

There is no quarrel with regard to the fact that the deceased is the father's brother of the accused. Except that he is an able bodied man, there is no evidence, whatsoever, before us to indicate that the deceased was a person having criminal propensities or antecedents. The evidence adduced by PW8, the mother of the deceased, would show that the deceased had extended financial help to the father of the accused on a previous occasion. PW18, the wife of the deceased would support the said version.

55. The cumulative effect of these two circumstances, that is to say, (1) the deceased was not carrying any lethal or dangerous weapon; (2) the deceased is a very close relative of the accused, would persuade us to hold that the facts and circumstances do not admit of any reasonable apprehension of *'death'* or *'grievous* hurt' to the accused, even though the apprehension of an assault simplicitor is quite justified. Therefore, we are of the considered opinion that the so called right of private defence claimed to have been exercised by the accused is not justified in law and his conduct is squarely in the teeth of the dictum laid down in **Mahabir Choudhary** *(supra).*

56. *Au contraire,* even if it is assumed that the accused had a right of private defence, it becomes imperative on us to find that the accused had exceeded the legally permissible limits of that right. Section 99 of the Penal Code postulates that the right of private defence shall, in no case, extend to inflict more harm than it is necessary for the purpose of defence. Can the use of a weapon, like MO1 knife, and its application to a vital part of the body of the deceased (chest), with such force so as to cause a fatal incised penetrating wound involving heart, be justified in law? Can it be said that the accused, in the exercise of his right of private defence, had inflicted only such harm as is necessary for the purpose of defence? Even when this Court is fully conscious of the binding precedents to the effect that the force applied by a person exercising the right of private defence cannot be gauged in golden scales, still, we are unable to persuade ourselves to hold that the accused had acted only within the legally permissible contours of the right.

57. In the light of the above discussion, we negate the right of private defence claimed by the accused.

58. The above finding on the right of private defence of the accused takes us to the last limb of the argument canvassed by the learned Senior Counsel appearing for the appellant/accused, that is to say, the conviction under Section 302 of the I.P.C. is neither warranted nor

sustainable. According to the learned Senior Counsel, the accused had neither any *'intention'* nor *'knowledge'* of a very high degree, so as to find him guilty under Section 300 of the I.P.C. Even then, the accused is entitled to the protection afforded by Explanation 1 to Section 300. At best, the offence under Section 299, punishable under Section 304 of the I.P.C. is attracted, is the submission of the learned Senior Counsel.

59. Murder v. Culpable Homicide:-

The fact that the appellant/accused caused the death of the deceased has been established. Both the offence of culpable homicide and murder involve killing of a person. What distinguishes these two offences is the presence of a special mens rea, which consists of four mental attitudes stated in Section 300 of the I.P.C., the presence of which would aggravate a lesser offence to a larger one. As held by the Honourable Supreme Court, in the classic case of **State of AP v. Rayavarapu Punnayya [AIR 1977 SC 45]**, 'culpable homicide' is genus and 'murder' its specie. All murder is culpable homicide, but not vice-versa. Generally speaking, culpable homicide, sans special characteristics of murder, is culpable homicide not amounting to murder. The Penal Code practically recognises three degrees of culpable homicide. The first is culpable homicide of the first degree, which is the gravest form of the offence, which is defined in Section 300 as murder. The second is culpable homicide of the

second degree, punishable under the I part of Section 304. The third is culpable homicide of the third degree, which is the lowest type of culpable homicide, punishable under Part II of Section 304.

60. In the context of appreciating the real but fine distinction between the offences under Sections 299 and 300 of the I.P.C., it is necessary to refer more to **R. Punnayya** (*supra*), a decision having assumed the status of *locus classicus.* By virtue of a comparative table indicating the ingredients of '*intention*' and *'knowledge'* as envisaged in two offences, the Hon'ble Supreme Court held in **R. Punnayya** (*supra*) that clause (b) of Section 299 corresponds to clauses (2) and (3) of Section 300. On clause (2) of Section 300, it was pointed out that the '*intention to cause death*' is not an essential requirement. The intention of causing bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of clause (2). Whereas, no such knowledge on the part of the offender is postulated by clause (b) of Section 299. The Hon'ble Supreme Court went on to point out that in clause (3) of Section 300, instead of the words '*likely to cause death*' occurring in the corresponding clause (b) of Section 299, the words '*sufficient in the ordinary course of nature*' have been used. The Hon'ble Supreme Court held that the difference between clause (b) of Section 299 and

clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. It is the degree of probability of death, which determines whether the culpable homicide is the gravest, medium or lowest degree. The word *'likely'* in clause (b) of Section 299 conveys the sense of *'probable'* as distinguished from a mere possibility. The words '*bodily injury …..... sufficient in the ordinary course of nature to cause death*' mean that death will be the 'most probable' result of the injury, having regard to the ordinary course of nature. So far as clause (3) of Section 300 is concerned, the Hon'ble Supreme Court pointed out that it is not necessary that the offender intended to cause death, so long as death ensues from the intentional bodily injury or injury sufficient to cause death in the ordinary course of nature. As regards clause (c) of Section 299 and clause (4) of Section 300, it was held that both require knowledge of the probability of the act causing death. However, in clause (4) of Section 300, such knowledge of the offender as to the probability of the death of a person or persons in general – as distinguished from a particular person or persons – being caused from his imminent dangerous act, approximates to a practical certainty.

61. One important factor explaining the subtle distinction between the two offences has been culled out by a Division Bench of this Court, speaking through one

among us [**K. Vinod Chandran,J.**], in **Balu v. State of Kerala [2021 (4) KLJ 131]**. The relevant findings are extracted here below:-

> "**8.** …..... As we noticed, Fourthly of Sec.300 does not encompass the entire gamut of the third limb of Sec.299. What is covered by Fourthly of Sec.300 is the knowledge that the act committed would be so imminently dangerous, that in all probability death would be caused or such bodily injury would be inflicted, as is likely to cause death, and the act is also done without any excuse for incurring the risk of causing death or such injury. This is the most heightened knowledge that the perpetrator has and <u>there is a lot more with lessor ramifications, which still remains under the third limb of Sec.299; which would be punishable under the second limb of Sec.304. …....</u>"
>
> (underlined for emphasis)

62. What should be the approach of a court of law, which is confronted with a question whether the offence is 'murder' or 'culpable homicide not amounting to murder' has been succinctly stated in paragraph 21 of **R. Punnayya** (*supra*) as thus:

> '21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act

> by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.'

63. In the light of the above authoritative pronouncements, this Court will refer to the factual matrix to find out whether the offence in question is one under Section 299, as distinguishable from Section 300 of the I.P.C. The inquiry contemplated at the first stage of **R. Punnayya** (*supra*) is not difficult in the light of the facts already discussed. There cannot be any doubt that the accused caused the death of the deceased by stabbing.

This takes us to the second stage to ascertain whether the act of the accused amounts to 'culpable homicide'. Section 299 of the I.P.C. defines 'culpable homicide' thus:

> '299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. '

Section 299 speaks of three different states of mind, (1) about the intention of causing death, (2) about the intention of causing such bodily injury as is likely to cause death and (3) about the knowledge that the offender is likely by such act to cause death. This Court would straightaway answer the question in the affirmative, since by any yardstick, it cannot be held that the accused had no knowledge, at least, that he, by the act of stabbing the deceased by using a knife, is likely to cause his death. We may not be misunderstood as avoiding consideration the first two limbs of the offence under Section 299, which pertains to the 'intention' component. We only relegate the same to be considered in detail while considering the question whether the offence found under Section 299 qualifies to be one under Section 300 of I.P.C. In arriving at this conclusion with respect to the offence under Section 299, this Court takes note that

nobody has got a contention that the act constituting the offence is either accidental or misdirected.

64. We have now reached the stage of considering the operation of Section 300 of the I.P.C, which is extracted hereunder:

> '300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—
> *2ndly*.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—
> *3rdly.—If* it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—
> *4thly.—If* the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
> Exception 1 : xxx xxx xxx
> Exception 2 : xxx xxx xxx
> Exception 3 : xxx xxx xxx
> Exception 4 : xxx xxx xxx
> Exception 5 : xxx xxx xxx'

As could be seen from the above, Section 300 contains four clauses and it needs to be ascertained whether the act of the accused would answer at least one among the four clauses referred to above. We will first ascertain

whether the act of the accused fits into clause 1 or *2ndly* above. In both clauses, the emphasis is on the *'intention'* of the accused, the former dealing with the specific intention to cause death and the latter, with the intention of causing such bodily injury, which to the knowledge to the offender is likely to cause death.

65. Recapitulating the facts, it could be seen that the accused was not initially present in the very scene of occurrence, when a spat between the deceased and the mother of the accused was going on. He came to the scene of occurrence seeing his mother being assaulted by the deceased. Of course, he was carrying MO1 knife when he came to the specific scene of occurrence, in respect of which we have already discussed the possibility of carrying the knife *ex abundanti cautela* for self-preservation. It is important to pinpoint that the accused did not employ the knife at the initial stage of his act to repel the aggression made by the deceased to the mother of the accused. He simply caught hold of the deceased and pushed him down. It is only when the deceased got up with MO4 stick and attempted to assault the accused that he stabbed the deceased, quite impulsively, as we prefer to put it. The following facts stand established:

1. There was no previous enmity between the accused and the deceased.

2. The accused did not participate in the wordy altercation between the deceased and his mother, but chose to distance himself as a mute spectator.
3. The accused stepped into the scene of occurrence influenced by the sudden provocation on seeing his mother being assaulted by the deceased.
4. The accused inflicted a single stab injury on on the deceased.

From the above, it could be seen that the accused was pre-eminently concerned about repelling the aggression made by the deceased, sans any intention, whatsoever, to cause the death of the accused. We may reiterate that the right of private defence of the accused was essentially rejected for the reason that the circumstances does not justify the apprehension of an assault, which may result in the death or grievous injury to the accused. Nevertheless, we found that the accused was well within his limits to apprehend an assault simplicitor. We, therefore, conclude that the accused had no intention, whatsoever, either to cause the death of the deceased, or to cause such bodily injury which is likely to cause the death of the deceased.

66. Now, let us consider clause *3rdly* to Section 300 of the I.P.C. Any discussion on clause *3rdly* will be incomplete unless **Virsa Singh v. State of Punjab [AIR 1958 SC 465]**, another decision, conceived as *locus*

classicus, is referred to. The Hon'ble Supreme Court speaking through **Vivian Bose, J.** explained the meaning and scope of clause *3rdly* thus:

> 'The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.'

It is therefore clear that so far as clause *3rdly* is concerned, the accused need not have an intention of causing a bodily injury, which is capable of causing death. Instead, he need only possess the intention of causing a bodily injury; supplanted by a further condition that such bodily injury intended is sufficient in the ordinary course of nature to cause death. Two questions surface; (1) whether the stab injury caused on the deceased is one which is specifically intended by the

accused, and (2) whether such injury is sufficient in the ordinary course of nature to cause the death of the deceased. As regards the second question, there may not be any confusion in view of the evidence tendered by PW20, the Doctor who conducted the postmortem of the deceased. Injury No.2 to Ext.P15 postmortem certificate is the fatal one. As regards the opinion as to cause of death, PW20 deposed that the deceased died due to stab injury to chest, involving heart.

67. Therefore, the crucial issue, insofar as clause *3rdly* is concerned, is whether the accused bore a specific intention to cause the particular bodily injury on the deceased. Here again, the reasons which weighed with us, while considering clauses 1 and 2 to Section 300, would enure to the benefit of accused. It is substantiated in evidence that there was a scuffle between the accused and the deceased. The accused caught hold of the deceased and pushed him down to the ground. The deceased got up with MO4 stick and attempted to assault the accused. We have already found that the accused had no intention to cause the death of the deceased. It was in a heighted moment of excitement, with the primary object of warding off the attack and in exercise of his right of private defence in good faith, that the accused stabbed the deceased on his chest. The fact that we negated the right of private defence on legal premises cannot mitigate the good faith of the

accused in this regard. In the given circumstances, it will be very difficult to hold that the situs of injury was designedly chosen by the accused for the purpose of attack. Nor could have the injury inflicted on the deceased been intended by the accused. The facts at hand have the trappings of Exceptions 1 and 4 to Section 300 of the I.P.C. There was a grave and sudden provocation. The fight between the accused and the deceased was a sudden one, pursuant to a quarrel between the deceased and the mother of the accused. The accused, in all probability, should have been in the heat of ungovernable passion. Circumstances do exist to deduce that the accused acted instantaneously and impulsively. Therefore, it is not reasonable to conclude that the accused had the intention to cause the particular injury, at the particular situs on the body of the accused. Therefore, even when we are satisfied with the second limb of clause *3rdly* that the injury inflicted was sufficient in the ordinary course of nature to cause death, we find that clause *3rdly* is not attracted for want of satisfaction of the first limb.

68. What remains is clause '*4thly*' to Section 300 of the I.P.C. It is important in this context to note that the last limb of Section 299 and clause *4thly* to Section 300 of the I.P.C., both, speak of the requisite knowledge of the probability of the act causing death. In

R. Punnayya (*supra*), the Hon'ble Supreme Court held thus as regards clause *4thly* of Section 300:

> 'It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general - as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.'

69. As held in **Khudu & Others v. Emperor [AIR 1939 Sind 57]**, a case under clause 4 of Section 300 is very unusual and illustration (d) is a sufficient indication to what class of cases it is intended to apply. Clause (4) of Section 300 of the I.P.C *vis-a-vis* the last limb of Section 299 of the Penal Code has presented considerable difficulty to courts in its practicable application to concrete cases. The range of probability in the two clauses relates to causing of death, but in one it is comparatively not so strong as in the other. Although one may know that the act or illegal omission is so dangerous that it is likely to cause death, still it is not murder, even if death was caused thereby, if the doer had no knowledge that in all probabilities it would

cause death. [See in this regard **State of Kerala v. Mani (1992 Crl.LJ 1682 (Ker)**].

70. In the context of the factual settings adverted to above, can it be said that the accused knew that his act is so imminently dangerous, that it must, in all probability, cause the death or such bodily injury as is likely to cause death of the deceased? It is important to note that probability spoken of in clause *4thly* is of the highest degree. The acts should be so '*imminently dangerous*' and the probability is almost prescribed to be of an exacting certainty to cause death or such bodily injury as is likely to cause death, as distinguished from a mere knowledge of a chance or possibility that such act may result in the death of the deceased. This Court, therefore, concludes that the requirements of clause *4thly* is also not answered in the given facts.

71. It was seriously canvassed by the learned counsel for the appellant that even if the conduct of the accused amounts to an offence under Section 300, the same will squarely fall under Exception 1 of the Section. Though we find considerable force in the argument raised by the learned counsel, we do not venture to discuss the exceptions to Section 300, inasmuch as we find that the requirements of clauses (1) to (4) of Section 300, or for the matter, any of them are not satisfied. [See in this regard **State of Kerala v. Daniel Nadar Vedakannu Nadar (1971 KLJ 182)**].

72. Our view is fortified by the following precedents on the point:

(1) **Hem Raj v. The State (Delhi Administration) [AIR 1990 SC 2252]** is a case where the accused inflicted a single stab injury on the chest of the deceased. The Hon'ble Supreme Court held that occurrence happened on a spur of moment and in a fit of passion upon a sudden quarrel. There was no pre-meditation to cause the injury. Nor was there any intention to cause death. However, the knowledge of the accused can be inferred and the offence punishable was under Part-II of Section 304 and not under Section 302 of the I.P.C.

(2) **Tholan v. State of Tamilnadu [1984 Crl.LJ 478]** is again a case involving a single stab on the chest of the deceased. It was held that in the absence of premeditation and motive and the incident occurring at the spur of the moment resulting in the death of the victim, Section 304 Part-II of the I.P.C. is attracted. It was taken note that the meeting of the accused with the victim was accidental and he could never intend to cause that particular injury which proved fatal.

(3) In **Mavila Thamban Nambiar v. State of Kerala [AIR 1997 SC 687],** the Hon'ble Supreme Court held as under:

> ".....After giving our careful thought to the nature of offence, we are of the considered view that the offence of the appellant would more appropriately fall under Section 304, Part II of

> the Indian Penal Code. The appellant had given one blow with a pair of scissors on the vital part of the body of Madhavan and, therefore, it would be reasonable to infer that he (appellant) had knowledge that any injury with the pair of scissors on the vital part would cause death though he may not have intended to commit the murder. We accordingly alter the conviction of the appellant from 302, IPC to one under Section 304, Part II of the I.P.C."

(4) In **Yogendra Morarji v. State of Gujarat [AIR 1980 SC 660]**, again the Hon'ble Supreme Court found that the accused had exceeded the limits of his right of private defence, but found the same as a circumstance, which can be taken into account in mitigation of the sentence. Accordingly, the conviction of the accused under Section 304, Part-II of the Penal Code was upheld.

(5) In **Raman v. State of Kerala [2008 Crl.LJ 4695 (SC)],** the accused during a scuffle stabbed the deceased with a knife, but the evidence showed that it was the deceased who first pulled collar of the appellant's shirt and tried to press his neck. It is in order to escape from the clutches of the deceased, the accused had inflicted a knife blow. It was held that although the accused had exceeded his right of self defence, he is only liable to be convicted under Section 304 of the I.P.C.

(6) In **Madan v. State of MP [2008 Crl.LJ 3950 (SC)]**, the accused assaulted the deceased by *lathi* and evidence

showed that they had exercised the right of private defence to some extent, to protect and defend their properties, but thereafter exceeded their right of defence. Conviction was ordered under Section 304, after setting aside the conviction under Section 302 of the I.P.C.

(7) In **Gokul Parashram Patil v. State of Maharashtra [AIR 1981 SC 1441],** a solitary blow was given by the accused on the left clavicle. The accused did not know that superior venacava would be cut. It was held that although the injury was sufficient in the ordinary course of nature to cause the death, it was not intended by the accused, thus answering Section 304 and not Section 302 of the I.P.C.

(8) In **Parichhat and Others v. State of M.P. [1972 CRL.L.J. 322]**, the Hon'ble Supreme Court held that the accused exceeded the limits of his right of private defence and caused the death of the deceased, however, without any premeditation and any intention for doing more harm; with the result, the judgment of conviction entered into by the High Court under Section 304, Part-I was upheld. The same is the situation in **Rafiq v. State of Maharashtra [AIR 1979 SC 1179]**, where the Hon'ble Supreme Court found that the accused had exceeded the limits of his right of private defence and he was, accordingly, found guilty of the offence under Part-I of Section 304 of the I.P.C.

(9) In **Laxman Sahu v. State of Orissa [AIR 1988 SC 83]**, the right of private defence claimed by the accused was negated, but his conviction under Section 304, Part I of the I.P.C. was upheld by the Hon'ble Supreme Court.

(10) In **Kasam Abdulla Hafiz v. State of Maharashtra [(1998) 1 SCC 526]**, the Hon'ble Supreme Court repelled the right of private defence claimed by the accused, but upheld the conviction under Section 304, Part-I of the I.P.C. Again, in **Sekar v. State representative by Inspector of Police, Tamilnadu [AIR 2002 SC 3667]**, the Hon'ble Supreme Court found that the accused exceeded the limit of his right of private defence, but convicted him under Section 304, Part-I of the I.P.C.

73. <u>Offence u/s. 299 :-</u>

We have already found that the objectionable act fails to answer the requirements of Section 300 of the I.P.C. As regards the requirements of the first and second limbs of Section 299, the same again speaks of 'intention', which we have already discounted in the attendant facts. However, the third limb of Section 299 speaks of knowledge on the part of the accused that he is likely to cause the death of the deceased by the act in question. We are of the considered opinion that the conduct of the accused squarely answers the requirements of the third limb of Section 299 of the I.P.C. Having employed a weapon like MO1 knife, the knowledge that a stab by using such a weapon is likely to cause death, albeit without

any intention, should necessarily be attributed to the accused, which renders him liable for punishment under Part II of Section 304 of the I.P.C.

74. In the light of the said finding, we modify the judgment of conviction made by the learned Sessions Judge for offence under Section 302 to the one under Section 304, Part-II of the I.P.C.

75. What remains is the appropriate sentence to be awarded. The punishment prescribed for the offence under Section 304, Part-II is imprisonment of either description for a term which may extend to 10 years, or with fine, or with both. It could thus be seen that the penal statute affords considerable discretion to the courts by providing a wide range of punishment, that is imprisonment for any term, which may extend to 10 years, or merely with a fine alone, or with both.

76. The Hon'ble Supreme Court in **Sushil Ansal v. State through Central Bureau of Investigation [(2014) 6 SCC 173]**, held thus:

> "**217**. We need to remind ourselves that award of punishment in a case where guilt of the accused is proved, is as serious and important a matter as the forensic process of reasoning by which the presumption of innocence is rebutted and the accused pronounced guilty. Like the former the latter also needs to be guided by sound logic uninfluenced by any emotional or impulsive outburst or misplaced sympathy that more often than not manifests itself in the form of a

> sentence that is either much too heavy and oppressive or wholly incommensurate considering the gravity of the offence committed. The courts have to avoid such extremities in their approach especially where there is no legislative compulsion or statutory prescription in the form of a minimum sentence for an offence. The courts do well to avoid the Shylockian heartlessness in demanding the proverbial pound of flesh. Justice tempered by mercy is what the courts of law administer even to the most hardened criminals. A spine-chilling sentence may be the cry of those who have suffered the crime or its aftermath but the courts are duty-bound to hold the scales of justice even by examining the adequacy of punishment in each case having regard to the peculiar facts in which the offence was committed and the demands of justice by retribution within permissible limits. Absence of a uniform sentencing policy may often make any such endeavour difficult but the courts do, as they ought to, whatever is fair and reasonable, despite the difficulties, besetting that exercise notwithstanding."

77. In **Deo Narain Mandal v. State of U.P. [(2004) 7 SCC 257]**, the Hon'ble Supreme Court held thus about the discretion in awarding sentence:

> "8..... It will have to be exercised taking into consideration the gravity of offence, the manner in which it is committed, the age, the sex of the accused, in other words, the sentence to be awarded will have to be considered in the background of the facts of each case and the court while doing so should bear in mind the principle of proportionality.

> The sentence awarded should be neither excessively harsh nor ridiculously low."

78. In the context of an appropriate sentence as well, we are bound to take into account the extenuating circumstances, which we have already taken note of while discussing the right of private defence. We choose to reiterate that there was a grave and sudden provocation by way of an assault to the mother of the accused, that there was only a single stab injury, that the accused never intended to cause the death of the deceased, who is none other than his paternal uncle, that he had accompanied the deceased to the hospital, and that the accused was only of the tender age of 19 years at the time of commission of the crime. We find that special circumstances exist mitigating the gravity of the offence, which appeals to our judicial conscience and discretion to show clemency to the accused in the matter of sentence.

79. We are therefore persuaded to limit the substantive punishment to the period of imprisonment already undergone by the accused, which is more than 3 years as submitted by the learned Senior Counsel for the appellant, simultaneous with enhancing the fine component to Rs.1,00,000/- (Rupees one lakh only).

80. We conclude by allowing this Criminal Appeal in part. The judgment of conviction under Section 302 of the I.P.C. is set aside. Instead, the appellant/accused is

convicted for offence under Section 304, Part-II of the I.P.C. The substantive punishment is limited to the period of imprisonment already undergone by the accused. The accused shall remit a fine of Rs.1,00,000/- (Rupees one lakh only), which, if realised, is directed to be paid to the widow and children of the deceased. In case of default of payment of fine, the accused shall undergo simple imprisonment for a further period of one year.

Sd/-

K.VINOD CHANDRAN

JUDGE

Sd/-

C.JAYACHANDRAN

JUDGE

jg