Partap vs The State Of U.P on 10 September, 1975

Equivalent citations: 1976 AIR 966, 1976 SCR (1) 757, AIR 1976 SUPREME COURT 966, 1975 CRI APP R (SC) 354

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, M. Hameedullah Beg, P.N. Bhagwati

PETITIONER:
PARTAP

Vs.

RESPONDENT:
THE STATE OF U.P.

DATE OF JUDGMENT10/09/1975

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
BEG, M. HAMEEDULLAH
BHAGWATI, P.N.

CITATION:
1976 AIR 966 1976 SCR (1) 757
1976 SCC (2) 798
CITATOR INFO :
R 1979 SC 391 (9)
F 1980 SC 660 (16)
R 1990 SC1459 (21)

ACT:
Indian Evidence Act (1 of 1872) -Sec. 105 Prosecution for murder- Plea of self-defence-Scope of proof.

HEADNOTE:
The appellant, his father and another were charged with murder and convicted by the trial court. The first information referred to eye witnesses, of whom the prosecution examined only two. These two were chance witnesses of another village, but the others who belonged to the village where the occurrence took place, were not examined. The third accused was acquitted on appeal. by the High Court and the father died after his conviction was con

firmed by the High Court. The appellants plea of private defence was rejected both by the trial court and the High Court.

Allowing the appeal to this Court,

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HELD (Per M. H. Beg J.): Section 105 of the Evidence Act contains two kinds of burden on the accused who sets up an exception (i) the onus of proving the existence of circumstances bringing the case within any of the general or special exceptions in the I.P.C. Or in any other law; and (ii) the burden of introducing or showing evidence, resulting from the last part of the provision which says that the court shall presume the absence of such circumstances. The effect of the obligatory presumption at the end of Section 105 is that the court must start by assuming that no facts exist which could be taken into consideration for considering the plea of self-defence as an exception to the criminal liability which would otherwise be there. But when both sides have led evidence of their respective versions the accused' can show, from the evidence on record, whether tendered by the prosecution or the defence that the mandatory presumption is removed. The last mentioned burden is not really a burden of establishing the plea fully but of either introducing or showing the existence of some evidence to justify the taking up of the plea. The burden resulting from the obligatory presumption is not difficult to discharge and its removal may not be enough for acquittal. But the right of the accused to obtain the benefit of reasonable doubt is the necessary outcome and counter part of the prosecution's undeniable duty to establish its case beyond reasonable doubt and that right is available to the accused even if he fails to discharge his own duty to prove fully the exception pleaded. [762A-D; 763E]

In the present case, even if the appellant did not fully establish his plea. yet, there is sufficient evidence, both direct and circumstantial, to justify the finding that the prosecution has not established its case beyond reasonable doubt against the appellant on an essential ingredient of the offense of murder namely the required mens rea. An examination of all the facts and circumstances revealed by the entire evidence, including the effect of non-production of the better evidence available which. for some unexplained reason was not produced, shows that the plea of private defence cannot be reasonably ruled out. Even if the deceased was not positively proved to be advancing threateningly with a spear poised for attack, towards the appellant or his father, yet, a consideration of the whole evidence leads to the inference that this was reasonably likely to be true. [763C-764A-E]

(1) The trial court was inclined to believe that the defence version was true to the extent that the deceased had rushed to the scene with a spear. It overlooked that the

deceased while going to help P.W. 1, had actually expressed his intention to break the heads of the members of the accused party and that he was acting in such a was as to appear to be bent on physically aggressive interference in a quarrel between the two sides. If that was the conduct of the deceased, it is reasonable to infer that he must have done some-

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thing which gave rise to the right of private defence in favour of the appeallant Otherwise, the conduct of the appellant, in sparing, P W. 1, who according to the prosecution had given offence to his father in the past and on the day of the incident. and was advancing towards the father threatening to strike him with a spade, but shooting the deceased who appeared on the scene subsequently and was, according to the prosecution version unarmed becomes inexplicable If the right of self-defence had arisen the shooting could not be murder, even if the right was exceeded the offence could not he culpable homicide amounting to murder.[760B-F]

(2) Further, the prosecution version is supported only by two chance witnesses, hut the other persons, who had according to the prosecution version witnessed the occurrence and whose names were mentioned in the FIR. were neither produced by the prosecution nor were they examined as court witnesses [760G-761B]

(3) Moreover the High Court itself did not rely on the statements of the alleged eye witnesses when it acquitted the third accused who was also alleged to have shot with his pistol [764H]

Parbhoo v. Emperor, AIR 1941 All 402(FB) and Rishi Kesh Singh ors. v. The State AIR 1970 All] 51 (FB), referred to

(Per P. N. Bhagwati and R.S. Sarkaria, JJ)

The appellant had established by a preponderance of probability, that the deceased was within a striking distance poised for imminent attack on the appellant with a spear, when the appellant fired the fatal shot, and hence. the death was caused by the appellant in the exercise of the right of private defence.[769F-G]

(1) Nothing turns on the evidence or the two witnesses who were examined but the approach of the trial court and the High Court to the plea of self-defense raised by the appellant was wrong necessitating a review of the evidence by this Court [767D,G]

(2) The burden on the accused under s.105, Evidence Act is not as onerous as that which lies on the prosecution under s 101, Evidence Açtto prove its case. While the prosecution is required to prove its case beyond reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability [767-T]

(3) The plea of private defence was specifically taken by the appellant at the trial in his examination under s 342 Cr.P.C., and was put to P.W. 1. the chief eye-witness for

the prosecution. The High Court was wrong in branching the plea as an after-though on the ground that he did not raise it in the committal court, especially when there is foundation for it in the prosecution evidence itself. The record also shows that only a composite question was put to the appellant and that he was not properly examined in the committal court. [767;768E-G]

(4) The appellant plea that the deceased was about to strike with his spear when the gun was fired was highly probable. The prosecution case was that, following the threatening gesture made by P.W. 1. to break the father's head with a spade and the call given by him, the appellant came to the scene of occurrence with a gun; that immediately thereafter the deceased came proclaiming that, he would break the heads of, and settle scores with everyone of, the accused party, and that the deceased had reached a distance of 3 or 4 paces from the appellant and was charging at him with the appellant fired. The prosecution story that the deceased was unarmed is improbable. He would not have behaved in that bold and truculent manner unless he was armed with a formidable weapon. [767H-767D]

(5) The defence witness also testified that he was attracted from his house to the scene of occurrence by the outcry of the father, that he saw the deceased

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armed with a spear running towards the scene of occurrence and that he saw the deceased Lying dead with a spear beside him. He was an independent witness and nothing was brought out in the cross-examination to show that he was either hostile towards the complainant's party or had any special interest in the accused. His version was probable and the High Court Was wrong in rejecting his evidence. [769D-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 120 of 1971.

Appeal by Special Leave from the Judgment and order dated the 24th July, 1970 of the Allahabad High Court at Allahabad in Criminal Appeal No. 581 of 1968.

A. N. Mulla and O. N. Mohindroo for the Appellant. D. P. Uniyal and O. P. Rana for the Respondent. The Judgment of P. N. Bhagwati and R. S. Sarkaria was delivered by R. S. Sarkaria, J. Beg, J. gave a separate opinion.

BEG, J. I have had the advantage of going through the judgement of my learned brother Sarkaria. I confess that I do not feel confident enough about the veracity of the defence case and the evidence found in support of it to be able to hold that it is proved on a balance of probabilities. But, I think that what transpires from a consideration of the whole evidence is enough to entitle the accused to a

benefit of doubt for the reasons given below.

The findings of the Trial Court on the defence version indicate that a question of law arise here which seems to have troubled several High Courts. It gave rise to two Full Bench decisions of the Allahahad High Court, the first in Parbhoo v. Emperor,(l) and the second in Rishi Kesh Singh & ors. v. the State('). It does not seem to have been considered in the same form by this Court. r I think this is an appropriate case in which this Court could consider and decide it, and, it is because this aspect of the case was ignored by the Trial Court as well as the High Court that I consider this to be a fit case for a reconsideration of evidence and interference by this Court under Article 136 or the Constitution.

The Trial Court, after assuming that there may be some truth in the defence version that Ram Nath had gone to the scene of occurrence with a bhala, said:

> "Even if Ram Nath had arrived there armed with bhala, there could be no apprehension of death or grievous hurt to any one of the accused persons as the accused persons were armed with gun and pistol and could defend themselves if Ram Nath tried t(3 strike them with 'bhala'.
>
> Pratap and Suresh'accused could not be justified in firing gun-shots and pistol-shots at Ram Nath in the expectation that Ram Nath may reach the place where Puttu Lal accused was standing and may strike him with 'bhala'.
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> (1) A.l.R. 1941 All. 402 (FB).
>
> (2) AIR 1970 All. Sl (FB).

Pratap and Suresh accused had started from their house A with gun and pistol before they had known about the reaching of Ram Nath at that place with a 'bhala'. It can reasonably be inferred from the own case of the defence that Pratap and Suresh accused, or at least Pratap accused, had arrived there with the intention of committing the murder of Raj Kumar or of any body who may interfere in the wordy duel between Raj Kumar P.W. and Puttu Lal accused".

This shows that the Trial Court was inclined to believe that the defence version was true to the extent that Ram Nath had rushed to the scene of occurrence with a bhala, when a quarrel between the two sides was taking place. But, it overlooked here that Ram Nath, while going to the help of Raj Kumar, had actually expressed his intention to break the heads of members of Puttu Lal's party. At any rate, according to the prosecution evidence., Ram Nath was acting in such a way as to appear like a "lion" bent on interference to protect Raj Kumar in a quarrel between the two sides. If this was Ram Nath's conduct, could he not have done something which gave rise to the right of private defence of person ? If that right had arisen how could shooting him be murder ? Even if it was exceeded the offence could not be culpable homicide amounting to murder.

Why should Pratap, the appellant, have spared Raj Kumar who, according to the prosecution evidence itself, had given offence to Puttu Lal in the past and then on the date of incident by actually demolishing a nali and then advancing towards him with his phawra, threatening to strike Puttu Lal, but shoot at Ram Nath who appeared subsequently and was, according to the prosecution version, quite unarmed ? The prosecution evidence is that Puttu Lal had called his son Pratap and asked him to bring his gun only when Raj Kumar had threatened to attack him with his phawra and had advanced towards Puttu Lal. Nevertheless, Pratap and Suresh are alleged to have shot down Ram Nath, even though Ram Nath was empty handed, but did nothing to Raj Kumar who was, according to the prosecution version, more offensive and threatening with a phawrah and was the cause of the whole trouble Such conduct, attributed to Pratap and Suresh, in the setting alleged, seems quite unnatural and eccentric.

Raj Kumar, P.W. 1, also stated that Atma Ram, Achhe Ram and Sia Ram, Pradhan, took their stand in parti land at about the same time as Ram Nath had arrived on the scene and had asked Ram Nath not to loose heart or to be discouraged as he was coming to deal with each one of Raj Kumar's adversaries. Then, at Puttu Lal's instigation, Pratap and Suresh are alleged to have shot at Ram Nath. Why is it that this version of the obviously interested Raj Kumar, PW 1, is, only supported by two chance witnesses of another village, but neither Atma Ram nor Achhe Ram, nor Sia Ram, Pradhan of village Sant Kuiyan, who had, according to the prosecution version, witnessed the occurrence not produced by the prosecution at all ? The prosecution could select its witnesses. But, why was such an objectionable selection made ? Was it not a case in which the Court should have exercised its power under Section 540 Criminal Procedure Code to summon at least Sia Ram Pradhan, in whose grove Ram Nath was shot, so as to ascertain the whole truth more satisfactorily ? Had not the Trial Court and the High Court too readily assumed that absolute truth fell from the lips of prosecution witnesses as regards the commencement of aggression even when their own statements contained admissions indicating that the whole or the real truth had not been revealed by them ? These are some of the doubts which the rather mechanical examination of evidence by the Trial Court and the High Court do not dispel.

The question which arises in this case is: Even if the defence version is not held to be fully established, by a balance of probabilities, were there not sufficient pointers in evidence of what was probably the truth which leaked out from some statements of the prosecution witnesses themselves ? They had indicated the bellicose and threatening attitude of Ramnath while he was advancing. Did this not tend to corroborate the defence version that he was actually advancing menacingly armed with a bhala piosed for an attack with it when he was shot at ?

It was held in the case of Rishi Kesh Singh (supra) by a majority of a Full Bench of nine Judges of the Allahabad High Court explaining and relying upon the decisions of this Court discussed there (at p. 51):

> "The accused person who pleads an exception is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the built of the accused".

In that case, the result of a consideration of the decisions of this Court in relation to the provisions of Section 105 of the Evidence Act was summed up by me as follows (at page 97-98):

> ". . . an accused's plea of an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are: firstly, a lifting of the initial obligatory presumption given at the end of section 105 of the Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and, thirdly, a complete proof of the exception by 'a preponderance of probability', which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo'. case which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice."

18-L925SupCl/75 Provisions of Section 105 of the Evidence Act, which are applicable in such cases, contain what are really two kinds of burden of the accused who sets up an exception; firstly, there is the onus laid down of proving the existence of circumstances bringing the case within any of the General exceptions in the Indian Penal Code, or, within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, and, secondly, there is the burden of introducing or showing evidence which results from the last part of the provision which says that "the Court shall presume the absence of such circumstances". The effect of this obligatory presumption at the end of Section 105 of the Evidence Act is that the Court must start by assuming that no facts exist which could be taken into consideration for considering the plea of self defence as an exception to the criminal liability which would otherwise be there. But, when both sides have led evidence of their respective versions, the accused can show, from any evidence on the record, whether tendered by the prosecution or the defence, that the mandatory presumption is removed. the last mentioned burden is not really a burden of establishing the plea fully but of either introducing or of showing the existence of some evidence to justify the taking up of the plea. The burden resulting from the obligatory presumption is not difficult to discharge and its removal may not be enough nor an acquittal. D Section 105 of the Evidence Act was thus explained in Rishi Kesh Singh's case (supra) (at P. 95):

> "Even a literal interpretation of the first part of Section 105 could indicate that 'the burden of proving the existence of circumstances bringing the case' within an exception is meant to cover complete proof of the exception pleaded, by a preponderance of probability, as well as proof of circumstances showing that the exception may exist which will entitle, the accused to the benefit of doubt on the ingredients of an offence. If the intention was to confine the benefit of bringing a case within an exception to cases where the exception was established by a

> pre-ponderance of probability, more direct and definite language would have been employed by providing that the accused must 'prove the existence' of the exception pleaded. But, the language used in the first part of Section 105 seems to be deliberately less precise so that the accused, even if he fails to discharge his duty fully, by establishing the existence of an exception, may get the benefit of the exception in directly when the prosecution fails in its duty to eliminate genuine doubt about his guilt introduced by the accused. Again, the last part of Section 105, even if strictly and literally interpreted, does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover, a restrictive interpretation of Section 105, excluding an accused 11 from the benefit of bringing his case within an exception until he fully proves it, is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence, the obligatory presumption, at the end of Section 105, cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in Parbhoo's case, 1941 All LJ 619-AIR 1941 All 402 (FB)".

It was also said there (at p. 89):

> "The legal position of a state of reasonable doubt may Be viewed and stated from two opposite angles. One may recognise, in a realistic fashion, that, although the law prescribes only the higher burden of the prosecution to prove its case beyond reasonable doubt and the accused's lower burden of proving his plea by a preponderance of probability only, yet, there is, in practice, a still lower burden of creating reason able doubt about the accused's guilt, and that an accused's can obtain an acquittal by satisfying this lower burden too in practice. The objection to stating the law in this fashion is that it looks like introducing a new type of burden of proof, although, it may be said, in defence of such a statement of the law, that it only recognises what is true. Alternatively, one may say that the right of the accused to obtain the benefit of a reasonable doubt is the necessary outcome and counterpart of the prosecution's undeniable duty to establish its case beyond reasonable doubt and that this right is available to the accused even if he fails to discharge his own duty to prove fully the exception pleaded. This technically more correct way of stating the law was indicated by Woolmington's case and adopted by the majority in Parbhoo's case, and, after that, by the Supreme Court. It seems to me that so long as the accused's legal duty to prove his plea fully as well as his equally clear legal right to obtain the benefit of reasonable doubt, upon a consideration of the whole evidence, on an ingredient of an offence, are recognised, a mere difference of mode in describing the position, from two different angles, is an immaterial matter of form only. Even if the latter form appears somewhat artificial, it must be preferred after its adoption by the Supreme Court". (See: K. M. Nanavati v. State of Maharashtra-AIR 1962 SC 605).

Applying the principle of benefit of doubt, as I had' explained above, to the plea of private defence of person in the instant case, I think that, even if the appellant did not fully establish his plea, yet, there is sufficient evidence, both direct and circumstantial, to justify the finding that the prosecution has not established its case beyond reasonable doubt against Pratap on an essential ingredient of the offence of murder: the required mens rea. After examining all the facts and circumstances revealed by the prosecution evidence itself and the defence evidence and considering the effect of non-production of the better evidence available which for some unexplained reason, was not produced, I am not satis-

fied that the plea of private defence of person can be reasonably ruled A out here. This is enough, in my opinion, to entitle the appellant to get the benefit of doubt.

I may observe here that the High Court had not only failed to grapple with this difficulty arising from the evidence in the case and some of the findings of the Trial Court, which seemed to think that the intention to murder or the required mens rea for murder must be presumed from the mere fact of homicide (a wholly incorrect approach in a case where a plea of private defence had been raised and sought to be established by some evidence), but, the High Court itself started from a totally unsound premise when it observed:

"It was Puttu Lal who was committing aggression by insisting that Raj Kumar should not dismantle the Nali It is again admitted by Puttu Lal that he cried out for help in response to which Pratap arrived armed with a double barrel gun."

In other words, the High Court assumed that a mere insistence by Puttu Lal that Raj Kumar should not dismantle the nali amounted to an "aggression" begun. The word "aggression" is generally used for an actual invasion of the property of another or an attack on the body of another. It is true that it is not necessary that an actual attack should commence before a right of private defence can arise. Nevertheless, a reasonable apprehension of injury could not be said to arise by a mere prohibition to dig up a "nali" or drain. It could arise if a man is advancing aggressively towards others holding out threats to break their heads even if he is armed with a lathi with which he could carry out such a declared intention. The extent of the right or its justification is another matter depending again upon facts which have a bearing on extent of the right or its reasonable exercise. In the circumstances of the case before us, I think, we can hold, that, even if Ram Nath was not positively proved to be threateningly advancing with a bhala poised for attack towards Pratap, appellant, or Puttu Lal, yet, a consideration of all the probabilities and evidence on record leads us to infer that this was reasonably likely to be true. If this was so, it is clear that the appellant must have discharged his gun when Ram Nath had advanced and come near enough in a manner which must have been so menacing as to raise an apprehension of an attack with the bhala. Such an assumption fits in with medical evidence too showing that the shots were fired from a close enough range to cause charring.

Another feature of the case is that the High Court itself did not rely on the statements of the alleged eye witnesses when it acquitted Suresh, who was also alleged to have shot with his pistol" giving him the benefit of doubt because, unlike Puttu Lal and Pratap, he had denied his presence or participation in the occurrence and was said to be only distantly related to Puttu Lal.

I think, on an analysis of the whole evidence, that the appellant Pratap was also entitled to the benefit of a doubt which could be said to be reasonable.

I, therefore, concur in the order proposed by my learned Brother.

SARKARIA, J. This appeal by special leave is directed against a judgment of the High Court of Allahabad dismissing the appeal of Partap appellant and maintaining his conviction under s. 302, Penal Code. The facts of the prosecution case as narrated at the trial by Raj Kumar, the star witness of the prosecution, were as follows:

> Raj Kumar had installed a Tubewell in his field known as 'Chharelawala.field' in the revenue estate of village Sant Kuiyan, in the year 1962. The water pumped out from this tubewell was utilised by him not only for irrigating his own fields but also those of the neighbours against charges. Subsequently, Puttu Lal accused also set up a tubewell in his land situate in the vicinity of Chharelawala field. Puttu Lal, too, started letting out the use of his tubewell on hire. An unhealthy competition ensued between Raj Kumar and Puttu Lal in this water business, and their relations became strained. There was a water channel running from north to south in Raj Kumar's field through which Puttu Lal used to supply water to others. To the south of Chharelawala field, there is grove belonging to Sia Ram, Pardhan of the village. The tubewell of Puttu Lal is located towards the south of that grove. To the west of the Chharelawala field, is a plot belonging to Puttu Lal.
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> Two or three days before the occurrence in question, there was an exchange of hot words between Raj Kumar and Puttu Lal when the latter insisted on taking water through the said channel. Raj Kumar firmly refused Puttu Lal the use of that channel.
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> on S-1-1967, at about 7.45 a.m., Raj Kumar and his brothers Ramchander and Bhagwan Sahai, started demolishing their channel so that Puttu Lal should not be able to supply water through it. About fifteen minutes thereafter, Puttu Lal and his son, Ram Parkash, appeared on the northern ridge of the grove of Siya Ram. Puttu Lal was carrying a lathi and Ram Parkash a bhala. Puttu Lal asked Raj Kumar and his companions not to demolish the channel. Raj Kumar rudely refused asserting that the channel belonged to him and he had every right to erase it. Raj Kumar advanced towards Puttu Lal threatening to break his head with the spade, and thus settle the matter once for all. On being so threatened, Puttu Lal shouted to his son, the appellant, to come immediately with his gun. In response to Puttu Lal's call, the appellant, armed with the double-barrel licensed gun of Puttu Lal, and Puttu Lal's other son, Suresh, armed with a pistol, came. A couple of minutes after the arrival of

the appellant and Suresh, the deceased Ram Nath who was the son of Raj Kumar's wife's brother, came out running from the grove. He shouted to Raj Kumar not to be afraid as he would settle the matter with every- A one of the accused and break their heads. On seeing the deceased, Puttu Lal said: "He thinks himself to be a lion, let us see him first of all". On this instigation, Partap fired his gun at Ram Nath from a distance of four or five paces. On receiving the gun-shot, Ram Nath turned back when he was hit by a second shot fired by Suresh from his pistol. Ram Nath, dropped dead. The accused then ran away taking their weapons with them. Raj Kumar PW 1 went home, scribed the report. Exh. ka-3, and handed it over in the Kain Ganj Police Station, 8 miles away, at 9.30 a.m. After registering a case on the basis of this report, Sub-Inspector Kartar Singh reached the spot and started the investigation. He prepared the inquest report and sent the body for post-mortem examination.

The autopsy was conducted by Dr. S. P. Chaturvedi, PW 3, on 6-1-1967, at 12.40 p.m. The Doctor found five gunshot wounds of entry and three of exit on the deadbody. There was blackening around all the wounds of entry. The death, in the opinion of the Doctor, was due to shock and haemorrhage on account of the gunshot wounds of the head and the right lung. The accused surrendered in the court of the Additional District Magistrate, Farrukhabad on 7-1-1969, and thereafter their custody was taken over by the Police. After conducting the preliminary enquiry the Magistrate committed Puttu Lal, Suresh and Partap accused for trial to the court of Session on charges under ss. 302/34, 109 Penal Code All the three accused were convicted and each of them was sentenced to imprisonment for life and a fine of Rs. 200/-.

The plea of the accused was one of denial of the prosecution case. Suresh pleaded alibi and alleged false implication. Partap pleaded that the deceased was about to strike him with a bhalla and consequently, he fired two shots, in self-defence, from his double-barrel gun at the deceased.

The accused examined Chhote Khan, DW 1. in defence. The trial judge rejected the defence version and convicted and sentenced the accused as aforesaid.

In appeal, the High Court acquitted Suresh accused but maintained the conviction of Puttu Lal and Partap. Before the admission of the special leave petition under Article 136 of the Constitution by this Court, Puttu Lal died. Thus only the appellant's conviction survives for consideration in this appeal.

The decision of the courts below rests mainly on the testimony of the three eye-witnesses, namely, Raj Kumar, PW 1, Atma Ram PW 2, and Achhey Ram, PW 4.

Mr. A. N. Mulla, the learned Counsel for the appellant contends that the evidence of P.Ws. 2 and 4 was not worthy of credence; that being residents of another village and having failed to give a credible reason for their presence at the scene of occurrence, they were chance witnesses of the worst type; that as admitted by their brother" Bisheshar Dayal, PW 15, they were not only related to

the deceased but were stock witnesses of the Police. that since the witnesses did not frankly and fully admit their mutual blood relationship"

> they were of a type to whom truth, even in trifles, appeared to be unpalatable; that the prosecution had failed to examine Siya Ram and Mahabir who were also named as eye- witnesses in the F.I.R. and the courts below had erred in not drawing an adverse inference against the prosecution on that score.
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> Although this criticism levelled against P.Ws. 2 and 4 is not totally devoid of force, we do not think it a sufficient ground to depart from the settled rule of practice according to which this Court does not, in the absence of material irregularity, illegality or manifest error, itself reappraise the evidence. In spite of these infirmities, the courts below have believed their presence at the time and place of occurrence. The reasons given by the witnesses for their presence at the spot, may be vulnerable, even wrong. True, they are residents of the neighbouring village, 1 1/2 or 2 miles away, and belong to the caste of the deceased. PW 15 may be bearing some relationship with the deceased. But the fact remains that PWs 2 and 4 have been named as eye-witnesses in the F.I.R. which was lodged in the Police Station, 8 miles away, with utmost promptitude.
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> Be that as it may, the fate of the case did not depend on the evidence of these two witnesses. Raj Kumar's evidence corroborated by the F.I.R. and the other evidence on the record, was by itself, sufficient to hold that the appellant had fired a fatal shot at the deceased from close range with the double-barrel gun of his father. Thus, the only question that falls to be considered in this appal is, whether Ram Nath was shot dead by the appellant in the exercise of his right of private defence ?
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> We have carefully scrutinised the judgments of the courts below. In our opinion, their finding in regard to the plea of self-defence is clearly erroneous. They appear to have overlooked he distinction between the nature of burden that rests on an accused under s. 105 Evidence Act to establish a plea of self-defence and the one cast on the prosecution by Section 101 to prove its case. It is well- settled that the burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.
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> Since the approach of the courts below is basically wrong, it has become necessary to examine the material on record bearing on the plea of self-defence. This plea was specifically taken by the appellant at the trial in his examination under s. 342, Cr. P.C. It was put to Raj Kumar PW 1, the chief witness of the prosecution, in cross examination. Raj Kumar replied: "It is wrong to suggest that Ram Nath would have murdered Partap if Partap had not fired at him. Ram Nath had nothing in his hand." The courts below have accepted without demur the ipse dixit of Raj Kumar that the deceased was unarmed. We find it impossible to swallow this so improbable a version

> the credibility of which was extremely underminded by the telling circumstances appearing in the prosecution evidence, itself. It was the admitted case of the prosecution that following the threatening gesture made by Raj Kumar to break Puttu Lal's head with the spade, and the call given by Puttu Lal, the appellant came there armed with a gun and immediately thereafter, the deceased came running, proclaiming that he would break the heads of and settle the scores with everyone of the accused party. It is further admitted that the deceased had reached at a distance of 3 or 4 paces from the appellant when the latter fired. The blackening found around the wounds of entry on the deadbody by the medical witness, confirm that the deceased was within six feet of the assailant when he received those injuries. Again, it is the case of the prosecution that at the time of the first gun-fire the deceased was facing the appellant. The medical evidence also confirms it, inasmuch as two entrance wounds (1 and 5) were located on the front side of the deceased. From this circumstance it is clearly discernible that the deceased was charging at the gunman and had reached within a striking distance when his charge was foiled by the gun-fire. It is difficult to believe that the deceased would have behaved in the bold and truculent manner he did, if he were not armed with a formidable weapon. It was put to Raj Kumar by the defence that if the deceased was empty handed-as was alleged by the witness how did he proclaim to break the heads of the accused. The witness had no satisfactory answer to it. Conscious that he was suppressing the fact in question, all that he could say in befuddled embarrassment, was: ''`I do not know with what weapon he was going to break the heads."

The appellant's plea that the deceased was going to strike him with a Bhalla, when the gun was fired, was highly probable.

one of the reasons given by the learned Judges of the High Court for ignoring this plea was that it was belated and had not been set up by the appellant during his examination in the Committal Court. A glance at the record of that examination would show that he was not properly examined in that court. Only a composite question with regard to all the circumstances of the prosecution case, was put to him in the Committal Court, which he denied. The omission of the appellant to set up the plea of private defence in the Committal Court, therefore, was no ground to brand it as an after-thought, particularly when there was foundation for it in the prosecution evidence, itself.

The circumstances appearing in the prosecution evidence, and the statement of the appellant recorded under Sec 342, Cr. P.C. did not exhaust the material in support of the plea of self-defence. There was the direct testimony of Chhote Khan, DW 1, who testified that he was attracted from his house to the spot by the outcry of Puttu Lal accused which was to the effect, that he was being killed. Witness saw Ram Nath deceased, armed with a spear, running towards the move of Siya Ram. Thereafter, he heard two reports of gun-fire. On reaching the grove, the witness saw Ram Nath lying dead with a spear by his side. Partap appellant and Puttu Lal were also seen running away from the scene. Partap was carrying a gun. Witness did not see Suresh and Ram Parkash there. Excepting the precise words of Puttu Lal's call and the fact of the deceased being armed with a spear, Chhote Khan's evidence in so far as it goes, fits in with the prosecution story.

The High Court has rejected hi, evidence without much discussion for two reasons; firstly, that he was not speaking the truth inasmuch as he stated that Puttu Lal was raising an outcry that he was being killed, because it was no-body's case that any body assaulted or attempted to assault Puttu Lal. Secondly, the witness did not appear and make any statement before the investigating officer. Neither of these was a good ground to reject his testimony but of hand. Chhote Khan was a resident of the same village. The place of occurrence is not situated at a far off distance from the village, Indeed, it was the prosecution case that the appellant and deceased came to the spot after hearing the shouts of Puttu Lal and Raj Kumar. Chhote Khan's coming to the spot from the village on hearing the same shouts, was therefore, equally probable. In any case, his reaching the scene on hearing the reports of gun-fire and seeing Ram Nath lying dead with a spear, was a highly probable fact.

Nor could his version that Puttu Lal was raising an outcry that he was being killed, be rejected outright. It was admitted by Raj Kumar in cross-examination, that he and his companions had advanced 2 paces towards the accused Puttu Lal and others, threatening to break their heads with the Phawra (spade and that the witness was then carrying (rather brandishing) the spade. It is further admitted that it was after this threat that Puttu Lal gave a call to the appellant to come armed with the gun. In the face of such a threat, it was not improbable for Puttu Lal to cry out for help saying that he was being killed.

Chhote Khan was an independent witness. Nothing was brought out in cross-examination to show that he was hostile towards- the complainant party or had any special interest in the defence.

In the light of the above discussion, the conclusion is inescapable that the appellant had succeeded in establishing by a preponderance of probability, that the deceased was within a striking distance, poised for imminent attack on the appellant with a spear, when the latter fired the fatal gunshot. In such a situation, the appellant had reasonable and immediate apprehension that he would suffer death or grieous hurt if he did not fire at the deceased. Thus the death was, in all probability, caused by the appellant in the exercise of his right of private defence.

For the foregoing reasons we allow the appeal, set aside the conviction of the appellant and acquit him.

V.P.S Appeal allowed .