HIGH COURT OF ALLAHABAD

Bench: Hon'ble Rahul Chaturvedi, J. and Hon'ble Ms. Nand Prabha Shukla, J.

Date of Decision: 22.05.2024

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. - 2531 of 2013

Dr. J.N. Mishra ...APPELLANT

VERSUS

State of U.P. ...RESPONDENT

Legislation:

Sections 302 of the Indian Penal Code (IPC)

Section 30 of the Arms Act, 1959

Section 374(2), 313 of the Code of Criminal Procedure (Cr.P.C.)

Subject: Criminal appeal against conviction and sentence under Section 302 IPC and Section 30 of the Arms Act, arising out of the alleged murder of the appellant's son-in-law, Sudhanshu. The appeal focuses on the right of private defence exercised by the appellant and his shadow-gunner.

Headnotes:

Criminal Law – Right of Private Defence – Criminal Appeal against conviction under Section 302 IPC and Section 30 of the Arms Act – Appeal allowed on grounds of reasonable apprehension of death – Incident occurred during a panchayat meeting to resolve familial disputes – Deceased son-in-law allegedly pointed a firearm at the appellant, leading the appellant's shadow-gunner to shoot in defense – Held that the appellant acted in exercise of the right of private defence – Trial Court's decision reversed – Appellant acquitted and set at liberty. [Paras 24-36]

Delayed FIR – Analysis – Noted delay of 5:30 hours in lodging FIR despite proximity of police station – Explanation provided by informant deemed unnatural and against normal human behavior – FIR timing questioned in context of police patrolling during Holi. [Paras 11-13]

Private Defence – Applicability – Examined whether appellant exceeded limits of private defence – Considered testimonies and circumstances, including appellant's subjective satisfaction and immediate threat perception – Found that appellant's actions were proportionate to threat faced – Cited Supreme Court precedents on private defence. [Paras 14-34]

Decision – Acquittal of Appellant – Judgment and order of the Additional Sessions Judge, Court No.2, Shahjahanpur, set aside – Appellant acquitted of charges under Section 302 IPC and Section 30 of the Arms Act – Appellant's bail bond discharged. [Paras 35-37]

Referred Cases:

- Periyasamy Vs. State (2024) SCC Online SC 314
- Darshan Singh Vs. State of Punjab (2010) 2 SCC 333
- James Martin Vs. State of Kerala (2004) SCC (Cri) 487
- Ex. CT. Mahadev Vs. The Direction General, B.S.F and ors. (2022) LiveLaw (SC) 551
- Dharam Vs. State of Haryana (2007) 15 SCC 241
- Jangir Singh Vs. State of Punjab Criminal Appeal No.2499 of 2009
- Gopal and another Vs. State of Rajasthan (2013) 2 SCC 188
- V. Subramani & Anr. Vs. State of T.N. (2005) 10 SCC 358

Representing Advocates:

Govind Saran Hajela for Appellant

R.P. Singh Parihar, Rajesh Shankar Srivastava for Respondent

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Hon'ble Rahul Chaturvedi,J.

Hon'ble Ms. Nand Prabha Shukla,J.

[1] Heard Sri Govind Saran Hajela, learned counsel for the appellant, Sri R.P. Singh Parihar and Sri Sudhir Singh Chauhan, learned counsels for the complainant and Sri Satyendra Tiwari, learned A.G.A. for the State at length and perused the records.

[2] Paper book is ready and learned counsels for the contesting parties are ready to argue the case finally on the merit of the case. We are in the receipt of citations supplied to the Court by the respective counsels in support of their contentions.

[3] By means of the present appeal under section 374(2) Cr.P.C., the appellant is assailing the legality and validity of the judgment and order dated

07.05.2013 passed by learned Additional Sessions Judge, Court No.2, Shahjahanpur while deciding S.T. No.457 of 2010 arising out of case crime no.155 of 2010, under section 302 IPC and Section 30 of the Arms Act, police station-Jalalabad, District-Shahjahanpur thereafter convicting and sentencing the appellant under section 302 IPC with life imprisonment and fine of Rs.50,000/-, under section 30 of the Arms Act for six months rigorous imprisonment and a fine of Rs.2,000/- and in default of fine, one month additional imprisonment was awarded to the appellant.

FACTS OF THE CASE :

[4] Before coming to the merit of the case, it is relevant to give a bird's eye view to the factual aspect of the issue. As surfaced from the FIR, (I) informant is Ashok Kumar Dubey s/o Ramswaroop, for the incident of 02.03.2010 at 18:00 hours in the evening, the FIR came into existence on the same day at 23:30 hours. The distance from the place of occurrence to the police station is hardly three furlong (603.50 mtr.) ;(ii) the FIR was lodged against the appellant Dr. J.N. Mishra ; Seema(wife of the appellant), Nidhi(daughter of the appellant and wife of the deceased) and one unknown person ; (iii) As per the allegations made in the FIR, informant's son Sudhanshu (25 years) got married with daughter of the appellant Nidhi. As per the allegation, the appellant wanted to make Sudhanshu as his 'ghar-jamai' to look after his nursing home but as per the social norms and traditions, Sudhanshu declined this offer of his father-in-law and on this score, there was deep rooted discord and differences between them; (iv) In order to resolve this tangle, 'panchayat' was convened on 02.03.2010 around six in the evening at the clinic of the appellant Dr. J.N. Mishra at Jalalabad whereby the informant, his wife Pushpa and his son-Sudhanshu went to the clinic where the appellant, his wife-Seema and his daughter-Nidhi and one unknown person were present. All of a sudden during heated altercation, the host/accused-apellant started hurling filthy abuses and thereafter on the exhortation made by Nidhi, wife of the deceased, the appellant and unknown person pumped fires upon his son-in-law Sudhanshu, who died on the spot. Anyhow, the informant and his wife Pushpa could save his life and lodged the present FIR at 11:30 p.m. after the delay of 5.30 hrs.

[5] After lodging of the FIR, Investigating Officer of the case has taken dead body of Sudhanshu(deceased) for the post mortem and after having thorough investigation into the matter, submitted the report under section 173(2) Cr.P.C. against the appellant Dr. J.N. Mishra alone, dropping the name of other co-

accused persons of the FIR. The said charge sheet was submitted under section 302 IPC and Section 30 of the Arms Act only against accused/appellant. Consequently, learned Magistrate took the cognizance of the offences and being cognizable offence, committed to the court of sessions for trial.

[6] Learned trial Court on 26.07.2010 has framed the charges against the appellant under section 302 IPC and since, there is recovery of licensee rifle of 315 bore having no.93 AB 1985 and therefore, Section 30 of the Arms Act was added among the charges which were duly explained to the appellant to which the appellant denied from the charges and insisted to be tried.

[7] The prosecution, in order to establish the case, produced seven witnesses of fact as well as formal witnesses, out of which Ashok Kumar Dwivedi as PW-1, Pushpa@Pushpalata as PW-2, Nawab as PW-3, Dr. Suresh Kumar Vashisth as PW-4, S.I. Vinay Pal Singh as PW-5, S.S.I. Surendra Singh as PW-6, and Constable 962 C.P. Jakir Hussain as PW-7 were produced. Besides above, 16 different documents were also produced by the prosecution during trial which were duly proved and were exhibited during trial.

[8] Soon after the prosecution witnesses were over, statements under section 313 Cr.P.C. was recorded of the accused in which he has denied every allegations of the FIR and the story of the prosecution and has submitted that, he has been falsely implicated in the present case. He further submitted that he has got no son and the deceased-Sudhanshu, who was his son-in-law, was insisting to transfer his newly raised clinic in his name and when appellant denied to do so, then in order to eliminate the appellant, Sudhanshu pointed his tamancha over his father-in-law(appellant). In order to defend the accused-appellant, the gunner of the appellant fired upon Sudhanshu, killing his own son-in-law. He further stated that Sudhanshu was his son-in-law and was unemployed. He was having all sorts of bad habits including drinking. Taking into account the holistic view of the matter and strained relationship between them, accused appellant was apprehensive about his own safety and that is why he engaged a private shadow-gunner whose name was Harpal@Babba. On the date of incident, it was next day of Holi and his son-in-law came to the clinic of the appellant and took out his tamancha, extended threat to eliminate the accused/appellant. Sensing imminent danger and threat upon the life of his master, his shadow gunner fired from his rifle eliminating Sudhanshu. At the relevant time, neither wife of the appellant nor

his daughter Nidhi as alleged in the FIR was allegedly present over the place of occurrence. Sudhanshu came to him all alone. After the incident, police personally informed the parent of the deceased, then they came to Jalalabad and lodged the FIR. It was further revealed that his shadow gunner Harpal@Babba died naturally during trial. In order to establish the case, defence has also produced one Ram Nath Pandey as DW-1.

[9] We have requested learned counsel for the appellant to provide his written arguments and counsel for the appellant has provided date and events, moot points for the determination of the present appeal and citations on which they want to rely upon. Learned counsel for the appellant, during the course of arguments, have hammered his submissions upon two following points :-

(i) That the FIR was delayed by 5:30 hours, meaning thereby for the incident of 6 p.m. in the evening, the FIR was lodged at 11:30 p.m. where the police station is hardly three furlong (603.50 mtr) away from the place of occurrence and there is no justifiable reason coming forward to explain this inordinate delay.

(ii) The alleged killing of son-in-law Sudhanshu was in exercise of power of right of self-defence and the deceased was carrying tamancha in his hand after extending threats to the appellant, which has created sufficient amount of apprehension in the mind of the appellant regarding his life and the fire was opened in exercise of power to right of self-defence.

The question as to whether while exercising his right of self-defence, the accused/appellant or his shadow-gunner have crossed his limits while exercising his powers?

[10] Before appreciating and analysing the judgment impugned by the learned trial Court, it is mandatory to overview the testimonies of the witnesses of fact, so as to appreciate the controversy involved in its correct perspective.

DELAYED FIR :

[11] It is admitted by PW-1 and PW-2 in their respective testimonies, that for the incident of 6 p.m. on 02.03.2010, the FIR was registered at 23:30 hours where the police station is hardly three Furlong (603.50 mtr.) away from the place of occurrence. Learned trial Court, while dealing with this issue at Page-16 of the judgment, has given undue advantage and importance to the informant that after the incident, he was literally frightened and shaken that he could not lodge the FIR within reasonable time. Though, the police station is not very far from the place of occurrence. But learned trial Court has given

undue weightage to the explanation given by the informant that after the incident, instead of rushing to either doctor or police station after the incident, he has taken his wife Pushpa to bus station and sent her to Farrukhabad with the instruction to inform his family members about alleged shootout and only after few persons came from Farrukhabad to Jagdishpur, then only he/informant got the FIR lodged at 11:30 p.m. through Om Kiran, the scribe.

[12] At page-2 of the cross-examination, informant stated that he was deeply frightened to see the murder of his son right in front of his eyes. He stated that in this firing transaction, he and his wife has not obtained a single scratch over them. After the incident, he came to his son, turned his dead body and thereafter, taken her wife to bus station to get her boarded in the bus and started waiting for the persons to come from Farrukhabad. He stated that "घटना के बाद मैंने अपनी पत्नी को फर्रुखाबाद की बस में बैठा दिया था उस बस का नंबर मुझे याद नहीं है उस यात्रा की टिकट मेरी पत्नी ने ली थी मैंने नहीं ली थी" This seems to be most unnatural conduct on the part of the parent, whose son was allegedly murdered by the accused-appellant/his body guard right in front of their eyes, as claimed in the FIR.

[13] From the aforesaid analysis, it is clear that the present FIR was registered after unexplained delay of 5:30 hours where the police station is hardly three furlong (603.50 mtr.) from the place of occurrence as stressed by learned counsel for the appellant. Yet another connected aspect of the issue is that, 02.03.2010 was the next day of Holi and it was six in the evening, Surendra Singh, S.S.I. was S.H.O. police station-Jalalabad on the date of incident. However, he was put before the court as PW-6 and was cross-examined, where he has stated that "घटना वाला दिन होली का दूसरा दिन था गश्त व् पिकेट चल रही थी थाने से घटना स्थल की दूरी करीब तीन फ़र्लांग की है मृतक सुधांशु का मोबाइल नंबर मैंने लिखा था घटना की सूचना मुझे 15 मिनट के अंदर नहीं मिली थी बल्कि वादी ने आकर दी थी मेरे थाने जलालाबाद में वायरलेस है कोतवाली फतेहगढ़ में वायरलेस है"

On conjoint reading of both the statements, it is clear that it was the next day of Holi and incident is at 6 p.m in the evening where it is claimed that the police party was on the picket to maintain public peace and order. This serious incident has taken place within a range of three furlong (603.50 mtr.) from the place of occurrence and the police party remain oblivious of this serious shoot out in the evening at 6 and it is the informant who has given this information after 5:30 hours, which itself castes serious question mark upon the way and manner this shoot out have taken place and thereafter FIR was lodged after

inordinate delay. The conduct of the informant, as mentioned in their cross-examination that after shoot out, he has only turned the dead body of his son and rushed to the bus station to sent his wife to Farrukhabad instead of going to the doctor or to the police station. All this aspect of the issue are most unnatural and against normal human behaviour.

RIGHT OF PRIVATE DEFENCE :

[14] The second aspect of the issue is as to whether this shoot out was as a result of exercising the right of private defence by the accused appellant and the injuries sustained by the deceased-Sudhanshu ? After the death of Sudhanshu, deady body was sent by the police for autopsy. Dr. Suresh Kumar Vashisth, PW-4 who conducted the autopsy on 03.03.2010 at 1:30 p.m. has submitted that (i) there was a gun shot injury of 0.9 cm x 0.8 cm x embedded under the chest below the right shoulder of 15 cm. The margins were inverted and blackening and tattooing were present, (ii) gun shot wound of exit of 1.5 cm x 1 cm which corresponded to the injury no.1 from the back side of the shoulder of 15 cm below. Both the injuries were through and through, (iii) wound of entry of 1 cm x 0.8 cm x inside the stomach which is embedded inside the right buttock. Around both the wound, there was blackening and scotching, suggestive of the fact that fire over the deceased was from the close proximity, say about 2-3 meters. As a result of second gun shot injury, deceased's right pelvic girdle was found fractured. The brain was paled, third rib was fractured, both the lobs of lungs were scattered. The heart was empty and within plural cavity, there was two ltrs. of blood present and the cause of injury was excessive blood loss. The doctor also took out one metallic bullet inside the stomach which was sealed and handed over to the police personally.

[15] At this juncture, learned counsel for the appellant has submitted that the recovery of the metallic bullet attains significance. Since, there is no resistance of bone inside the stomach, full metallic bullet was recovered but when the said bullet was sent to the F.S.L. examination, the F.S.L. examination report in its report dated 04.09.2010 the expert opined that the said bullet was engraved with the sign 'E B-1' when compared with rifle no.AB-93-1985. It cannot be compared as peculiar feature of the bullet recovered from inside the body were completely missing. It is also mentioned in the F.S.L. report that the alleged recovered bullet 'E B-1' was in mutilated and incomplete one. It is shocking that the doctor has handed over the complete bullet in a sealed cover but the Investigating Officer of the case is

sending bullet which is incomplete and mutilated one. Thus, under the circumstances, the expert has expressed his inability to give any opinion with regard to the operation by that rifle. This is classic example which put grave question mark about the standard of investigation and the working of the police. This is a million dollar question and it is the police who has to give explanation for this deep rooted incompetence which has given benefit to the defence.

Exercise of right of private defence and its applicability in the present case

[16] Before coming to the aspect of the issue, it is imperative that as many as three named and one unknown person were made accused in the present case and the police after holding thorough investigation, have dropped the name of two named accused persons namely Ms. Seema and Nidhi and one unknown person from the charge sheet. It is admitted fact that, the deceased Sudhanshu got married with Nidhi and specific role has been attributed to her i.e. of exhortation to his father/accused. The appellant/accused has given deadly blow upon the deceased, who was her husband. PW-6, Surendra Singh, S.H.O, was entrusted with the investigation, asked his subordinate Shri Ram Lakhan Singh to assess the authenticity of this allegation against Nidhi Mishra as she was entrusted with positive role. Sri Ram Lakhan Singh went to Aligarh and after collecting sufficient material from various quarters, submitted that on the date and time of the incident, she was at Aligarh preparing for her B.A.M.S. examination from Aligarh University. Therefore, after being satisfied, the police has dropped the name of Nidhi Mishra from the charge sheet. It is stated that these non-charge sheeted named accused persons were never tried by the prosecution to summon them in exercise of power under section 319 Cr.P.C.

[17] Now, coming to the real issue which has resulted into this unfortunate incident. The informant Ashok Kumar Dubey has casted positive story that on the eve of convening ‘panchayat’ to resolve the deep rooted discord between his son and appellant/accused, after the exhortation made by Nidhi Mishra, his father/unknown person has given fire upon his own son-in-law. This was serious allegation given by the counter part of the appellant upon his own samdhi and daughter-in-law. Whereas PW-3, Nawab in his testimony, has changed the entire texture of the case. The interesting feature is that PW-3 has not been declared Hostile by the Court. In his testimony, PW-3, Nawab, in no uncertain terms, have revealed that on 03.03.2010 right in front of his eyes, the police has taken out one tamancha and 2-3 live cartridges and blood

soaked earth was also taken from the place of occurrence. PW-3 put a signature over the recovery of 315 bore tamancha and the cartridge by the police from the place of occurrence.

He further stated that he and the appellant enjoys the common wall in between two shops. At that relevant point of time, he came to the clinic of the appellant. Tamancha was loaded one and at the relevant time, neither the informant nor his wife Smt. Pushpa was present in the clinic. The accused appellant is having one Nursing home. The deceased often abused his own father-in-law on phone and was insisting to transfer the property(nursing home) in his name and this was the sole bone of contention between them. As soon as he came to the clinic, the deceased pointed out tamancha upon his father-in-law, the appellant. It is the body guard/gunner who has given first blow upon Sudhanshu(deceased) apprehending threat to his master/appellant and the second fire was given, when Sudhanshu again tried to eliminate his father-in-law by fixing his target. This testimony of Nawab assumes extreme importance as he is independent witness of the incident as prosecution witnesses. He stated in his cross-examination that :

“अभियुक्त जगदीश नारायण मिश्रा की दूकान मेरे पड़ोस में है |मैं घटना के समय अपनी दुकान पर था इस तमंचा में एक कारतूस लगा हुआ था |घटना के समय मृतक के पिता अशोक कुमार व माता श्रीमती पुष्पा दुकान पर मौजूद नहीं थे| मुल्ज़िम का नर्सिंग होम बरेली जलालाबाद रोड पर नया निर्मित है मृतक अभियुक्त से फ़ोन पर गली गलोच करता था व नर्सिंग होम वाली सम्पति व अन्य सम्पति अपने नाम हस्तानांतरण के लिए कहता था इसी बात का विवाद था | दूकान पर मुल्ज़िम के अंगरक्षक हरिपाल उर्फ़ बब्बा व दो तीन लोग मौजूद थे |अंगरक्षक ने ही मृतक सुधांशु पर फायर किया था |दूसरा फायर घूमकर सुधांशु ने फिर करना चाहा तो अंगरक्षक ने दूसरा फायर फिर सुधांशु पर किया |उस समय सीमा व निधि दूकान पर मौजूद नहीं थे"

[18] From the place of occurrence, the police has recovered one 315 bore country made pistol from the right hand of Sudhanshu(deceased) and two live cartridges. The natural query is that, if somebody is going to have ‘panchayat’ to resolve the tangle, why anybody would carry weapon with him? Moreover, when the son-in-law is going to meet his own father-in-law and why the father-in-law would kill his own son-in-law, making her daughter widow unless and until something very serious is expecting to occur for the life and security of father-in-law/appellant himself.

This issue has to be resolved from the testimonies of the various witnesses. There are two parallel stories (i) Father-in-law has eliminated his own son-in-

law on the exhortation made by her own daughter Nidhi Mishra as the deceased has declined the offer to become ghar-jamai. (I) There is shoot out between accused/appellant and the deceased son-in-law as he came to meet the accused-appellant with different design with weapon in his possession, to eliminate his own father-in-law for the sake of his property. Thus, Right of Private Defence is now claimed by the appellant-accused.

[19] Per contra, counter theory has been narrated by the accused/appellant that it is the son-in-law who became greedy and asking his father-in-law to transfer his entire property including clinic in his name which was declined by his father-in-law. On this score, there was a long drawn bad breath and differences between the father-in-law and son-in-law. Infuriated by this, son-in-law Sudhanshu came on the fateful day with tamancha of 315 bore and pointed on his own father-in-law which resulted into gunning down of his own son-in-law Sudhanshu in exercise of power of right to private defence by accused/appellant. The police has recovered the said tamancha and prepared its recovery memo. In the “Inquest report” too, there is reference of alleged tamancha of 315 bore and its specifications. Thus, it cannot be said that this tamancha was planted one. PW-3, Nawab in his testimony and thereafter formal witnesses have supported this angle of the case.

[20] Learned counsel for the appellant has strenuously argued that this unfortunate incident has taken place in exercise of power of right of private defence and has pointed out following relevant sections of IPC in connection with present case which reads thus :-

The private defence is defined in Section 96 of IPC which says nothing is offence which is done in exercise of right of private defence. Section 97 of IPC provides that right to private defence of the body and the property which reads thus :-

“97. Right of private defence of the body and of property.—

Every person has a right, subject to the restrictions contained in section 99, to defend—(First)— His own body, and the body of any other person, against any offence affecting the human body;(Secondly)— The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, rob-bery, mischief or criminal trespass.”

Section 100 of IPC provides that when the right of private defence of body extends of causing death. Section 100 of IPC is quoted hereinbelow :-

“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:

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

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

3. An assault with the intention of committing rape;

4. An assault with the intention of gratifying unnatural lust;

5. An assault with the intention of kidnapping or abducting;

6. An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

7. An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act."

Section 102 IPC is quoted hereinbelow :-

“The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed;

and it continues as long as such apprehension of danger to the body continues.”

[21] In addition to this, learned counsel for the appellant has relied upon the judgment of Hon’ble the Apex Court in the case of Periyasamy Vs. State reported in (2024) SCC Online SC 314. The Hon’ble Apex Court while dealing with the above aspect of the issue have referred the ‘Right of Private Defence’ in paragraph no.18 of the above judgment which is quoted hereinbelow :-

“The principle is best captured in the following words found in Russel on Crime, 11th Edition Vol.I

"… 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".

[22] Though, the Right of Private Defence is nowhere defined in the IPC. It would depend on the circumstances of each case that such right is available or not, is determined within the said boundaries only. No test in abstract can be laid down for determining whether the person legitimately acted in private defence. The law only provides that a person claiming such right bears the onus to prove the legitimacy of his action done in furtherance thereof and it is not the Court to presume the presence of such circumstance or the truth in such plea being taken.

[23] In another judgment in the case of Darshan Singh Vs. State of Punjab and another, reported in (2010) 2 Supreme Court Cases 333 Hon'ble the Apex Court has mentioned the following principles regarding Right of Private Defence :-

" 3. The following principles of right to private defence emerge :-

(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 selfcreation.

(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) Even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existenc-e-Of the right of private defence beyond reasonable doubt.

(ix) The IPC 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 exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

[24] Now moot question for determination are in two fold (I) whether action of assault on the part of accused appellant was in exercise of right of private defence ? (ii) Whether he has exceeded his limits in exercise of private defence by giving successive fires upon the deceased ?

[25] From the aforesaid postulates propounded by Hon'ble Apex Court, it is mere reasonable apprehension in the mind of the accused is sufficient to put a 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 Right of Private Defence. It is enough that if accused apprehends that such an offence is contemplated and it is every likely to be committed if Right of Private Defence is not exercised. The Right of Private Defence commences as soon as reasonable apprehension arises and it is co-terminus with the duration of such apprehension. It is unrealistic to expect a person under the assault to modulate his defence step by step with arithmetical exactitude. In this regard,

there is yet another judgment relied by learned counsel for the appellant that in the case of James Martin Vs. State of Kerala reported in 2004 Supreme Court Cases (Cri) 487 , paragraph no.18 of which is quoted hereinbelow :-

“Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.”

[26] In this regard, the conditions formulated in Darshan Singh’s case (supra) is of great importance. Similarly, in the case of James Martin (supra), it was observed by Hon’ble the Apex Court that, ‘situations have to be judged from the subjective point of view of the accused concerned in the surrounding, excitement and confusion of moment confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force then was necessary used in the prevailing circumstances on the spot, it would be inappropriate as held by the court to adopt test by detached objectivity which would be so natural in a court room, or that would seem absolutely necessary to a perfect cool bystander.

A person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

[27] Learned counsel for the appellant has drawn the attention of the Court to the recent judgment in the case of Ex. CT. Mahadev Vs. The Direction General, B.S.F and ors. Reported in 2022 LiveLaw (SC) 551 , paragraph no.21 of which is quoted hereinbelow :-

“21. To sum up, the right of private defence is necessarily a defensive right which is available only when the circumstances so justify it. The circumstances are those that have been elaborated in the IPC. Such a right would be available to the accused when he or his property is faced with a danger and there is little scope of the State machinery coming to his aid. At the same time, the courts must keep in mind that the extent of the violence used by the accused for defending himself or his property should be in proportion to the injury apprehended. This is not to say that a step to step analysis of the injury that was apprehended and the violence used is required to be undertaken by the Court; nor is it feasible to prescribe specific parameters for determining whether the steps taken by the accused to invoke private self-defence and the extent of force used by him was proper or not. The Court’s assessment would be guided by several circumstances including the position on the spot at the relevant point in time, the nature of apprehension in the mind of the accused, the kind of situation that the accused was seeking to ward off, the confusion created by the situation that had suddenly cropped up resulting the in knee jerk reaction of the accused, the nature of the overt acts of the party who had threatened the accused resulting in his resorting to immediate defensive action, etc. The underlying factor should be that such an act of private defence should have been done in good faith and without malice. “

Learned counsel for the appellant has further drawn the attention of the Court to the judgment of Hon’ble Apex Court in the case of Dharam Vs. State of Haryana reported in (2007) 15 SCC 241, paragraph no.61 of which is quoted hereinbelow :-

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

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

[28] Hammering his submissions on the above quoted observation by the Hon'ble Apex Court, Sri Hajela, learned counsel for the appellant underlines, that it is the human psyche at the spur of moment which reacts to ward of the danger and to save himself, which is basic human instinct. It cannot be weighed on any golden scale or with any mathematical precision. It differs from person to person, situation to situation and no steel jacket or airthematical formula could be propounded to meet out such a situation. At the time, the accused has to see how his life could be saved from such a grim situation, when his opponent has fixed his target towards him or trying to liquidate him from the close proximity. Anything could happen at any time. It is neither possible or prudent to laid down the abstract parameters which can be applied to determine as to what means or force could be used by person under calamity. He could flee away from the site or he became aggressor. Answer to such type of question depends upon the host of factors, like prevailing circumstance at the spot, his feeling at relevant time, the confusion and the excitement depending upon the nature of assault upon him etc. If we judge the action of appellant that, it is clear cut case of the prosecution that appellant has exceeded his limits while exercising his valuable right of private defence by giving successive fires upon the deceased, ensuring his death. But, if we examine the testimony of PW-3, Nawab, who in no uncertain terms states that the deceased even after receiving first gun shot upon his person again aimed at the appellant by his tamancha from a close proximity. This scenario could be well visualized and appreciated that the appellant in exercise of his right of private defence commences as soon as reasonable apprehension arises and co-terminus with that duration that reasonable apprehension lasts. There cannot be steel jacket formula that while exercising this right, only single shot is good enough. But, fact remains that this exercise of right of private defence can never be vindictive or malicious, as it would be repugnant to very concept of private defence.

[29] Under the circumstances, let us examine the facts of the present case and speculate the circumstances hypothetically in which the appellant/accused was placed. He was pitted against his own son-in-law/deceased with illegal tamancha in his hand and was standing right in front of him in the close proximity. There was heated altercation which had already taken place and both of them are against each other standing nearby. It could be anybody's call. The shadow/gunner has given first fire upon appellant causing serious injury over his vital part. The aggressor again turned and fixed the target over the accused person, the second shot was fired upon him causing his death, as it is clearly indicated in the deposition of PW-3, Nawab in his cross-examination, in which he stated that :

"दूकान पर मुल्ज़िम के अंगरक्षक हरिपाल उर्फ़ बब्बा व दो तीन लोग मौजूद थे |अंगरक्षक ने ही मृतक सुधांशु पर फायर किया था |दूसरा फायर घूमकर सुधांशु ने फिर करना चाहा तो अंगरक्षक ने दूसरा फायर फिर सुधांशु पर किया |उस समय सीमा व निधि दूकान पर मौजूद नहीं थे"

It is true that no fire was made by the deceased upon the appellant, but it has given rise to a serious apprehension in the mind of appellant/shadow gunner, that if no action is taken by them in next few seconds, it is just possible that deceased may kill the appellant. The decision has to be taken within spur of moment or rather fraction of seconds.

[30] It is almost settled by the various pronouncement by the Hon'ble Apex Court that the situation has to be judged from subjective satisfaction of the individual accused. No father-in-law would eliminate his own son-in-law making his own daughter widow, unless and until he is put under the serious and extra-ordinary peril in which his own survival is under immense threat and severe danger. If the deceased is carrying the tamancha in his hand, going for the alleged panchayat, this by itself is surprising that he was expecting something untoward may happen in which he may use the weapon. Exactly, the same thing happened, when he put his tamancha fixing the target upon his own father-in-law, then in that situation, it could be anybody's call. Even after having the first gun shot, he again turned up and fixed the target again giving more than reasonable apprehension to the accused, that again there is chance to be eliminated. Under these circumstances, second/successive shot was fired upon the deceased in order to save the appellant's life. Thus, by no stretch of imagination, it could be termed that second shot was

vindictive or driven by some malice. In fact, the accused appellant is now looser from both the sides. He might be killed by the deceased who is his son-in-law or even after killing the deceased, though, the appellant has saved himself, but has made his daughter widow as argued by Sri Hajela, learned counsel for the appellant.

[31] Learned A.G.A. as well as counsels for the informant submits that, this is nothing but a cold blooded murder by the accused/appellant, who brutally killed his own son-in-law by giving successive fires upon him to ensue his death. Assuming for the sake of argument that the deceased was carrying country made 315 bore tamancha in his hand, but not a single shot was fired by him. It is not the question of firing by the tamancha, but it has given sufficient apprehension in the mind of appellant, that he would be murdered, if he does not exercise his valuable right of private defence.

[32] Per contra, learned counsel for the complainant as well as learned A.G.A. have referred the judgment in the case of Jangir Singh Vs. State of Punjab in Criminal Appeal no.2499 of 2009 decided on 31.10.2018, paragraph no.12 of which is quoted hereinbelow :-

“The law on this aspect of causing disproportionate harm and exceeding right to private defence is amply clear. In cases of disproportionate harm leading to death of the aggressor, sentence under section 304 part-I is the appropriate sentence.”

[33] There is yet another judgment of Hon’ble Apex Court in the case of Gopal and another Vs. State of Rajasthan reported in (2013) 2 Supreme Court Cases 188, paragraph no.17 of which is quoted hereinbelow :-

“Regarding the plea of private defence, it is useful to refer a decision of this Court in V. Subramani & Anr. Vs. State of T.N. (2005) 10 SCC 358. The following principles and conclusion are relevant:

“11. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression “right of private defence”. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in

a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short “the Evidence Act”), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. (1968) 2 SCR 455, State of Gujarat v. Bai Fatima,(1975) 2 SCC 7, State of U.P. v. Mohd. Musheer Khan, (1977) 3 SCC 562, and Mohinder Pal Jolly v. State of Punjab,(1979) 3 SCC 30.) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P.,(1979) 2 SCC 648 runs as follows: (SCC p. 654, para 9) “It is true that the burden on an accused person to establish the plea of self-defence is not

as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence." 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."

[34] The accused appellant in his 313 Cr.P.C. statement, in his last reply stated that his son-in-law(deceased) came to his clinic and challenged him by putting under the threat of tamancha and his bodyguard fired upon him. The injured deceased even after having one gun shot injury again revived and turned and tried to fix his target then only the second fire was fired.

The DW-1, Sri Ram Nath Pandey in his testimony stated that he went to appellant's clinic to fetch medicines where there were few patients and the accused appellant along with his private body guard were present. His son-in-law came and started hurling filthy abuses. The deceased was interested in property(clinic) to transfer in his name. He further stated, :

"सुधांशु कोई फायर नहीं कर पाया था केवल ताना था डॉक्टर साहब के अंगरक्षक हरपाल उर्फ़ बब्बन ने सुधांशु के गोली मार दी सुधांशु को मैं पहले से जनता था की वह डॉक्टर साहब के दामाद है"

Learned counsels for the complainant underline that the deceased had only fixed his target but did not fire. I am unable to accept this argument of counsels for the informant. As mentioned above, it is subjective satisfaction of the accused as to how he cope with the situation. No mathematical formula could suffice the objective. It is the reasonable apprehension which counts.

[35] After hearing learned counsels for the contesting parties and the authorities cited by them, the Court has occasion to analyse the submissions and the legal pronouncement in this regard. As rightly pointed out by Hon'ble the Apex Court that there cannot be golden parameters or arithmetical formula to judge that the force used by the aggressor is excessive or beyond the limits. As mentioned, neither it is prudent nor desirable to lay down any abstract parameters to determine as to whether the means and force adopted by threatened person was proper or not ? The answer to this query depends upon the host of the factors aggressor's own psyche, his own temperament and behaviour, his own feeling at the relevant time, the confusion and the excitement depending upon the nature of assault upon him. The weapon

carried by the aggressor and he is in near proximity, all these factors has to be counted while deciding that the appellant has transgressed his limit of right of private defence or not. Whether he has any vindictive or malicious idea in eliminating the deceased ? As mentioned above, the inter se relationship between the appellant and deceased was quite delicate. The appellant's own life and the future life of his daughter was at stakes and spur of moment, he has to take the call. In this situation, he has chosen to save his life after, subjectively satisfying himself and thereafter decided to kill his own son-in-law. As rightly pointed out by Sri Hajela that the appellant is looser from both the sides and as such, we are of the opinion that the power and force used by the appellant while eliminating his son-in-law, is not excessive or beyond the limits and he has acted in exercising the right of private defence.

[36] Thus, from the aforesaid discussion, we are unable to accept the findings and the conclusion recorded by learned Additional Session Judge, Court No.2, Shahjahanpur in deciding the S.T. No.457 of 2010 arising out of case crime no.155 of 2010 under section 302 IPC and Section 30 of the Arms Act, police station-Jalalabad, District-Shahjahanpur convicting the appellant and sentencing for life imprisonment under section 302 IPC and fine of Rs.50,000/- and under section 30 of the Arms Act for six months rigorous imprisonment and a fine of Rs.2,000/-.

[37] The present appeal stands ALLOWED. The judgment and order dated 07.05.2013 passed by learned Additional Sessions Judge, Court No.2, Shahjahanpur in S.T. No.457 of 2010 arising out of case crime no.155 of 2010 is hereby set-aside. The appellant is on bail. He need not to surrender but his sureties are discharged and the appellant is set at liberty forthwith, if not wanted in any other case.