

NAGJI ODHAVJI KUMBHAR & ANR.

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v.

STATE OF GUJARAT

(Criminal Appeal No.880 of 2009)

APRIL 23, 2019

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**[SANJAY KISHAN KAUL AND HEMANT GUPTA, JJ.]**

*Penal Code, 1860:*

*ss. 302 and 324 r/w s. 34 – Prosecution under – Death of two persons and injuries to two – Injuries also received by the accused – Cross-case by the accused – Conviction by courts below – In appeal, plea taken that the accused acted in private defence and at the spur of the moment without pre-meditation – Held: There is no evidence that the deceased were armed with any weapon – In view of the evidence of injured witnesses that the accused were armed with spears and other weapons and since the deceased were not armed, right of private defence is not available to the accused – The act of the accused also cannot be said to be at the spur of the moment without pre-meditation – Therefore, they are also not entitled to alteration of conviction from s. 302 to s. 304 – Conviction u/s. 302 upheld.*

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**Dismissing the appeal, the Court**

**HELD:** 1. The prosecution has relied upon the statement of complainant PW-3 as also the statement of PW-4 who are injured witnesses. PW-2, the doctor has been examined to prove the injuries on prosecution witnesses. It is statement of PW 3 which led to lodging of First Information Report that the appellants who were 7 to 8 in number challenged the witnesses. The appellants were having spear, accused was having axe and others were having sticks. They attacked the deceased and both the injured witnesses with spears and axe. [Paras 12, 13][254-F-H]

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2. The appellants have lodged cross First Information Report. There is no evidence on the part of the appellants that the deceased were armed with any weapon in the first version, when they lodged report. The right of private defence is not

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- A available when the alleged assailants are unarmed. The right of private defence is to protect the person and the property. In such right, the person cannot cause more harm than what is necessary for the protection of the person and the property. What harm can be expected from the hands of the deceased when they were unarmed, whereas from the testimony of PW-3 and PW-4, the injured witnesses, the appellants were armed with spears and other weapons. The Post-Mortem report corroborates an oral testimony that both the deceased have received stab wounds. Therefore, the appellants cannot be said to have acted in the right of their private defence. Since the deceased were not armed,
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  - C therefore, the appellants are not entitled to the right of private defence. [Paras 15, 17][255-A-D; 256-A]

*Jangir Singh v. State of Punjab* 2018 (15) SCALE 88  
– distinguished.

- D 3. Since there are multiple wounds on the chest of the deceased, it cannot be said that the appellants have acted at the spur of the moment without pre-meditation and that the appellants have not taken any advantage or acted in a cruel or unusual manner. It is not a case of single injury which one can infer on account of sudden fight. Therefore, the appellants are not entitled to be convicted under Section 304 IPC as they have given multiple injuries on the vital parts of the deceased. The Trial Court as well as the High Court was perfectly justified in law in convicting and sentencing the appellants for the offence under Section 302 IPC. [Para 18][256-A-C]

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## **Case Law Reference**

2018 (15) SCALE 88 distinguished Para 7

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 880 of 2009.**

- G From the Judgment and Order dated 24.10.2008 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 234 of 1990.

Ravi Prakash Mehrotra, Ankit Agarwal, Ms. Deepti R. Mehrotra,  
Advs. for the Appellants.

Ms. Jesal Wahi (for Ms. Hemantika Wahi), Adv. for the  
H Respondent.

The Judgment of the Court was delivered by

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**HEMANT GUPTA, J.**

1. The challenge in the present appeal is to an order passed by the High Court of Gujarat at Ahmedabad on 24.10.2008 maintaining conviction for offences under Sections 302 and 324 of IPC against the appellants for causing death of Bhura Govind and Lakha Arjan.

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2. The prosecution case is that on 1<sup>st</sup> July 1987 at about 12 midnight in Village Prempara-Rampara, the appellants caused injuries to Bhura Govind and Lakha Arjan with spears etc and on account of grievous injuries inflicted, both of them died on the spot. The FIR was lodged at 7 AM on 2<sup>nd</sup> July 1987 and the appellants were arrested on 17<sup>th</sup> July 1987. The cause of occurrence is that the appellants were not giving right of way to the deceased. The complainant party had filed the civil suit in which injunction was granted in their favour. The appellants also lodged a cross case which is Sessions Case No. 97 of 1987.

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3. After completion of investigations, the appellants were made to stand trial. The appellants have been convicted for life for offence under Section 302 but no separate punishment was inflicted for the offence under Section 324 IPC.

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4. In the present appeal, the argument of learned counsel for the appellants is that the deceased and their accomplices, 9 in number, were the aggressors. The injuries have been inflicted on both the appellants. Such injuries have been proved by PW-10, Dr. Nikhil Kumar Buch who was posted at Civil Hospital, Junagarh at the relevant time. The appellants have remained in hospital from 02.07.1987 to 17.07.1987. The appellants have received grievous injuries, while protecting the possession of their land, thus, they have acted in their right of private defence.

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5. It is also argued in the alternative that the occurrence has taken place at the spur of the moment without any pre-meditation and that the appellants are not taken any advantage or acted in a cruel or unusual manner, therefore, the conviction of the appellants for the offences under Section 302 read with Section 34 IPC is not sustainable. In fact at best, an offence under Section 304 (Part II) can be said to have made out. The appellants have undergone more than 11 years of actual imprisonment, therefore, in the event the appellants are convicted for an offence under Section 304(Part II), they would be entitled to be released having

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- A completed the sentence which may be imposed as the maximum sentence is 10 years for an offence under Section 304(Part II).

6. The argument is based on the statement of PW-13, Murlidhar Vasu, the Investigating Officer. He deposed that the appellant No. 1 was lying at the spot and was bleeding. It is also argued that Vajibai, wife of appellant no. 1, has been examined as defence witness. She deposed that appellant no. 1 came home and informed her that 9 persons have assaulted both the appellants and it is she who telephoned the police about the occurrence. It is also argued that the cross case registered on the basis of complaint of the appellants was separately investigated and the trial conducted. Thus, the primary argument is that the occurrence having taken place at the spur of the moment, the conviction of the appellants for an offence under Section 302 IPC is not maintainable.

7. The learned counsel for the appellants relies upon the judgment of this Court in **Jangir Singh Vs. State of Punjab**<sup>1</sup> wherein the right of private defence was found to be valuable right and that this right should not be construed narrowly.

8. Before we consider the argument raised by learned counsel for the appellants, injuries received by appellant no. 1 (Ex.12), who was examined on 02.07.1987 at 5.15 AM by PW-10-Dr. Nikhil Kumar Buch, are as under:

- E “D/E (1) CLW on central part of head 2 1/2"X 1/2"X up to bone deep vertical.  
 (2) Incise wound on forearm back middle part 1"X 1/4"X up to muscle deep oblique.
- F (3) Incise wound on upper part of Lt foreman back 3/4"X 1/4"X up to bone deep vertical.  
 (4) CLW on route of Rt ear back 1 1/2"X 1/4"X 1/4" vertical.  
 (5) Border of Rt ear 3/4th lower part cut.
- G (6) Swelling and tenderness of Rt forearm 9 fracture.  
 (7) Abrasion on Lt shin lower part 1"X 1/2" vertical  
 (8) 9 fracture of proximal phalanx of Lt ring finger.

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H <sup>1</sup>Criminal Appeal No. 2499 of 2009 decided on 31.10.2018

Cause of injury-Injury No. 2,3,5 are inflicted by some sharp cutting A object.

Injury No. 1,4,6,7,8 are inflicted by some hard and blunt object.”

9. In respect of appellant no.2, the injuries received by him as reported by PW-10-Dr. Nikhil Kumar Buch (Ex.11) are as under:

“C/o Assaulted at midnight

O/E 1) Incise wound on frontal part of head 2"x1/2"x up to bone deep vertical.

2) Incise wound on Lt fore arm Lower part outer side 1"x1/4"x1/4" vertical.

3) Incise wound on Lt forearm Lower part backside ½"x1/4"x1/4" oblique.

4) Incise wound on Rt shin lower part 1"x1/2"x1/4" vertical.

5) Swelling and tenderness of 2" diameter on Rt upper outer of D Thigh.

6) Swelling and tenderness of Lt forearm 9 fracture.

Cause of injury-Injury No. 1 to 4 are inflicted by some sharp cutting object.

Injury No. 5 and 6 are inflicted by some hard and blunt object.”

10. The post-mortem report of the deceased-Bhura Govind shows injuries on the vital parts. The injuries inflicted are on the chest. These injuries are as under:

“1. One pocket wound, at the place of rib of No. 3, which injury F was in the left chest in middle part which wound was 22 inch x 1 inch horizontal and 7 inch depth, which would was slanting.

2. One pocket wound, on left back part was 1.5 inch x half inch 2.5 inch depth.

3. One would was pocket in the left side of the body. Which was G slanting of 1 inch x half inch x 1.5 inch in shape.

There was fracture at injury No. 1 on left third rib. These all injuries were of before the death. The corresponding injuries of which were as under:-

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- A      1. The layer of the lungs was cut on the front and back at the place of injury No. 1.  
      2. In right lungs, upto injury no. 2, the wound was stretched. Which was stretched upto the lower lib.
- B      3. The upper part of the left lungs, there was wound from front to back straight. Which was corresponding wound to injury no. 1. The vein of lungs and artery and the trachea were cut. In the left side of chest the air was there and the blood was gathered/collected.”
- C      11. The injuries on the dead body of Lakha Arjan are as follows:  
      “1. On the shoulder of left arm, one pocket wound, which wound was slanting of 1 inch x 0.5 inch depth.  
      2. One pocket wound, on the left side below of the armpit the wound was 2.5 inch x 1 inch x 6 inch, which would was going to horizontal side.
- D      He states that these injuries were of before the death. He states that on the body of the deceased there was corresponding injuries which were as under:-  
      1. The layer of left lungs was cut at the place of injury No. 2. The upper part on trachea of left lungs, the upper part of the left lungs was cut. The left lungs were tightened and there was air in it and the blood was gathered.  
      2. The vein and artery of the lungs were cut.”
- E      12. The prosecution has relied upon the statement of complainant PW-3, Ramabhai Rajan as also the statement of PW-4 Govindbhai Punabhai who are injured witnesses. PW-2 Dr. Govindbhai Lakhmanbhai has been examined to prove the injuries on prosecution witnesses.
- G      13. In fact, the presence of the two witnesses at the time of occurrence is not seriously disputed. It is statement of PW 3 which led to lodging of First Information Report that the appellants who were 7 to 8 in number challenged the witnesses at about 12 night on 01.07.1987. The appellants were having spear, Hansraj was having axe and others were having sticks. They attacked the deceased and both the injured witnesses with spears and axe.
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14. The learned Trial Court granted benefit of doubt to Hansraj A whereas convicted the appellants for offence under Section 302 IPC.

15. The appellants have lodged cross First Information Report, Ex.23. There is no evidence on the part of the appellants that the deceased were armed with any weapon in the first version, when they lodged report. The right of private defence is not available when the alleged assailants are unarmed. The right of private defence is to protect the person and the property. In such right, the person cannot cause more harm than what is necessary for the protection of the person and the property. What harm can be expected from the hands of the deceased when they were un-armed, whereas from the testimony of PW-3 and PW-4, the injured witnesses, the appellants were armed with spears and other weapons. The Post-Mortem report corroborates an oral testimony that both the deceased have received stab wounds. Therefore, the appellants cannot be said to have acted in the right of their private defence. B

16. It has been held in the judgment of this Court in **Jangir Singh case (supra)**, that in order to succeed in such plea of private defence, it must be proved that the right of private defence extended to cause death. The said judgment arises out of the fact wherein, the accused and the deceased were the volunteers in the Punjab Home Guard and both had self-loading rifles of 0.003. They had altercation in respect of borrowing of money for about 15 minutes, thereafter the appellant fired at the deceased which has taken his life. The Court found that both the deceased and the appellant were altercating face to face standing at a distance of 10 feet from each other. Keeping in view the facial expressions, the appellant felt imminent danger from the fact of aiming of rifle at him by the deceased. In the present case, the deceased were not carrying any weapon which is evident from first statement given on behalf of the appellants. C

17. The argument that one of the appellants was lying in a pool of blood at the place of occurrence on the basis of statement of the Investigating Officer does not merit any consideration. The first version of the appellants is that the deceased were not armed. The deceased may be accompanied by some other person who might have caused injuries on the person of the appellants. However, there is no evidence, who were the persons accompanying the deceased and with what weapon and what is their role. Such aspect is not the subject matter of the present trial. Separate trial is in progress in respect of First Information Report D

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- A lodged by the appellants. Since the deceased were not armed, therefore, the appellants are not entitled to the right of private defence.

18. The deceased had multiple stab wounds on the chest. Since there are multiple wounds, it cannot be said that the appellants have acted at the spur of the moment without pre-meditation and that the appellants are not taken any advantage or acted in a cruel or unusual manner. It is not a case of single injury which one can infer on account of sudden fight. We, therefore, do not find any merit in the alternate argument that the appellants are entitled to be convicted under Section 304 IPC as they have given multiple injuries on the vital parts of the deceased. The learned Trial Court as well as the High Court was perfectly justified in law in convicting and sentencing the appellants for the offence under Section 302 IPC. We do not find any error in the order passed which may warrant our interference in the present appeal. The criminal appeal is dismissed.

Kalpana K. Tripathy

Appeal dismissed.