rightly paid it. He must, therefore, be held to be entitled to recover the amount from the defendant.

We are clearly of opinion that the plaintiff is entitled to interest on the amount of the earnest money from the 27th February, 1947, to the date of the suit. This amount was wrongfully and illegally withheld by the defendant, and there can be no reason why the plaintiff should be deprived of its interest. In the ordinary course we might have allowed even future interest from the date of the suit to the date of realization, but the plaintiff has filed no appeal with regard to the same.

Rupees 50 were claimed by the plaintiff as expenses incurred on agreement, telegrams, etc. It is obvious that this amount must have been spent by the plaintiff on the agreement and other incidental charges. The defendant did not seriously contended that this amount did not come up to Rs. 50.

In the result, we allow the appeal, set aside the decree of the trial Court and pass a decree in favour of the plaintiff for Rs. 12,900 with costs throughout.

GROVER, J.—I agree.

B.R.T.

APPELLATE CRIMINAL

Before G. D. Khosla and Tek Chand, JJ.

BALBIR SINGH,—*Appellant*

versus

THE STATE,—*Respondent*

Criminal Appeal No. 539 of 1958

1959

Mar., 20th

Indian Penal Code (Act XLV of 1860)—Section 100—Right of private defence—Nature, scope and extent of—Taking of life of another in the right of self-defence—When

justified—Quantum of force to be employed—Retreat—When necessary—Section 300 Exception 2—Benefit of—When can be given—Indian Evidence Act (I of 1872)—Sections 102 and 105—Burden of proving guilt and exceptions—On whom lies—Section 133—Accomplice—Meaning of—Testimony of—Whether requires corroboration—Nature of corroboration required.

Held, that self-defence within well-defined limitations is the natural and inalienable right of every human being. It is the primary law of nature and is founded on necessity and is not superseded by law of society although curtailed thereby. Though abridged, the right cannot be abrogated. The exercise of the right within a circumscribed ambit is recognised from ancient times.

Held that law permits taking of the life of another for prevention and not for punishment. It is a right essentially of defence and not of retribution. The right of self-defence is exercisable in the face of actual or imminent danger. It is available only to those who act honestly and in good faith. In no case, can it be employed as a shield to justify aggression. The accused cannot invoke self-defence as a device or pretence for provoking an attack in order to slay his assailant and then claim exemption on the ground of self-defence. The necessity justifying exercise of the right must be urgent and the danger of loss of life or great bodily harm, imminent. The right exists if the attack is either actual or threatened. The Courts will naturally view the circumstances from the standpoint of the accused and not from that of a cool bystander. In order to justify the the taking of life on the ground of appearance of peril, the appearance must be real, though not the peril. The act of killing must be committed because of an honest and well-founded belief in the imminence of danger and not in a spirit of revenge. Law allows resort to force to repel force—*vim vi repellere licet*, but this should be done not for taking revenge but for warding off the injury—*non ad sumendam vindictam, sed ad propulsandam injuriam*. Right of self-defence is not available to a person who resorts to retaliation for past injury but to him who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. The necessity must be present, real or apparent, before the antagonist can justificably be deprived of his life. The right of self-defence commences when necessity begins, and ends when necessity

ceases. In short the following four cardinal conditions must exist before the taking of the life of a person is justified:—

Firstly, the accused must be free from fault in bringing about the encounter;

Secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity;

Thirdly, there must be no safe or reasonable mode of escape by retreat; and

Fourthly, there must have been a necessity of taking life.

Held, that the quantum of force that may be employed will depend upon the nature and the fierceness of the assault and the ordinary rule is that the force used should be proportioned to the force of the attack or the threatened danger. It must be such as the circumstances reasonably indicate to be necessary for self-defence. Differences of age or physical strength apart, an assault by an unarmed person is not permitted to be repelled by causing fatal injuries with a deadly weapon. Of course, the Courts do not expect a person assaulted to modulate his defence step by step according to the waxing or the waning tempo of the attack. Once the assault has assumed a dangerous form, Courts make all reasonable allowances in favour of a person, who in fear of his life or limb, gives harder blows than appear necessary to a calm spectator watching from safe distance. An accused person when placed in such a predicament, is not expected to maintain *sang froid* and remain composed and unperturbed. To use the words of Holmes, J:—'detached reflection cannot be demanded in the presence of an uplifted knife'.

Held, that while the law does not expect from the man whose life is placed in danger to weigh with nice precision the extent and the degree of the force he employs in his defence, the law does insist that a person claiming such a right does not resort to force which is out of all proportion to the injuries received or threatened and far in excess

of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity. Life of an antagonist may not be taken if it can be avoided by retreating, and if retreat is practicable consistently with one's safety. Where there are two courses, equally feasible, open to a person, one leading to and the other from the difficulty he must take the later in order to rely on the right of self-defence, if he can do so without adding to his peril. But where such a course is not possible beacuse of suddenness or fierceness of the attack. he is not obliged to retire and in such a case he might stand his ground and inflict counter blows. The strict common law doctrine of 'retreat to the wall' or 'retreat to the ditch'. as expressed by Blackstone has undergone modification. A person attacked in his own premises or where he has a legal right to be, is not bound to retreat. The exemption from retreating is available to the faultless, but those in fault must retreat if able to do so, there being a safe avenue of escape unless prevented by fierceness of the attack. In a situation where the accused is either an aggressor or has intentionally sought his adversary or is a tresspasser, it is his clear duty to retreat, if reasonably possible, in case he believes that his life or safety is menaced.

Held, that the benefit of Exception 2 to Section 300 of the Indian Penal Code can be given where an accused person has exercised the right of private defence of person or property in good faith, and then has exceeded that power which the law had given to him, and has caused the death of his antagonist without premeditation, and withuot any intention of doing more harm than was necessary for the purpose of such defence. The other requirement of law before Second Exception to section 300 can be availed of is that more harm than was necessary for the purpose of such defence, should not have been caused.

Held, that the law in India places the burden of proof upon the prosecution to bring the guilt home to the accused and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by leading evidence pointing to the guilt of the accused. Under section 105 of the Indian Evidence Act the burden of proving the existence of circumstances bringing the case within

any of the general or special exceptions is placed on the accused. All that this means is, that it is the duty of the accused to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within any Exception, and that will suffice to satisfy the Court that such circumstances may have existed. Despite what is stated in section 105, Indian Evidence Act, as to the accused bearing the burden of bringing the case within the statutory Exception, the prosecution is not absolved from the burden laid on it by section 102.

Held, that an accomplice means a guilty associate or partner in crime, a person who is believed to have participated in the offence or, in some way or other, is connected with the offence in question. An accomplice is a competent witness against an accused person, and a conviction is not illegal, merely because it proceeds upon his uncorroborated testimony. It is a rule of caution, which has almost acquired the status of a rule of law, that as the evidence of an accomplice is tainted, it generally requires corroboration by independent evidence, confirming in material particulars, that the crime had been committed by the accused. Corroboration is not required in every detail of the crime and circumstantial evidence, in the absence of direct evidence, can be treated as sufficiently corroborative.

Appeal from the order of Shri G. C. Jain, Sessions Judge, Jullundur, dated the 25th July, 1958, convicting the appellant.

K. S. NAGRA, for Appellant.

NARINDER SINGH and CHATAR SINGH RAJPAL, for Respondent.

JUDGMENT

Tek Chand, J.

TEK CHAND, J.—Balbir Singh accused-appellant, formerly a Head Constable in the Railway Police stationed at Delhi, has appealed from his conviction under section 302, Indian Penal Code. The Sessions Judge, Jullundur, has awarded the lesser penalty of imprisonment for life to the accused-appellant for murdering one Malkiat Singh

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in village Dialpur, situate at a distance of three miles from Police Station Kartarpur in district Jullundur.

Malkiat Singh was murdered in the house of P.W. 2 Baldev Kaur, a teacher in the Government Girls Middle School, on the night between 20th and 21st of December, 1957. The first information report was made by P.W. 2 Baldev Kaur at Police Station Kartarpur, at 10 a.m., on 21st of December, 1957. In the first information report, Exhibit P.A., she had stated that she was living in the house which she had taken on rent and Malkiat Singh deceased used to visit her. One Suba Singh, P.W. 17, an ex-Patwari, having felt frustrated in his attempts to have a liaison with her, turned against her and sent complaints to the Sarpanch, the Headmistress and to the Divisional Inspector of Schools against her character and her association with Malkiat Singh. In the first information report regarding the incident, she simply stated that when she got up in the morning and came into the *deorhi* from the room she saw Malkiat Singh lying dead besmeared with blood, having many injuries on his chest and belly. She raised hue and cry and several people of the village assembled. Leaving them there near the dead body, she had come to lodge a report. She suspected Suba Singh and his companions as murderers of Malkiat Singh. Shri Hira Lal, Sub-Inspector, recorded the first information report and proceeded to the place of occurrence reaching there at 10.30 a.m. on 21st of December, 1957. He prepared the injury statement and the inquest report and took into possession jacket Exhibit P. 1 which was lying near the dead body. He also found in its pocket a piece of paper, Exhibit P. 3, which bore finger prints in blood which were later found to be of the accused. He also took into possession

other articles and also took bloodstained earth, a piece of paper, Exhibit P. N./1, bearing the address of Malkiat Singh, produced by Baldev Kaur. She also produced a ring, Exhibit P. 2, from her box. The dead body was sent for post-mortem examination on a bullock-cart. On 25th of December, 1957, the accused was handed over to him by Police Inspector Ishwar Singh, at Dehlon.

P.W. 2 Baldev Kaur was taken into custody on 7th of January, 1958, and on the same day she offered to appear as a prosecution witness and was produced before the District Magistrate on 7th of January, 1958, who tendered pardon to her. Her statement as an approver (Exhibit P.B.) was recorded by Shri Isa Das, Magistrate First Class, Jullundur, on 8th of January, 1958. On 13th of March, 1958, Baldev Kaur was examined before the Committing Magistrate. Her statement was recorded as P.W. 2 by the Sessions Judge, Jullundur, on 21st of July, 1958. After her examination-in-chief, the Public Prosecutor had made a request to the trial Court to transfer her statement made to the Committing Magistrate to his filed under section 288, Criminal Procedure Code, but the request was not granted, because the trial Court thought, that the departures made by her, from her previous statement, were not on material points, and he was not satisfied, that she had changed her statement deliberately in order to supress the truth.

The case of the prosecution rests in the main on the testimony of P.W. 2 Baldev Kaur who was a direct witness and on circumstantial and other evidence of corroborative character.

According to her statement in the Sessions Court, Baldev Kaur was married to one Onkar

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Singh in 1950. After one year a daughter was born to them, and later on, Onkar Singh turned an ascetic, had left the house and had not been heard of since. Baldev Kaur thought of educating herself and prepared herself for Giani Examination after having joined the Central City College at Ludhiana. On one occasion in 1952, she had gone to village Naurangwal and there met Balbir Singh accused for the first time. She served in a Municipal School at Jagadhri and in April, 1955, she took up service in the Government Middle School at Dialpur. A few months later, she went to Patiala to receive training and returned to Dialpur in July, 1956. Balbir Singh accused had been visiting her on several occasions and there had developed between them an attachment. He was a frequent visitor to her at Dialpur. There was another teacher Shrimati Dalip Kaur, P.W. 10, who was employed in the same school as Baldev Kaur, at Dialpur, and these two women started living together in the same house for some time. On the occasion of Diwali, they along with some girl students had decided to go to Amritsar ; and a day before, the accused had met her at Jullundur and she had brought him along with her to Hamira. He joined their party when they proceeded to Amritsar. Suba Singh, P.W. 17, is a dismissed Patwari and he also wanted to develop intimate relations with her but was repulsed. Feeling himself frustrated, he turned against her and started shadowing her and harassing her. He also was in the same railway train by which Baldev Kaur, the accused and other members of their party were proceeding to Amritsar. They were travelling in a second class compartment though they had purchased third class tickets. Suba Singh brought this matter to the notice of the railway guard, and at his instance, their tickets were checked but in view of the influence of Balbir Singh, who was in

the railway police the guard did not take any action. They stayed for a couple of days at Amritsar. Suba Singh, had, in the meanwhile, made several complaints against Baldev Kaur regarding her liaison with Balbir Singh, and the Sarpanch of the village made inquiries about it from her. He also had sent a complaint against her to the Head-mistress of the school. Her friend Dalip Kaur suggested to her that she should seek assistance from one Resham Singh, who was an influential person in the locality. Although she saw Resham Singh on a few occasions, but he being otherwise occupied, was not of any help to her. In the meanwhile she made acquintance with Resham Singh's friend Malkiat Singh (deceased) who soon became interested in her. At this time she decided to live separately from Dalip Kaur and took the house of one Dharam Pal on rent. Malkiat Singh, who had been a frequent visitor when she was living in Dalip Kaur's house, also started making frequent calls on her in the new house and their friendship grew, though according to her statement, Malkiat Singh did not take any liberties with her. On one occasion, when she had gone with Malkiat Singh to Jullundur, she accidently met Balbir Singh and all three came back together to Dialpur. On this occasion, Malkiat Singh went to Dalip Kaur's house and Balbir Singh stayed with Baldev Kaur in her house. During the night, Balbir Singh, who did not like her keeping company with Malkiat Singh, asked her not to have anything to do with him. Her association with Malkiat Singh nevertheless continued, though in her letters to the accused she had been assuring him that she was no longer associating with Malkiat Singh or Dalip Kaur.

A few days before 3rd of December, 1957, she wrote a letter to accused Balbir Singh at Delhi

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that she would be going there on 3rd of December, 1957, and he should meet her at the railway station. She gave this letter to Malkiat Singh so that he might put it in an envelope and post it at the address of the accused. It seems that Malkiat Singh had given this letter to some friend of his, who, by way of a practical joke, also enclosed a chit on which it was written "*Mar jaen chapni wich nak dob ke.*" These were insulting words suggesting that out of shame he should commit suicide. It appears to be a veiled suggestion that Baldev Kaur was not being true to him. When she met him in Delhi, he felt resentful on account of having received the chit and on her return to Dialpur she complained about it to Malkiat Singh. After this she received many letters from the accused, exhorting her not to associate with Malkiat Singh or Dalip Kaur. On 16th of December, 1957, the accused paid a surprise visit to her in the morning and while she had gone to the school, he stayed in her house and searched for any letters that she might have received from Malkiat Singh. He found no such letters but came across a paper on which Malkiat Singh's address was written and felt annoyed with Baldev Kaur for having kept his address. The accused left her in anger on this account. She then wrote a letter to the accused promising not to have anything more to do with Malkiat Singh, but in fact she did not give up her relations with Malkiat Singh.

On 20th of December, 1957, Malkiat Singh came to her in the evening and stayed with her and the two of them had their meals together. At about 8.30 p.m. the accused came and knocked the door which was chained from within and shouted to her to open the door. Recognising him from his voice, she told Malkiat Singh that Balbir Singh had come, and that he woud fight with him. He

asked her what should be done, and then she advised him that he should conceal himself behind one of the outer doors so that when she would open the door for the accused to enter, Malkiat Singh should quietly slip out. It had become dark. She opened the door to Balbir Singh but he stood in the doorway, suspecting that she was not alone. He refused her invitation to come inside and insisted, that she should bring some light so that he could see if she was alone or there was someone with her. It is then stated by her, that while she and the accused were arguing with each other, she wanting him to come in and he insisting that she should light the lamp first, "Malkiat Singh came up and caught hold of him (accused) by the neck. I left them there and went hurriedly inside the house to bring a light. When I returned with the light I saw that Malkiat Singh was lying dead on the floor and the accused had a bloodstained *chhura* (dagger, though translated as knife) in his hands. He did not give any blow to Malkiat Singh in my presence. * * * * Then I told the accused that he should not have murdered the man in my house. Thereupon he said that he would throw out the dead body. I kept standing with the lamp in my hand. The accused tried to lift the dead body of Malkiat Singh, but as he was too heavy for him, he could not do so." The accused then went inside her house and searched for the letters that he had sent her and burnt them. The accused also took out some papers from the pocket of the deceased and burnt them. He spent a few hours in her house and then departed telling her, that she should not name him as the culprit. At 6 in the morning, she came out and told the persons that a murdered man was lying in her *deorhi*. She admitted as P.W. 2 that she had wrongly mentioned the name of Suba Singh in Exhibit P.A. and she had done so because the accused

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had told her not to mention his name as the culprit. In cross-examination she stated "I did not see any injuries being caused to the accused."

Post-mortem examination disclosed as many as 16 incised wounds on different parts of the body. There were cuts on fourth, fifth, sixth and seventh left ribs. The upper lobe of the left lung had been pierced. There were three cuts in front of the left side of the heart. The peritonial cavity had been pierced through. In the opinion of the doctor, death was due to shock and internal haemorrhage as a result of injuries to vital organs caused by same sharp-edge weapon; and the injuries were sufficient in the ordinary course of nature to cause death.

The accused was stationed at Delhi Police Lines. On 20th of December, 1957, he had obtained three days' leave and had left the police lines at 12.05 p.m. Foot Constable Hans Raj, P.W. 38, had also taken leave and both he and the accused travelled together up to Ludhiana by the Flying Mail. At Jullundur, railway train had to be changed as the Flying Mail did not stop at Hamira, the railway station nearest to Dialpur. The accused was seen in the passenger train proceeding to Hamira by P.W. 14 Surjit Singh, Assistant Station Master, Hamira, who had travelled with the accused. Surjit Singh had stated that he knew Balbir Singh for the last two years and it was either on 20th or 21st of December, 1957, that they had travelled together up to Hamira from Jullundur and the accused parted from him at 9.30 p.m. Village Dialpur is at a distance of two miles from Hamira. He must have reached the house of Baldev Kaur at about 10.30 p.m. P.W. 22, Joginder Singh, stated that on the night between 20th and 21st of December, 1957, he got into a train at

Hamira which was bound for Patiala and saw the accused entering the train. He had known the accused previously. Accused reached Delhi on 21st of December, 1957, at 4 p.m. and met two Head-constables Kartar Singh, P.W. 29, and Madho Ram, P.W. 30. His three days' leave expired on 24th of December, 1957, but he did not join duty on that day. He got a telegram sent for extension of leave which was granted to him till 31st of December, 1957. He did not even join on 31st of December, 1957. On 2nd of January, 1958, he appeared before Gurnam Singh and Pritam Singh, P.W. 23 at his village Dehlon, where he is said to have confessed his guilt and desired to be produced before the police. On 3rd of January, 1958, P.W. 23 produced the accused before the police.

The accused in his statement under section 342, Criminal Procedure Code, denied having committed the offence with which he was charged. He stated, that he had been falsely implicated due to a wrong suspicion, that he was having a liaison with Baldev Kaur. He stated that the police had extorted the statement from her, against him, after she had been beaten. He said that the injury on his left hand was received on 25th of December, 1957, when he was working with his *toka*. He stated that he was arrested by the police from his house in Dehlon on 31st of December, 1957, and denied having confessed his guilt before P.W. 23, Pritam Singh on 2nd of January, 1958. He admitted that he was on friendly terms with Baldev Kaur and he had been meeting her but denied having taken any improper liberties with her. He deined having travelled by the Flying Mail from Delhi to Jullundur with Hans Raj, P. W., on 20th of December, 1958. He said that he left Delhi at night at 11 p.m. by Janta Express.

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The first question that arises in this case is whether the statement made by Baldev Kaur was that of an accomplice, and therefore, required corroboration in material particulars, or, whether conviction could stand on her sole testimony, as being that of an ordinary witness. Under section 133 of the Indian Evidence Act, an accomplice is a competent witness against an accused person, and a conviction is not illegal, merely because it proceeds upon his uncorroborated testimony. It is a rule of caution, which has almost acquired the status of a rule of law, that as the evidence of an accomplice is tainted, it generally requires corroboration,—*vide* section 114, illustration (b), Indian Evidence Act. An accomplice means, a guilty associate or partner in crime, a person who is believed to have participated in the offence or, in some way or other, is connected with the offence in question. Judged from this test, Baldev Kaur, who did not participate or assist in the commission of murder, was not an accomplice. But she appears to be an accessory after the fact in so far as she, with a view to shield Balbir Singh accused, had come out with an entirely false story, that she had found the body of Malkiat Singh, deceased in her *deorhi* in the morning ; and she suspected P.W. 17, Suba Singh, to be the murderer of Malkiat Singh. This was an attempt on her part to put the police on a false track. She was not a privy to the murder, but she aided the accused in escaping. Though not strictly an accomplice in the sense of a *particeps criminis,* in so far as she was cognisant of the commission of an offence by the accused and did not disclose his name, she was no better. Therefore, the cautionary rules, as set forth in the leading judgment of the Court of Criminal Appeal in *R.* v. *Baskerville* (1), by Lord Reading, C.J., should be applied. Her testimony by itself, should

(1) (1916) 2 K.B. 658

not form basis for conviction of the accused, unless there was corroboration by independent evidence, confirming in material particulars, that the crime had been committed by the accused. Corrobration is not required in every detail of the crime and circumstantial evidence, in the absence of direct evidence, can be treated as sufficiently corroborative.

In this case the finger-prints of the accused in blood found on the paper, Exhibit P. 3, recovered from the jacket of the deceased by the police on arriving at the spot, on the morning of the crime, furnish a valuable corroboration of Baldev Kaur's testimoney pointing to the guilt of the accused. That the finger prints were of the accused, has been proved by the testimony of P.W. 3, Parduman Singh, D.S.P., Officer Incharge, Finger Print Bureau, Phillaur, and from the statements of P.W. 55 Vasudev Singh, Inspector, Finger Print Bureau, and P.W. 56 Agya Ram, Sub-Inspector, Photographer, Finger Print Bureau, Phillaur. According to the report of the Serologist, Exhibit P.U.U., this paper was stained with human blood. The paper, Exhibit P. 3, was recovered from the pocket of the deceased, soon after the occurrence and during the course of investigation by the police. This is stated by P.W. 7, Hazura Singh, P.W. 8, Bihari Lal and P.W. 57, Sub-Inspector, Hira Lal. There is a mention of this document in the inquest report prepared by the Sub-Inspector Hira Lal,—*vide* Exhibit P.Q.Q.

It is amply proved from the testimony of P.W. 38 Hans Raj that the accused had travelled from Delhi up to Ludhiana. The Assistant Station Master, Hamira, has proved that he travelled from Jullundur to Hamira and it was 9.30 p.m. when he saw him last. P.W. 22 Joginder Singh

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has stated having seen the accused on the return journey on the same night at Hamira. P.W. 9 is Resham Singh, a member of Dehlon Municipal Committee, and he stated that he had asked Malkiat Singh to help Baldev Kaur who was being harassed by Suba Singh, P.W. 17, and that Malkiat Singh and Baldev Kaur got thick with each other. He also stated that he and the accused met Baldev Kaur in the company of Malkiat Singh in Jullundur, and that the accused admonished her in his presence as to why she had come along with Malkiat Singh. P.W. 10 Dalip Kaur has stated about the incident when the accused travelled with her and Baldev Kaur to Amritsar. The above evidence proves that the accused had been frequently associating with Baldev Kaur and was resentful of her association with Malkiat Singh, and that the attachment that had developed between the accused and Baldev Kaur was not merely Platonic. He suspected that she was also carrying on an intrigue with Malkiat Singh. As a jealous rival he felt resentful and had expressed his resentment on a number of occassions. Baldev Kaur did not seem to have particular preference for the one or the other and she appears to have been equally generous in giving her favours to the accused, and the deceased. To the accused she would make promises to give up the society of Malkiat Singh but the moment official duty or other work deprived her of the company of the accused, she was always willing to find solace in the company of Malkiat Singh. The corroborative evidence lends support to the inference that on the night of the occurrence the accused had come to the house of Baldev Kaur when Malkiat Singh was already there, and had intentionally killed him.

The next important question is as to what exactly happened just before Malkiat Singh met his

end. It has been argued by the learned counsel for the accused that according to the statement of Baldev Kaur, while the accused was arguing with her and was refusing to enter the house, "Malkiat Singh came up and caught hold of him by the neck". From this the learned counsel wanted to show, that aggression had proceeded from Malkiat Singh, and the accused was justified in using force against Malkiat Singh, even to the extent of causing his death, by giving him as many as 16 thrusts with the *chhura*. It is to be noted that some of these *chhura*-thrusts had pierced his lungs, heart and stomach.

The point to be examined is whether Baldev Kaur told the truth when she said that Malkiat Singh came up and caught hold of the accused by the neck. When Baldev Kaur and Malkiat Singh were surprised by the unexpected visit of Balbir Singh at night, her immediate and perhaps natural reaction was of apprehension of harm to Malkiat Singh at the hands of Balbir Singh and she, therefore, told Malkiat Singh that the accused had come, and he would now fight with him. Malkiat Singh appears to have shared this apprehension and asked her as to what he should do. She told him that he should stand behind the door of the *deorhi,* and when it was opened and the accused entered the house, he should manage to escape. It was very dark and she did not light the lamp so that he might unobtrusively slip away. The attitude of Malkiat Singh, therefore, was of a person who wanted to escape and not to stand his ground and give a fight to the accused, not knowing as to how he might have armed himself. The mental attitude of Malkiat Singh and of Baldev Kaur strongly suggests that they feared danger to Malkiat Singh from the accused. It is not her case that she saw Malkiat Singh grappling with the accused or giving him any blows or kicks. Admittedly, the

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accused did not sustain any injuries at the hands of Malkiat Singh either on his neck or on any other part of his bady. On the other hand, Malkiat Singh received 16 thrusts on different parts of his body, without being able to offer any resistance whatsoever. This is because he was unarmed, whereas, the accused had come armed with a sharp-edged weapon of which he made full use. The defence counsel went to the length of arguing, that the accused being literate, be probably had a small penknife in his pocket kept for sharpening pencils and suddenly finding his life in danger, at the hands of Malkiat Singh, he used the small penknife with a view to defend himself. As already mentioned, Baldev Kaur stated that the accused held a *chhura* in his hand. *Chhura* is a dagger and cannot be decribed as a small penknife.

The learned counsel for the accused has advanced the plea of self-defence. He has rested this contention on the statement of Baldev Kaur that "Malkiat Singh came up and caught hold of him (accused) by the neck." In the background of the above facts, the rule relating to the right of private defence may be examined. Self-defence within well defined limitations is the natural and inalienable right of every human being. It is the primary law of nature and is founded on necessity and is not superseded by law of society although curtailed thereby. Though abridged, the right cannot be abrogated. The exercise of the right within a circumscribed ambit is recognised from ancient times:—

> "*Quamvis vim vi repellere omnes leges et omnia jura permittunt,—tamen id debet fieri cum moderamine inculpatae tutelae, non ad sumendam vindictum, sed ad propulsandam injuriam.* (Although

it is lawful to repel force by force, nevertheless this ought to be done with the moderation of blameless defence, not for taking revenge but for repelling injury)".

According to the ancient law givers of India, homicide was permitted if committed when danger to life was feared प्राण संशये Manu enjoined resort to arms in self-defence आत्मनः परित्राण desisted before striking, he was to be captured, and not killed ग्रहणं न वधःस्मतः (Katyana in Smritichandhika page 729). For other instances, reference may be made to the Hindu Law in its Sources by Ganganatha Jha, page 541 *et seq.*

Law permits taking of the life of another for prevention and not for punishment. It is a right essentially of defence and not of retribution. The rights of self-defence is exercisable in the face of actual or imminent danger. It is available only to those who act honestly and in good faith. In no case can it be employed as a shield to justify aggression. The accused cannot invoke self-defence as a device or pretence for provoking an attack in order to slay his assailant and then claim exemption on the ground of self-defence. The necessity justifying exercise of the right must be urgent and the danger of loss of life or great bodily harm, imminent. The right exists if the attack is either actual or threatened. The Courts will naturally view the circumstances from the standpoint of the accused and not from that of a cool bystander. In order to justify the taking of life on the ground of appearance of peril, the appearance must be real, though not the peril. The act of killing must be committed because of an honest and well-founded belief in the imminence of danger and not in a

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spirit of revenge. Law allows resort to force to repel force—*vim vi repellere licet,* but this should be done not for taking revenge but for warding off the injury—*non ad sumendam vindictum, sed ad pronulsandam injuriam.* Right of self-defence is not available to a person who resorts to retaliation for past injury but to him who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. The necessity must be present, real or apparent, before the antagonist can justifiably be deprived of his life. The right of self-defence commences when necessity begins, and ends when necessity ceases.

As to the quantum of force that might be employed, that would depend upon the nature and the fierceness of the assault and the ordinary rule is that the force used should be proportioned to the force of the attack or the threatened danger. It must be such as the circumstances reasonably indicate to be necessary for self-defence. Differences of age or physical strength apart, an assault by an unarmed person is not permitted to be repelled by causing fatal injuries with a deadly weapon. Of course, the Courts do not expect a person assaulted to modulate his defence step by step according to the waxing or the waning tempo of the attack. Once the assault has assumed a dangerous form, Courts make all reasonable allowances in favour of a person, who in fear of his life or limb, gives harder blows than appear necessary to a calm spectator watching from safe distance. An accused person when placed in such a predicament, is not expected to maintain *sang froid* and remain composed and unperturbed. To use the words of Holmes, J.—'detached reflection cannot be demanded in the presence of an uplifted knife'. *Brown* v. *U.S.* (1).

(1) 256 U.S. 335 (343)

While the law does not expect from the man whose life is placed in danger to weigh with nice precision the extent and the degree of the force he employs in his defence, the law does insist that a person claiming such a right does not resort to force which is out of all proportion to the injuries received on threatened and far in excess of the requirements of the case. In certain eventualities, it is the duty of the accused even to retreat in order to avoid danger to himself before inflicting fatal injury. This is a necessary corollary that follows from the right of self-defence being based on necessity. Life of an antagonist may not be taken if it can be avoided by retreating, and if retreat is practicable consistently with one's safety. Where there are two courses equally feasible, open to a person, one leading to and the other from the difficulty he must take the latter in order to rely on the right of self-defence, if he can do so without adding to his peril. But where such a course is not possible because of suddenness or fierceness of the attack, he is not obliged to retire and in such a case he might stand his ground and inflict counter blows. The strict common law doctrine of 'retreat to the wall' or 'retreat to the ditch' was thus expressed in the words of Blackstone (Commentaries, Book 4, page 185)—

> "The party assaulted must, therefore, flee as far as he conveniently can, either by reason of some wall, ditch, or some other impediment ; or as far as the fierceness of the assault will permit him ; for it may be so fierce as not to yield a step, without manifest danger of his life, or enormous bodily harm ; and then in his defence he may kill his assailant instantaneously. And this is the doctrine of universal justice, as well as of the municipal law."

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This doctrine has undergone modification. A person attacked in his own premises or where he has a legal right to be, is not bound to retreat. The exemption from retreating is available to the faultless, but those in fault must retreat if able to do so, there being a safe avenue of escape unless prevented by fierceness of the attack.

From the above discussion, four cardinal conditions must have existed beore the taking of the life of a person is justified on the plea of self-defence :—

Firstly, the accused must be free from fault in bringing about the encounter ;

Secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity ;

Thirdly, there must be no safe or reasonable mode of escape by retreat ; and

Fourthly, there must have been a necessity for taking life.

The law of right of private defence as contained in section 100 of the Indian Penal Code is no different. The question is whether the above principles apply to the facts of this case. The previous conduct of the accused, his amorous relations with Baldev Kaur, his unconcealed jealousy and pronounced repugnance of Malkiat Singh, whom he considered to be his rival and whom he strongly suspected to be pursuing his intrigue with her, his suprise visit at night after having armed himself with a *chhura,* his suspicion of Baldev Kaur's being with another, his persistent refusal to enter the house unless she had lighted a

lamp to enable him to see if there was anybody with her in the house, and on seeing Malkiat Singh his having plunged the *chhura* sixteen times into his body without having received a single scratch or any other injury on his person, are facts which leave me under no doubt that the accused had come with a premeditated intention to commit aggression if necessary. It is shown that he was the aggressor and he had come there, after having armed himself with a dagger, in order to deal with a rival whose presence in the house of Baldev Kaur he suspected, and on reaching there, he had found his suspicions confirmed. The conduct of the accused clearly indicates that on discovering the rival lover, as to whose presence there, he had misgivings, he did him to death in hatred and in revenge. The accused in this case had taken three days' leave and had come all the way from Delhi to this village to pursue his amour with Baldev Kaur. On discovering her at night in the company of Malkiat Singh and thus being supplanted, he was burning with jealousy and chagrin. Baldev Kaur's previous promises to him to avoid Malkiat Singh's company, turned out to be false. Before receiving even a single blow from Makiat Singh, the act of the accused in killing him was in retribution than in self-preservation.

I do not believe Baldev Kaur when she says, that Malkiat Singh had caught hold of the accused by the neck, but even on the assumption that what she stated did happen, I cannot persuade myself to believe that that would have caused in the mind of the accused apprehension of death or of grievous hurt at the hands of Malkiat Singh. The accused could have no reasonable ground to believe, that the deceased was about to take his life or going to cause him any serious bodily harm. On the one side there was Malkiat Singh who was unarmed

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and on being taken unawares by the accused and apprehensive of his safety, he wanted to make good his escape. In that hope he stood behind the door on Baldev Kaur's advice, so that he could run away, the moment the accused entered the room. On the other hand, there was the accused, who had come armed, as Baldev Kaur had previously given him reasons to mistrust her promises to give up the liaison with Malkiat Singh. The accused, despite Baldev Kaur's overtures, was not budging from the threshold and insisted on coming face to face with his rival. The moment he cast eyes on him, he did not leave him till he had drawn blood by having given him no less than sixteen thrusts with his *chhura*. Before the accused attacked Malkiat Singh, the latter had not done anything so as to cause in the mind of the accused, apprehension of death or of grievous hurt. When the accused came to the house of Baldev Kaur and she opened the door to him, neither his life nor limb was imperilled. The accused had himself brought about the situation by his uninvited nocturnal visit to Baldev Kaur, who had chosen the company of another visitor. Malkiat Singh who was being entertained by her, was not an intruder, the intrusion was from the side of the accused. In a situation where the accused is either an aggressor or has intentionally sought his adversary or is a trespasser, it is his clear duty to retreat, if reasonably possible, in case he believes that his life or safety is menaced. A person in the situation of the accused could not justify killing on the ground of self-defence unless he had retreated. In this case, the accused had no reasonable grounds for fearing that in retreat he would not have found safety. As a matter of fact, I am firmly of the view that the life or person of the accused was neither threatened nor was there any reasonable fear of such a danger either actual or apparent.

Under no circumstances, the accused had any justification for striking a large number of blows with a weapon which was sharp-pointed and lethal. I am convinced that it was wholly a one-sided affair from the begining to the end. The attack on the deceased was fierce, murderous and unrelenting, without there being a semblance of belief, far less well-grounded foundation, that he would be attacked by Malkiat Singh. The killing in the circumstances can neither be excused nor extenduated on the plea of self-defence.

The case of the accused, in my view, cannot be brought under Exception 2 to section 300 of the Indian Penal Code. The benefit of that section can be given, where an accused person has exercised the right of private defence of person or property in good faith, and then has exceeded that power which the law had given to him, and has caused the death of his antagonist without premeditation, and without any intention of doing more harm than was necessary for the purpose of such defence. The above requirements of law do not exist in this case. The accused had come all the way from Delhi to the village, and had armed himself with a dagger (*chhura*). He had no legal right to claim ingress in the house of Baldev Kaur, who was then entertaining Malkiat Singh, who was staying with her, with her full accord. Even if the accused suspected that she was entertaining a lover to his annoyance or chagrin, he could not force an entry, or on seeing him there, use force against him. It appears that the accused had come prepared for such an eventuality. The contention of the defence counsel that as nobody had seen the accused coming with a knife, it might as well be, that Malkiat Singh had that knife and while Malkiat Singh was about to use that knife the accused snatched it from his hands and then

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attacked Malkiat Singh with the latter's knife. There is not a tittle of evidence in support of such a suggestion. The accused has not said so and his counsel is only drawing upon his imagination in making a fanciful insinuation.

The other requirement of law before Second Exception to section 300 can be availed of is that more harm than was necessary for the purpose of such defence, should not have been caused. This is not a case in which the offence under section 302, Indian Penal Code, can be converted to an offence under section 304, Part I, or Part II, Indian Penal Code. The number and nature of the injuries go to show that the accused had opened the attack with an intention to kill and did not desist till he had accomplished his intention.

Lastly, it has been urged that the trial Court has erred in convicting the accused by wrongly casting the burden of proof of circumstances justifying the exercise of the right of private defence, on the accused. Reference has also been made in this connection to the case of *Woolmington* v. *The Director of Public Prosecutions* (1). In that case, the following statement of the law in Foster's Crown Law (1762), page 255, was disapproved of by Viscount Sankey—

> "When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."

(1) L.R. 1935 Appeal Cases 462

In that case, Viscount Sankey said—

> "But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; * * *
>
> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given "by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The effect of *Woolmington's case* (1), was at first misunderstood and the above observations were later on somewhat modified by Viscount Simon, L.C., in *Mancini* v. *Director of Public Prosecution* (2), to which Viscount Sankey assented. Macini was found guilty of the murder of one Distleman and was sentenced to death and

(1) L.R. 1935 Appeal Cases 462
(2) 1942 Appeal Cases 1

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that sentence was confirmed by the Court of Criminal Appeal. Macini, who was the manager of a club, had inflicted a fatal wound on Distleman with a knife. At the trial, on behalf of the accused the plea of self-defence was set up. The prisoner admitted that he had the knife in his pocket and said that he was attacked by Distleman, whereupon in self-defence he drew the blade from his pocket and inflicted a blow which proved fatal. The House of Lords dismissed the appeal. Referring to *Woolmington's decision* (1), Viscount Simon said—

> "The language employed by Lord Sankey does not assert and does not imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing-up to directing the jury on the question of manslaughter or the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that

(1) L.R. 1935 Appeal Cases 462

the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it."

The question of burden of proof in cases where the accused has set up the plea of self-defence came up before the Court of Criminal Appeal in a recent case *R.* v. *Lobell* (1), After referring to *Woolmington's case* (2), and *Mancini's case* (3), and also to a decision of the Privy Council in *Chan Kau* v. *The Queen* (4), Lord Goddard, C.J., said—

"It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or, "indeed, need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus on him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If, on a consideration of all the evidence, the jury are left in doubt

(1) (1957) 1 All. England Law Reports 734
(2) L.R. 1935 Appeal Cases 462
(3) 1942 Appeal Cases 1
(4) 1955 A.C. 206 (211)

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whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty."

The law in India places the burden of proof upon the prosecution to bring the guilt home to the accused and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by leading evidence pointing to the guilt of the accused. Under section 105 of the Indian Evidence Act the burden of proving the existence of circumstances bringing the case within any of the general or special exceptions is placed on the accused. All that this means is that it is the duty of the accused to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within any Exception, and that will suffice to satisfy the Court that such circumstances may have existed. Despite what is stated in section 105, Indian Evidence Act, as to the accused bearing the burden of bringing the case within the statutory Exception, the prosecution is not absolved from the burden laid on it by section 102.

Without departing from the above dicta and applying the above rules, it is not a case in which the question of the guilt of the accused is being determined by placing the burden of proving the existence of the right of private defence upon the accused. After examining the whole of the evidence, I am led to the conclusion that it is a case of commission of plain murder on the part of the accused and the facts of this case rule out the applicability of any one of the Exceptions to section 300, Indian Penal Code.

The attack on Malkiat Singh was without a warning, savage and unsparing, and pursued from

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the start to the finish with unabated vigour and undiminished fury. The accused struck blows on Malkiat Singh with relentless determination, which knew no mercy or moderation and did not depend on provocation for a prod.

After giving the facts and circumstances of this case my careful consideration, I feel convinced that there was not a semblance of the exercise of the right of private defence upon the part of the accused. There is no question of such a right having been exceeded with a view to convert the offence of murder under section 302, Indian Penal Code, into one of culpable homicide under section 304, Indian Penal Code. In my view, Balbir Singh, the accused appellant in this case, is guilty of murder and was rightly convicted. The Sessions Judge has already awarded him lesser penalty and therefore there is no further scope for any interference with the sentence. The appeal deserves to fail and should be dismissed.

G. D. Khosla, J.

G. D. KHOSLA, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before K. L. Gosain and A. N. Grover, JJ.

MAHARAJA PATESHWARI PARSHAD SINGH,—
Appellant

versus

A. S. GILANI,—*Respondent*

Regular First Appeal No. 20 of 1957.

1959

Mar., 30th

Code of Civil Procedure (Act V of 1908)—Section 11—Decision by Court of Small Causes—Whether operates as res judicata *in a subsequent suit not triable by that Court—Court of Small Causes—Whether a Court of exclusive jurisdiction.*