Supreme Court of India
Yogendra Morarji vs State Of Gujarat on 10 December, 1979
Equivalent citations: AIR 1980 SC 660, 1980 CriLJ 459, (1980) 2 SCC 218
Author: R Sarkaria
Bench: D Desai, O C Reddy, R Sarkaria
JUDGMENT R.S. Sarkaria, J.

1. This appeal by special leave is directed against a judgment, dated August 4, 1973, of the High Court of Gujarat, reversing the acquittal of the appellant and convicting him under Section 304, Part II, Penal Code, with a sentence of seven years' rigorous imprisonment,

2. The prosecution case, as it emerged finally from the evidence on record, was as follows:

Appellant is a businessman residing in Bombay. His native village is Bhuj in the State of Gujarat, There is a village Raydhanpar at a distance of 8 miles from Bhuj. Appellant purchased some lands in the area of Raydhanpar, He employed one Malshi as his Manager to look after the land. Malshi lived in a rented house in Raydhanpar. Whenever the appellant used to be in Bhuj, he ordinarily visited Raydhanpar also. The appellant was taking steps to improve and develop Ms lands. For that purpose, he planned to construct wells in the lands. The construction of two wells had been completed. For sinking the third well, he employed Ravudan (P.W. 3), Rata (P.W. 5) and Arjan, residents of village Raydhanpar, Ravudan and his associates contracted with the appellant to sink the well, Ravudan was to be paid Rs. 15/- per foot for digging the well. An agreement for carrying out this work was drawn up and executed between Ravudan and the appellant. Kana deceased was employed by the appellant to quarry stones from a nearby hill to supply the same at the site, Ravudan and his associates dug the well up to a depth of about 10 feet, but could not continue the work further, because according to them, hard rock had appeared at that depth. Dispute arose between Ravudan and others on one hand and the appellant on the other. Ravudan and his associates were demanding higher charges. Kana was also demanding Rs. 60/-from the appellant as his dues. The appel-lant, however, took up the stand that nothing was due from him to Kana because the latter had already received an over-payment of Rs. 180/-,

3. On July 30, 1970, the appellant visited Raydhanpar. In the evening at about 8 p. m., he was in the house of his Manager, Malshi. Malshi was not there but his wife, Lakshmi and children were there. According to the prosecution story, as narrated at the trial, Ravudan, Rata and Arjan went to the appellant in the house of Malshi and demanded payment of their dues. According to the F. I. R. which was lodged by Khima (P. W. 2), the Police Patel of the village, he was also present in the house of Malshi along with Ravudan, Rata and Arjan when they pressed the appellant for payment of their dues. Although, at the trial, Khima has changed that version. Kana owed Rs. 40/- to his first cousin, Khima (P. W. 2). Khima was pressing Kana for payment of that amount. Kana, in turn, told Khima that he would clear that loan after recovering Rs. 60/- from the appellant When the aforesaid persons demanded payment of their dues, the appellant refused to pay, insisting that nothing was due from him and he curtly asked them to quit the house, According to the prosecution story at the trial, when Ravudan, Rata and Arjan came out of the house, Khima told them that he had good relations with the appellant and he would persuade him to pay their dues. After about one and a

quarter hours, the appellant started his jeep which had been parked in the Vada of Malshi for going to Bhuj, Khima, Kana, Ravudan, Rata and Wala waited at a distance of about 250 feet from the Vada of Malshi in the road leading to Bhuj, At about 9.30 p. m. they saw the jeep with lights on coming from the Vada of Malshi Khima and Kana raised their arms signalling to the appellant to stop the vehicle, while their companions also came close to the jeep. On seeing these five men in the road, the appellant took out his revolver and fired three shots one after the other. Two of those shots did not hit anybody but the third shot fired by the appellant hit Kana in the chest, The appellant then sped off in his vehicle to Bhuj, Immediately after the firing, many persons including the Harijans from the locality collected at the spot. A cart was brought and Kana was removed in it to the Civil Hospital, Bhuj, where he was found dead. Khima then went to the Police Station, Bhuj and lodged the F. I. R, at about 1.30 a. m. on July 31, 1970.

4. Earlier at about 11 p. m, on July 30, 1970, the appellant reached the Police Station in the same vehicle. He met the Head Constable, surrendered his revolver and expressed a desire to lodge a report. At that time, the Station House Officer, Shri Deol was not present. He requested the Head Constable to send a message to Shri Deol who in response, came to the Police Station at about 11.15 p. m. and found the appellant and his jeep there. The appellant also lodged a report at the Police Station, complaining the commission of offences under Sections 147/336, Penal Code, by Khima, Ravudan and others. He said to have alleged that he was attacked while coming in his jeep-car which was pelted with stones. He further said that the lives of the family members of Malshi were in danger and sought police aid.

5. Soon after the making of the report by Khima, the appellant was arrested by the police there and then. His jeep-car was also kept in the Police Station during the night. Next morning, the Sub-Inspector formally seized the jeep under a Panchnama. Subsequently, the investigation was taken over from Mr. Deol by the Police Sub-Inspector, C I. D, and the appellant was sent before a Magistrate under a charge-sheet who committed him to the Court of Session for trial on a charge raider Section 302, Penal Code. In his examination under Section 342, Criminal Procedure Code, the appellant gave a counter version. It will be useful to extract in full in his own words as follows:

I bought lands in Raydhanpar in 1969. Since then, I had been assisting the villagers in all ways, On the day of the incident, I reached Raydhanpar in the afternoon, at 1.45 p. m. I asked Jayanti if Ravudan had commenced the work of digging the well, He replied in the negative. I asked him to go to the house of Ravudan and tell him to see me, At about 4 p.m. myself and Jayanti were about to set off for my field. My jeep was In the Vada. Myself and Jayanti had taken our seats in the jeep, At that time, Ravudan came. I asked Ravudan as to why he had not commenced digging the well. He said, that he came across hard rock, and told me that I should pay him at the rate of Rs. 20/- per ft. I told him that I would go to the field and verify the fact, and would let him know my reply at night. I had told him that if I found that there was rock, then I would accede to his re-quest Myself and Jayanti straight went to the well, I looked into the well. I found that there was no rock, and that no progress had been made and they had not gone beyond the depth of 10 ft. As usual at 8 p. m. I returned to the house and was about to take meals. In the beginning of July, a contract had been enter-ad into between me and Ravudan, whereby it was agreed that he should dig fill there was percolation of water, and that I should pay him (r) Rs. 15/- per ft, While I was about to take meals, Ravudan met

me at the house of Malshi and asked me as to what I had decided, I told Ravudan that I had verified the fact, there was no rock, he had not gone beyond a depth of 10 feet, that considering the amount taken in advance by him, there was no justification in his demand. He had worked for about a week, he had gone to a depth of 10 ft. On that day he had done work, the charges whereof would amount to Rs. 150/-. By that day, it had rained. He needed money to carry on agricultural operations. So on that day, I had paid to him an additional amount of Rs. 150/-.

Ravudan said, that there was rock, that I should pay him at the rate of Rs. 20/- per ft and that too from the ground level. I told him that if that was his attitude, I would have the job completed through some one else, and I would not like to have any dealing with him. He told me that he would not allow anyone else to do the job. I told him to get away from the place. He insisted that the accounts must be settled there and then, I told him that Malshibhai had gone to Surat, and that accounts would be settled on Monday, after Malshi returned Ravudan said that suggestion was not acceptable to him, and that the account should be settled there and then. While this discussion was going on, people began to pour in, About 15 men were in the compound of Malshi Some of them had sticks, Ravudan's brother Megha was there, Megha and others took the side of Ravudan, Some of them also told me that I should make immediate payment. I told those persons that I would not pay money and asked them to go away, Ravudan took a stick and rushed on to the Ota where I was, with a view to assault me. At that time, Laxmiben came out of the kitchen. She caught the arm of Ravudan, and began to entreat Ravudan not to create trouble. Karnidan and Muludan were there, and they also intervened. Slowly the crowd was pushed out of the compound, This incident lasted half an hour. Those persons stood outside the compound. They were speaking abusive words, and were telling me to get out, and that they would teach me a lesson. When 15 men were in the compound. there was a crowd outside the compound. They had told me to get out and had told me that it would be my last meal. The crowd waited outside for half an hour and abused me. Then the situation was quiet. I wanted to return to Bhuj, and so, I wanted to know what wag the situation, so I asked Karnidan to go out and know what was the position, Laxmiben also suggested that she would go out and call Shaktidan. Karnidan returned, Karnidan told me that the situation was quiet and that I could safely go to Bhuj. Then, Laxmiben and Shaktidan also came. Myself, Jayanti and Shaktidan took our seats in my jeep. Then, I came out of the Vada, passed by the house of Harijans, and took a turn to the north. At that time, I saw a crowd in the field. As I proceeded further, I saw a barricade across the road. So, I stopped the vehicle, As soon as I stopped the car, the crowd rushed towards my vehicle and began to throw stones on my vehicle, Some people were running in the field along the hedge. They were running towards me. Then, I reversed my vehicle. I was not able to see anything behind. The crowd was following me and continued pelting stones. The persons in front of the crowd were Just 3 or 4 ft. away from my vehicle, 1 was completely encircled. I felt that my life was in danger. There were two mora occupants in the car, I saw that there was danger to their lives. At that time I took out my revolver from my pocket with a view to scare away the crowd. Then I fired 3 rounds, so, the crowd began to run away in all directions. Then the road was clear, I sped the vehicle bumped aver the barricade and fled away reached Bhuj. I went to the main road, near my bungalow. Even at that moment I apprehended that those persons chase me and would endanger my life So, I gave the key of my bungalow to Jayanti; and called for, some cartridges. I loaded my revolver. Then I went to the residence of Sunder Shah, I wanted to ring up Mr. Rao the D.S. P. rang up at the residence of Mr. Rao. He was not at his residence, but was out of Bhuj. I could not contact

Mr. Rao. From there, I rushed to the Bhuj Taluka Police Station, Shaktidan guided me. Thers, (sic) Head constable was in the Police Station, I narrated this incident, to him. He was taking down down something. At that time, Deol and Pahuja appeared at the Police Station, I had told the Police that the lives of Laxmi and her children were in danger. So, Deol, Pahuja and the Police Party went to Raydhanpar.

6. At no stage, it was seriously disputed that Kana died by a shot fired by the appellant from Ms revolver. Indeed, the evidence of the eye-witnesses Khima Jakhu (P. W. 2), Ravudan (P.W. 3) and Rata Sava (P.W. 5) was not impeached with regard to this fact. The main question that fell for consideration was whether the appellant had caused the death of the deceased Kana in the exercise of last right of private defence,

7. The learned Sessions Judge found that the version given by the accused is a probable one; that there was a deliberate attempt on the part of the villagers to way lay the accused who fired as he had reasonably apprehended death or grievous hurt at their hands. The trial fudge noted that Khima (P. W. 2) had materially changed his version that he had given to the F.I.R. and P. Ws. 2 and 3 also, at the ferial, made the same departure from their statements recorded by the Police during investigation. On this premise, mainly, he concluded that the prosecution witnesses were suppressing the truth and were unreliable. He, there-fore, gave benefit of doubt to the appellant and acquitted him.

8. In the F.I. R., Khima (P. W. 2) had stated that ha was present inside the house of Maishi when there was a dispute between Ravudan, Kana and Vala on one side and the accused over payment of the dues demanded by them, but at the trial he changed this version and said that he was going to the Vada of Malshi and had just reached it s entrance. When Ravudan, Kana etc. came out of the Vada after having a dispute with the appellant, Khima assured his cousin Kana, Ravudan, Rata and Valla that he had good relations with the accused and would persuade the (sic) when he would come out, to pay their dues. The High Court found that this variation from the story in the F.I.R. did not affect the truth of the substratum of the prosecution story told by P.Ws. Khima, Ravadan and Rata at the trial.

9. The High Court held that apart from the bare statement of the appellant and the suggestions made by the defence to the prosecution witness in cross-examination, there is not an iots of evidence on record to support the defence version that the road to Bhuj had been blocked or barricaded by by the villagers; or that his jeep[had been stoned and damaged by a large crowd of villagers. The High Court found that the defence version had been concocted and was false on material points and rejected the plea of private defence.

10. With regard to the nature of offence, the High Court said:

Looking to fee circumstances of the case, it cannot be said that the accused had fired threes rontjds from Ms revolver with the intention of causing the death of any particular person,. It cannot be said with certainty that ha had deliberately aimed his revolver at Kana while ferine three rounds from It,. There is some reason to believe that the accused fired three rounds from his revolver out of night,

After holding that the case did not fall under the first three clauses of Section 300, Penal Code, they further observed :

It is difficult to say that he had fired the revolver without any excusa, and in that case, his act in causing the death, of Kana would not fall wider Section 303(4) of the Indian Penal Code Under the circumstances they held that the accused had only knowledge that Ms act was likely to cause death, With this reasoning, they convicted him under Section 304, Part H, Penal Code, with s sentence of seven years' rigorous imprisonment Hence, this appeal by Yogendra against his conviction and sentence,

11. The principal question that falls for consideration in this case is whether the death of Kana was caused by the appellant in the exercise of his right of private defence.

12. Before considering this question in the light of the evidential material on record, it will be worthwhile to remind ourselves of the general principles embodied in the Penal Code, governing the exercise of the right of private defence.

13. The Code excepts from the operation of its penal clauses large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations. The most salient of them concerned the defence of body are as under? Firstly, there is no right of private defence against an act which is not in itself an offence under the Code; Secondly, the right commences as soon as and not before a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension (Section 102). That is to say, right avails only against a danger imminent, present and real; Thirdly, it is a defensive and not & punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. (Section 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right Every reasonable allowance should be made for the bona fide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack." It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; Fourthly, the right extends to the killing of the actual or potential assailant when there is] a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the

quality and character of the perilous act or threat intended to be repelled; Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailent; Sixthly; the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the protection of the public authorities." (Section 99).

14. Before coming to the facts of the instant case, the principles governing the burden of proof where the accused sets up a plea of private defence, may also be seen, Section 105, Evidence Act enacts an exception to the general rule whereby in a criminal trial the burden of proving everything necessary to establish the charge against the accused beyond reasonable doubt, rests on the prosecution. According to the section, the burden 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 Code or in any other Law, shall be on the accused person, and the Court shall presume the absence of such circumstances. But this Section does not neutralise or shift the general burden that lies on the prosecution to prove beyond reasonable doubt all the ingredients of the offence with which the accused stand charged. Therefore, where the charge about the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in Section 299 of the Penal Code. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises. As pointed out by the Court in Dahyabhai v. State of Gujarat , under Section 105, read with the definition of "shall presume" in Section 5, Evidence Act, the Court shall regard the absence of circumstances on the basis of which the benefit of an Exception (such as the one on which right of private defence is claimed), as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. The accused has to rebut the presumption envisaged in the last limb of Section 105, by bringing on record evidential material before the Court sufficient for a prudent man to believe that the existence of such circumstances is probable. In other words, even under Section 105, the standard of proof required to establish those circumstances is that of a prudent man as laid down in Section 3, Evidence Act. But within that standard there are degrees of probability, and that is why under Section 105, the nature of burden on an accused person claiming the benefit of an Exception, is not as onerous as the general burden of proving the charge beyond reasonable doubt cast on the prosecution. The accused may discharge his burden by establishing a mere balance of probabilities in his favour with regard to the said circumstances.

15. The material before the Court to establish such a preponderance of probability in favour of the defence plea may consist of oral or documentary evidence, admissions appearing in evidence led by the prosecution or elicited from prosecution witnesses in cross-examination presumptions, and the statement of the accused recorded under Section 313 of the CrPC, 1973.

16. Notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with

which the accused stands charged. Thus, there may be cases where, despite the failure of the accused to discharge his burden under Section 105, the material brought on the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens rea requisite for an offence under Section 299 of the Code (See Dahyabhai v. State of Gujarat (ibid) State of U. P. v. Ram Swarup , Pratap v. State of U.P. .

17. Let us now deal with the facts of the case in hand in the light of the principles stated above. We have already stated that the presence of the eye-witnesses, Khima (P.W. 2), Ravudan (P. W. 3) and Rata Sava (P. W. 4) at the time and place of occurrence and their evidence on the narrow point that the accused fired three shots from his revolver one of which hit and caused the death of Kana was not challenged by the accused in cross-examination or otherwise at any stage. Therefore, the position is that in the absence of proof of circumstances that the accused had caused the death in the exercise of his right of private defence, the charge of culpable homicide would be held to have been established against him by the prosecution. We must therefore focus our attention on these points: Had the accused discharged the burden that lay on him under Section 105, Evidence Act to prove his plea of private defence? Had he sufficiently established on a balance of probabilities all the circumstances necessary to show that the homicide of Kana was justified on the ground of self defence? If the answer to the preceding questions be in the negative, does the evidential material on record, albeit insufficient to establish affirmatively the circumstances necessary to bring his case within the relevant General Exceptions contained in the Penal Code, conferring and regulating the exercise of the right of private defence of body, in the totality of the circumstances of the case, has the effect and impact of inducing a reasonable doubt with regard to the mensrea requisite for the offence of culpable homicide?

17A. At First, we may catalogue here certain admitted or undisputed facts appearing in the prosecution evidence itself. These are:

1. About 45 minutes or one hour before the occurrence, there was a sharp quarrel or heated altercation between the accused, Yogendra, on one side, and Ravudan (P. W. 3), Rata (P.W. 5), Vala and Kana (deceased) on the other, over payment of certain amounts.

Kana was claiming Rs. 60A- as his dues from Yogendra on account of stones quarried and supplied by him to the accused a few days earlier (vide Khima, P. W. 2), Similarly, Ravudan and his workmen, Vala and Rata were demanding Rs, 200/- from the appellant, which, according to Ravudan, was the amount due to him from the appellant in respect of the digging of a well, Yogendra not only refused to pay anything to them, but unceremoniously turned them out of She house of Malshi, This rude behavior of the accused was (sic)esented by Ravudan and Ms companions (vide Ravudan, P. W. 3 and Rata, P.W. 5).

2. On being turned out of the house of Malshi, Ravudan, Kana, Vala and Rata met Khima who Joined them Just outside the house of Malshi and assured them that he Would get soma amount for them from the accused with whom ha (Khima) claimed to have good, relations,

3. While discussing among themselves about the dispute with the accused over payment of their dues, these five persons, namely, Khima, Kana, Ravudan, Rata and Vala moved to some distance from the house of Malshi along the road and reached near the field of one Vira Momaya. The distance between the place of occurrence and the Vada of Malshi, according to Khima (P.W. 2), is 100 paces? while according to the inspection note of the trial Judge, this distance is 325 ft,, Even if Khima's version was taken at its face value, the fact remains that these persons went together to a considerable distance along the cart-road leading; to Bhuj.

4. These fives persons then stood or fingered together in or by the side of the road for about 45 minutes or about one hour, at a considerable distance from the house of Malshi.

The inference about the duration at their remaining there in or by the side of fee road, is deducible from the prosecution evidence itself. In the F.I.R. as well as at the trial, Khima (P.W. 2) stated that the dispute with the accused in the house of Malshi over payment of the dues of Kana, Ravudan, etc. took place at about 8 p. m. In the F. I, R., Khima gave the time of seeing the jeep of the accused coming out, of the Vada of Malshi as 9.30 p. m., implying that the occurrence took place shortly after 9.30 p.m. After trial, he did not pin-point the time of occurrence, though an effort to give the impression that the incident took place soon after their coming out of the Vada of Malshi is discernible, Ravudan (P. W. 3) admitted in cross examination'that Kana received the fatal shot at about 9.15 or 9.30 p.m, According to him, the dispute over payment of their dues with the accused in the house of Malshi took place sometime between 8 and 0 p.m. The statement of P.W. 5 is on this point, similar to that of P.W. 3. Jesang Sava (P. W. 6), Sarpanch stated that it was 9 p. m. when he heard the report of gunshot Ganga Ala (P. W. 7) places the time of occurrence at about 9.15 p.m. on the basis of the gun-fire report heard by him and P.W. 6, while they were in the Chora. Taking the time of the quarrel inside the house of Malshi as about 8.15 p. m. (on the basis of the evidence of Khima, Ravudan and Rata), and that of the occurrence as 9.15 p.m. , it is evident that these five persons were lingering in that road leading to Bhuj, for about 45 or 60 minutes,

5. According to the F. I. R. (Ex, A) lodged by Khima, they were all "waiting outside" to explain/convince Yogendra-bhai" when he would come out in his car for going to Bhuj and that was why ha had tried to stop the car by raising the hand. He admits that the F.I. R, was made by him and signed by him, although he adds that before obtaining his signature thereon, it was not read over to him, Even so, Khima did not specifically dis-own this portion of Ex. A when it was read out to him at the trial, In the wit-ness-stand, Khima stated that since ha was in pressing need of money he told Kana that be had good relations with Yogendra, and he "would see to it that he (Kana) got some amount from Yogendra". In cross-examination also, Khima stated: "I had gone to the scene of the incident, simply with a view that I might get my dues".

6. When at about 8.15 p.m. they saw the lights of the station-wagon of the accused they stood on the right side of the road in the field, and as the wagon approached that place, Khima and Kana raised their hands signalling to the accused to stop the vehicle, and according to Khima, the accused then did stop the vehicle for a moment, while according to P. W. 3 and P. W. 5, the accused had only slowed down the vehicle.

7. Immediately after the accused had stepped or slowed down the vehicle in response to the signal given by Khima and Kana, he stretched out his hand and fired three rounds in quick succession one of which hit Kana. At the time of the firing, Kana, Khima, Ravudan, Rata and Vala were together on the right side of, the vehicle at a distance of about 5 feet from it,

8. In cross-examination, Khima stat-(sic)ated that the accused fired the revolver after aiming it towards them. Ravudan did not say anything about the aiming of the revolver towards any particular person. He simply said that the accused fired three rounds, whereupon Kana was hit. The High Court has correctly appreciated and interpreted the (evidence of these witnesses to reach the finding that the accused had not fired Ms revolver after aiming at any particular person.

9. Shortly after the firing, the accused sped away in his vehicle towards Bhuj by the same road,

10. At about 11.15 P. M. on the day of occurrence, when Laxman Singh, Polios Sub-Inspector (P. W. 11) went to the Police Station, Bhuj on being sent for from his house, he found the accused already there in the Police Station. Head Constable Bakatwar Singh, who was in- charge of the Police Station during the temporary absence of the Sub-Inspector, was also there, The accused gave information to the Sub-Inspector that the family of his Manager was in danger.

Rane J, who wrote the leading judgment in the High Court, noted that "the evidence of the Sub-Inspector shows that when he went to the Police Station at 11 P.M. on the date of the incident, the accused was there". Notwithstanding this evidence, the learned Judge observed) "From the above circumstance, however. It cannot be inferred as to at what time the accused had actually gone to the Police Station", With respect, we are unable to appreciate this "reasoning", If She accused was found already present in the Police Station at 11.15 P.M. , he must have reached there, at least, shortly before that,

11. Within five or ten minutes of receiving the information from the accused that the family members of his Manager at Raydhanpar were in danger, Sub- Inspector Laxman Singh, Deputy Superintendent of Police, Pahuja, and some members of the police force proceeded in the Police Van to Raydhanpar and reach- ed there at 12 midnight. The police party remained in Raydhanpar for 5 or 10 minutes and returned to Bhuj after leaving some armed constables near the house of Malshi and elsewhere in the village, On his return from Bhuj at 0.30 Hrs., the Sub-Inspector recorded the First Information Report No, 75/70 made by the accused in the cross-case, in which he complained of the commission of offences under Sections 147/336 etc., I.P.C. against Khima, Ravudan, Rata and others. When the Sub-Inspector was about to 'complete' the recording of the accused's complaint, Khima (P.W. 2) also came there and lodged the P. I. R. (Mark A) in this case. P.W. 6, Jesang Sava who had accompanied Khima, stated in cross-examination that when they reached the Police Station, the accused was already there with Sub-Inspector, Deol,

12.(i)There is no evidence on the record to show that after his arrival in the Police Station, the accused or his jeep was allowed to move out, or in fact moved out of the Police Station, On the contrary, Laxman Singh (P. W. 11), in spite of an attempt on his part to feign ignorance with regard to this fact, had to admit after some equivocation, under the stress of cross-examination, that during

the night the jeep of the accused was "lying outside the compound of the Police Station", P.W, 8, also admitted that when they went to the Police Station to lodge the report, "the Jeep of the accused was lying in the compound."

(ii) Although the Sub-Inspector (P. W. 11) stated that after 0.30 Hrs. that is, on his return from Raydhanpar, he did not allow the accused to move out of the Police Station, The other evidence shows that even during the period the Sub-Inspector and party had gone to Raydhanpar, the accused or Ms jeep could not have been permitted to go out from the Police Station, P.W. 11 admitted in cross-examination that at 23-25 hrs. information was received in the Police Station from the Hospital on telephone that Kana with a bullet wound was in the Hospital and his condition was serious and that steps be taken to get his Dying Declaration recorded. Five minutes later, further information was received from the Hospital that Kana had died. Damji who was then in charge of the Police Station made entries in the Station Diary with regard to the receipt of these informations. With this information in their possession, the Police could not in the normal course, have allowed the accused, even if he wanted to move out of the Police Station, In all probability therefore, the accused after his arrival in the Police Station remained there.

(iii) The Sub-Inspector had come to know from the F.I.R, lodged by the accused, that his jeep had been damaged. Towards the end of Ms statement in cross-examination, the Sub-Inspector, Laxman Singh Deol, again stated: "Since morning, the jeep was in the com-pound of the Police Station. The windscreen glass of the jeep was broken. There were 10 or 15 dents on the bonnet of the vehicle". He however, conceded that he had not drawn the Panchnama of attaching the jeep till the evening of July 31, 1970.

(iv) The accused himself carried his revolver and cartridges to the Police Station and surrendered the same to the Police who however, formally seized it later in the morning under a Panchnama. But Deol (P. W. 11) has admitted that the revolver and the cartridges were with the accused throughout when he was in the Police Station even prior to their formal attachment, under the Panchnama, Ex. 48.

18. We may now turn to two other material facts which have been alleged by the accused but were denied by the prosecution witnesses concerned when they were put to them by the defence in cross-examination. They are: (a) pelting the jeep with stones and (b) blocking or barricading the road by which the accused was proceeding to Bhuj.

19. As regards (a) it may recall that according to the accused as soon as he stopped the jeep on seeing a barricade across the road, the crowd (including the deceased and his companions) rushed towards his vehicle and began to shower tones on it. The accused reversed the vehicle but the crowd continued to pelt tones and came close within 3 or 4 feet to the vehicle and completely encircled it. As already discussed, the accused had reached the Police Station in the same vehicle around 11 p.m. Thereafter his Jeep remained in the compound of the Police Station while the accused also remained in the Police Station, According to the Police Sub-Inspector (P. W. 11) he had in the morning, noticed that the wind-screen of the vehicle had been broken and there were dents and depressions in the vehicle.

20. The High Court has rejected the story of stone throwing, as "absolutely false" for the following reasons;

(i) According to P. S. I. Deol, there were only 10 to 15 dents in the jeep car apart from the damaged wind-screen. Therefore, "if the stones were thrown by the deceased and his companions at the jeep car, at least a dozen must have been thrown". But the Panchnama of the scene which was made immediately next morning, does not show that there were any stones lying at the scene of offence, Any other prosecution witness has not been cross-examined on this aspect

(ii) No glass splinters of the damaged windscreen were found lying at the scene of the crime.

(iii) None of the persons travelling in the jeep car, at the time of incident, received any sort of injury,

(iv) According to the accused, before going to the Police Station, he first went to his house and thereafter to the house of a friend for the purpose of contacting the Deputy Superintendent of Police on phone. "The accused had ample time at his disposal for creating evidence by making some dents on the jeep and breaking the windscreen thereof, before he went to the Police Station.

(v) No copy of the Panchnama which was prepared first in point of time, with regard to the seizure of the jeep and the marks of damage found on it, has been produced on the records of this case; but it appears that this "Panchnama has been produced in the cross-case filed by the accused against some of the prosecution witnesses and other".

(vi) The accused has not examined Jay-anti and Shaktidan, who according to him, were also with him in the jeep at the time of occurrence.

21. In our opinion, none of these reasons enumerated above justifies a positive and emphatic finding, such as the High Court has recorded, that "the two-fold theory of 'barricade' and stone-throwing advanced by the accused is absolutely false and an afterthought" Reasons (i) and (ii) are not of a definite tendency. The scene of occurrence was inspected on the following day at 9.15 a.m. The villagers had ample time to remove the stones and glass-splinters, if any, from the scene of offence. Nos. (i) and (ii) lose their significance when we keep in mind that the scene of occurrence was inspected by the investigator on the following day about twelve hours after the occurrence. The deceased was not only a village dignitary, being the elected Up-Sarpanch, but also the first cousin of the Police Patel, Khima who is the star witness of the prosecution. Naturally, therefore, the entire village was deeply interested in the success of the prosecution case against the accused, who in their eyes was an undesirable "outsider". Khima is not an unsophisticated rustic as he poses to be. Being a Police Patel, he was supposed to be fully aware of the significance of the presence of stones and like tell-tale evidence at the spot, which might proclaim him and his companions to be the aggressOrs. Indication of the fact that during the period of twelve hours after the occurrence and before the inspection, the villagers were active in removing such circumstantial evidence from the spot is available from the Panchnama Ex. 41, itself wherein the investigating officer who inspected the scene of crime has noted: "some grass and a crop had been sown in the field where the incident had taken place. The blood mark appears on the earth about 15 paces away in the southern side from the

scene of the incident....The fields are situated towards," the east north and so(sic) side . The foot-prints/marks of many people who were doing the digging work are seen there at the said place of the incident". The crucial sentence is that which has now been underlined. The significance of this "digging on the boundary of field of occurrence" becomes clear when we recall the statement of the accused and the cross-examination of the prosecution witnesses on the point. The accused has stated that "some people were running in the field along the hedge: they were running towards me Then. I reversed my vehicle". The accused tried to establish in cross-examination of prosecution witnesses, the fact that some persons, including the deceased were waiting in ambush behind that hedge in the field of Vira Momaya, where the deceased fell on receiving the fatal shot. That was why Khima (P. W. 2), Rata Sava (P.W. 5) Jasang Sava (P. W. 6) and Jakhu (P. W. 8) pointedly cross-examined about the presence of this hedge along the road on the boundary of the field of occurrence. Although all these witnesses denied the presence of hedge, they admitted this much that the field was under Moth crop which was hardly one inch high. Rata Sava first conceded: "From Malshi's Vada till the point of the incident, there is a hedge. It is to the left if one proceeds from the Vada of Malshi to the scene of the incident." In the next breath, perhaps when he realised the significance of the question, he said: "It is not true that similarly, there was a hedge on the right side, and that after this incident, the hedge was removed." Normally, when a field under crop abuts on a public road, one would expect a fencing or hedge to protect it from damage by stray cattle and human- beings, particularly when such a field lies in the proximity of village habitation.

22. It is against this background that the note in the Panchnama (Ex. 41), about the presence of digging marks and the footprints of many people who were doing this digging work at the place of the incident, is to be appreciated. The very presence of these marks and foot-prints at the place of occurrence, by the side of the dusty road frequented by cattle and men, indicates that they were fresh. It will therefore, be not unreasonable to hold that after the occurrence and before the inspection of the scene of offence, some material objects or bushes had been dug out with a view to foil by anticipation, the defence theory of the deceased and his companions lying there in ambush for the accused.

23. Thus, the possibility of the stones and glass splinters also having been removed from the scene of the incident by those very persons who purposely removed the hedge overnight from the spot, could not be reasonably ruled out.

24. As regards (iii), that is, non-receipt of injury by any of the occupants of the jeep, it may be noted that this vehicle was a closed vehicle of station-wagon type. It is a matter of common-knowledge that wind-screens of cars are so constructed that on being hit by a stone or other hard object, they crack and split up into fragments which do not fly away but either fall perpendicularly or remain stuck-up to the jellylike layer of the screen. Thus even if the vehicle was pelted with stones and its windscreen was hit, the possibility of the inmates of the car receiving injury was remote. Circumstance (iii), therefore, does not necessarily falsify the story of the vehicle being pelted with stones or blunt objects.

25. The failure of the accused or his counsel to bring on the record the first Panchnama which was prepared with regard to the attachment of the jeep, cannot give rise to an adverse inference against

the accused, particularly when the Sub-Inspector Luxman Singh Deol himself admitted in cross-examination that there were marks of violence and dents on the jeep car when he saw it in the morning. This Panchnama was a material document prepared by the investigating officer. It was primarily the duty of the prosecution to bring it or its copy on the records of this case, also. The prosecution therefore, cannot be allowed to take advantage of its own lapse,

26. Regarding (vi): It was common ground that Jayanti and Shaktidan were present in the jeep car with the accused at the time of occurrence. But the failure of the accused to examine them does not necessarily show that the defence version is "false". True, they are relations of Malshi who was then the Manager of the accused. But we cannot overlook the fact that the accused had immediately on reaching the Police Station., reported that the lives of the family members of Malshi were in danger at the hands of the irate villagers and that immediates steps be taken to protect, them. Viewed against this background, it would be unrealistic to expect Jayanti and Shaktidan to readily come forward and appear as witnesses in defence of the accused, The episode resulting in the death of Kans who was the Upsarpanch and cousin of the Police Patel of the village, had become an issue between the villagers and the "outsider" accused,

27. Circumstances being what they were, Jayanti and Shaktidan, actuated by the sheer extinct of self-preservation, would be least disposed to depose against their co-villagers and incur their wrath. While Jayanti and Shaktidan had to live, work and have their being in the village the accused, being domiciled in Bombay, and thus an absentee landowner in the village, was no better than an outsider. It was therefore extremely doubtful that Jayanti and Shaktidan would appear as defence witnesses at the instance of the accused. In such a situation, when the presence of Shaktidan and Jayanti in the jeep at the relevant time was not disputed by the prosecution, the court should have summoned and examined them as court witnesses. True, that the burden to establish his plea of private defence was on the accused, nevertheless it was as much the duty of the Court as of the parties to bring on the record all material evidence necessary to reach at the truth. In the circumstances, the failure of the accused to examine these persons as his witnesses, therefore, did not ipso facto give rise to the inference that the defence story wae "absolutely false".

Regarding No. (iv):

28. It is the accused's version that after the occurrence and before reaching the Police Station at about 11 p. m., he spent about one hour or 45 minutes in going to his friend's house, for unsuccessfully attempting to contact the Deputy Superintendent of Police on phone and in procuring more cartridges from his house for his revol time ana opportunity to fabricate the dents and damage-marks on his vehicle. Whether he actually fabricated these marks of violence on his vehicle (sic)ing this period, remains a big question marks. It cannot be answered with positive certainty either way. At the highest, all that can be said is that this delay on the part of the accused in going So the Police Station is an infirmity which degrades the probability as to the existence of the face of stone-throwing with consequent damage to the windscreen and the body of the Seep, to the status of a possibility, may be a strong possibility,

29. But, certainly this delaytor which the accused had given explanation, was hardly a ground for jumping to the conclusion that the defence version on this point was "absolutely false" and "concocted".

30. In our opinion, though the material brought on the record is insufficient to prove affirmatively the defence version that the Seep of the accused was pelted with stones and damaged, it does establish a reasonable possibility, falling short of a preponderating probability as to the existence of that fact.

Regarding the barricade:

31. The accused had failed to substantiate this fact by a balance of probability. The very fact that soon after firing the shots, the accused sped away vat his Jeep to Bhuj by "bumping" over - as he says - the barricade, shows that the road had not been effectively blacked or barricaded.

32. To complete the survey of the evidence one more aspect of the case may be examined. The earliest version of Khima, P. W. 2, in the F.I.R. (Ex. A), and of his companion witnesses during investigation was, that Khima was also present along with Ravudan, Kana, Rata Sava and Vala inside the house of Malshi; when the dispute over the payment of the claimed dues took place with the accused, that Khima was anxious for payment to Kana because he had to collect that amount from Kana towards repayment of the loan due to him; that accused bad turned out. all the five of them, including Khima from the house of Malshi without paying them even a penny. At the trial, Khima, Ravudan and Rata Sava have all committed a volte-face on this point, and stated that Khima was not present inside the house of Malshi when their quarrel with the accused over payment of their dues took place, and that Kima met them only near the entrance of the Vada of Malshi, When after the dispute they were turned out by the accused. The High Court has said this change introduced by these witnesses does not affect the substraturn of the prosecution story, viz., that it was the accused who had fired the fatal shot which caused Kana's death. That may be so, Nevertheless, this change appears to have been designedly made in (sic) on this point by all the three material witnesses, has an important bearing on the plea of private defence set up by the accused. This change appears to have been introduced with a view to give plausibility to their version at the trial that they were innocently trying to stop and intercept the vehicle of the accused on the way to Bhuj, so that Khima may, by his good offices, persuade the accused to make payment to his companions. Detailed discussion with regard to the effect of this twist to the story given by these witnesses, on the accused's plea of private defence will be considered later. Suffice it to say here that the version of these witnesses regarding the purpose of their going to the place of occurrence and stopping the vehicle of the accused, was not as innocuous and simple, as reproduced by us at No. 2 in the catalogue of facts appearing in the prosecution evidence It would be imprudent to swallow this changed version at the trial, without demur. Being an afterthought, it had to be appreciated against the background that only 45 or 60 minutes earlier, following a sharp dispute, the accused had ignominiously turned out these witnesses, including Khima, from the house of Malshi.

33. It is in the light of the above conspectus, the Court has to consider the questions: (a) whether a right of private defence of the body ever accrued to the accused. (b) If so, whether the exercise of that right extended to the causing of death.

34. For reasons that follow, the answer to the first question must he in the affirmative.

35. The fact is important to bear reiteration that Ravudan, Rata and their companions admittedly resented the haughty manner in which the accused had denied them payment and turned them out of the house of Malshi. It will also bear repetition that the earliest version of Khima, Ravudan and Rata Sava was that Khima was present in the house of Malshi when the dispute with the accused over payment of the amounts claimed by them, took place. It is further noteworthy, despite the twist on this point given in examination-in-chief, Rata Sava had to concede under the stress of cross-examination that at the time of the said dispute, Khima was present in the com-pound of Malshi. Khima, according to his own admission, was in dire need of money. His cousin, Kana deceased, owed him Rs. 60/-. Kana had promised to repay the loan after getting the amount from the accused. Khima admittedly wanted to collect the amount from Kana as soon as the latter got payment of the same from the accused. Under these circumstances, Khima's presence by the side of Kana when the latter demanded payment from the accused, was a probable fact. It was equally probable - as stated in the F. I. R. - that he was also turned out of the house along with his companions by the accused. In such a situation, it would be but natural that Khima also shared with his companions a sense of resentment against the accused.

36. The accused has stated that Ravudan had even attempted to assault him with a stick but the attempt had been foiled by the intercession of Smt. Lasmi-ben, and that after the crowd had been pushed out of the compound, it remained standing outside for about half an hour, "speaking abusive words", challenging the accused to come out to be taught "a lesson", and threatening to kill him saying that "it would be my (accused's) last meal". The accused may have exaggerated the utterances or behavior of Ravudan and party. But, if we keep in mind that Ravudan, Rata, Kana and their companions had admittedly felt offended at the treatment meted out to them by the accused, the version of the accused cannot be said to be devoid of substance. It was not improbable that on being unceremoniously turned out of the house of Malshi, these angry persons stood and lingered for some time outside the compound of Malshi and gave vent to their indignation by abusing and threatening to teach the accused a lesson when he came out.

37. It may also be recalled, that according to the prosecution evidence while moving towards the place of occurrence all these five persons were discussing among themselves and the only topic of discussion, (vide Rata Sava, P. W. 5, in cross-examination), was "of getting money from the accused". It will not be unreasonable, therefore, to infer that the passion, ire, hatred and temper generated against the accused by the dispute at the house of Malshi continued to simmer in the minds of Ravudan, Kana, Rata, Vala etc. till the occurrence took place. The changed story propounded by Khima and his companion witnesses at the trial that they were merely trying to stop the jeep of the accused to persuade and request the accused to pay them something, does not inspire confidence. The odd and out-of-joint time chosen, the strategic place selected and the unusual manner adopted, viewed against the backdrop of what happened a short time earlier at the house of

Malshi, all clearly point to the conclusion that the common intention of Khima, Kana and their companions in attempting to intercept and stop the vehicle of the accused was anything but peaceful. The surrounding circumstances and probabilities of the case clearly indicate that these five persons had attempted to stop the vehicle of the accused in order to wrongfully restrain or gherao the accused in prosecution of their avowed common object of "getting money" from him by putting him in fear of physical harm. In short, the common object of this assembly of five persons in attempting to intercept and stop the vehicle of the accused was to extort money from him by putting him in fear of injury. In the circumstances, as soon as Khima and Kana raised their hands to stop the jeep of the accused and then tried to follow and close on it, it was not unreasonable for the accused to apprehend some physical harm at their hands. Therefore, under Section 102, Penal Code, a right of private defence of the body had accrued to the accused.

38. It remains to be considered further whether this right extended to the voluntary causing of death. Answer to this question depends on whether in the circumstances, the accused had an immediate apprehension of death or grievous hurt at the hands of the complainant party. In this connection, it is to be noted that it has not been established that Kana deceased or any of his companions was carrying any arm. Even if we take into account that the complainant party pelted the vehicle with stones, then also It being a closed station wagon, the inmates could not reasonably apprehend death or grievous hurt as a result of this stone-throwing. If his vehicle had been encircled, as the accused says, he could have accelerated his vehicle and easily run through the cordon, even if, in the process he knocked down some determined obstructor. After running through the cordon he could speed further to Bhuj, as he did after the incident.

39. Furthermore, the accused should not have fired all the three rounds in quick succession. He should have after firing one round waited for a second or two to see its effect on the persons attempting to gherao him. If that fire did not have the desire effect, then he should have fired the next round. But the mere fact that he did not assess the necessity of firing each successive shot does not negative good faith on his part in the exercise of his right because a person placed in peril is' not expected to weigh "in golden scales" what amount of force is necessary to keep within the right. Thus, this is a case in which the accused has exceeded this limit of the right of private defence available to him under Section 101, Penal Code. Nevertheless, this is a circumstance which can be taken into account in mitigation of the sentence.

40. We agree with the High Court, that the offence committed by the accused is one under Section 304, Part II, Penal Code and does not amount to murder under any of the four clauses of the definition given in Section 300, Penal Code.

41. For all the foregoing reasons, we will while upholding the conviction of the appellant under Section 304, Part II Indian Penal Code, reduce his sentence to six months rigorous imprisonment and a fine of Rs. 10,000/- (Rupees Ten thousand only) and in default, to suffer two years' rigorous imprisonment. The fine shall be paid within two months from today. The fine, if realised, shall be paid as compensation' to widow, or failing her, to the immediate heirs of the deceased, Kana. The bail of the appellant is cancelled. He shall surrender to serve out the sentence inflicted on him.