REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1049 OF 2018

RATHEESHKUMAR @ BABU **Appellant(s)**

VERSUS

THE STATE OF KERALA & ANR. **Respondent(s)**

O R D E R

This appeal arises from the judgment and order dated 05.01.2018 passed by the High Court of Kerala at Ernakulam in Criminal Appeal No.779 of 2013 by which the High Court dismissed the appeal filed by the appellant herein and thereby affirmed the judgment and order of conviction passed by the Additional Sessions Court, Adhoc-III (Fast Track Court-III), Palakkad in Session Case No.490 of 2008 for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, "the IPC").

2. The case of the prosecution may be summarised as under:-

It appears from the evidence on record that the appellant herein is an agriculturist. He owns his own agricultural farm. The agricultural farm of the deceased is adjacent to the agricultural farm of the appellant herein. On the date of the incident, the deceased was trying to put up a fence in some part of his land. The

putting up of fence was objected vehemently to by the father of the appellant herein namely, Ramakrishnan. There was some altercation in words between the two. According to the case of the prosecution, the father called for his son i.e. the appellant herein for help. The appellant herein reached to the place where the quarrel was going on. Thereafter, according to the case of the prosecution, the appellant and his father caught hold of the deceased and the appellant is said to have taken out a knife and inflicted stab injuries on the chest region of the deceased. The deceased succumbed to the injuries.

3. In such circumstances referred to above, the First Information Report that came to be lodged for the offence of murder. At the end of the investigation, chargesheet was filed. As the offence was exclusively triable by the Sessions Court, the case came to be committed to the Court of Sessions. The trial court vide order dated 09.06.2009 framed charge. The charge reads as under:-

> **"I, R. Narayana Pisharadi, Addl. Sessions Judge, Ad Hoc- III, Palakkad, hereby charge you, the above said accused as follows:-**
>
> **Firstly:-**
>
> **That on 6.4.07 at about 12-45 p.m. in the compound of house no Kuzhalmannam Panchayath at the police Chithali Edakkad in Kuzhalmannam No. 1 Village in Alathur Taluk, at the place at a distance of 10.64 metres from the south-eastern corner of the aforesaid house to the south-east, you the first accused caught hold of the collar of the shirt worn by the deceased Narayanan and that you the second accused caught hold of the neck of the deceased Narayanan and you the first accused stabbed the deceased Narayanan on the right chest and on the right side of the body with a knife causing grievous injuries to him and as a result of such injuries, Narayanan died at 2.24 p.m. on the same day and thereby you the first accused have committed murder of Narayanan and thereby committed an offence punishable under section 302 of the Indian Penal Code**

and within the cognizance of this court and

Secondly:-

That the aforesaid act was committed by the first accused in furtherance of the common intention of both the accused to murder Narayanan and thereby you the second accused have committed the offence punishable under section 302 read with 34 of the Indian Penal Code and within the cognizance of this court and

Thirdly:-

That on the same at the same time and at the same place, you the first accused beat Narayanan who had fallen down on account of the stab injuries sustained by him with a wooden bar which is a dangerous weapon, and voluntarily caused hurt to him and thereby you the first accused have committed and offence punishable under section 324 of the Indian Penal Code and within the cognizance of this court and

Lastly:-

That on the same day at the same time and at the same place, you the first accused beat CW1 Sidhique on the shoulder and the neck with a wooden bar which is a dangerous weapon and caused hurt him and thereby you the first accused have committed an offence punishable under section 324 of the Indian Penal Code and within the cognizance of this court And I hereby direct that you be tried by this court on the said charges."

4. In the course of the trial, the prosecution examined as many as seventeen witnesses. The prosecution also relied upon some pieces of documentary evidence. Amongst those seventeen witnesses that came to be examined, four of them were eye-witnesses to the incident i.e. PW-1 – Sidhiq, PW-2 – Hemachoodan, PW-3 – Shibu and PW-12 – Mini.

5. After the prosecution closed its evidence, the further statement of the appellant herein came to be recorded under section 313 of the Evidence Act, 1872 in which the appellant claimed himself to be innocent and denied having done anything.

6. The trial court upon appreciation of the oral as well as documentary evidence, acquitted the father however, held the appellant herein guilty of the offence of murder.

7. The appellant being dissatisfied with the judgment and order of conviction passed by the trial court preferred criminal appeal before the High Court. The appeal came to be dismissed.

8. In such circumstances referred to above, the appellant is here before this Court with the present appeal.

9. Mr. Adlolf Mathew, the learned counsel appearing for the appellant vehemently submitted that the High Court committed a serious error in dismissing the appeal and thereby, affirming the judgment and order of the conviction passed by the trial court. The learned counsel took us through the oral evidence on record more particularly, the depositions of the four eye-witnesses to the incident. He also invited our attention to some of the findings recorded by the trial court as well as by the High Court and relied upon such findings, he tried to develop an argument before us that the appellant is entitled to the benefit of Exception 2 to Section 300 of the IPC or Exception 4 to Section 300 of the IPC. He would submit that when the altercation was going on between the father of the appellant herein and the deceased, the appellant was nowhere in the picture. It is only when the father called for the appellant that he reached the place of the incident and having realised the seriousness of the situation, was left with no other option but to take out a knife and stab the deceased to death. He further submitted that there was an imminent threat to his property. He was trying to protect his property and while trying to protect his

property, he exercised his right of private defence.

10. In the alternative, he submitted that the case may even fall within Exception 4 to Section 300 of the IPC. According to him, the act was not pre-meditated or pre-planned. Everything happened in a spur of a moment and that too in the heat of passion. He would submit that the father of the appellant desperately wanted to stop the deceased putting up a fencing. Whereas, the deceased was firm in putting up the fencing. This dispute ultimately led to a very ugly fight between them which led to this particular incident.

11. In such circumstances referred to above, the learned counsel prayed that the conviction of the appellant be altered from Section 302 to Section 304 Part 1 of the IPC and the sentence be reduced accordingly. On the other hand, Mr. Nishe Rajen Shonker, learned counsel appearing for the State while vehemently opposing this appeal submitted that no error not to speak of any error of law could be said to have been committed by the High Court in dismissing the appeal. The High Court after re-appreciation of the oral as well as documentary evidence on record rightly dismissed the appeal and thereby, affirmed the judgment and order of the conviction passed by the trial court. He invited our attention to an important fact that notice was issued in this particular matter, only on the point of sentence. According to him, at the relevant point of time, the Court must have prima facie felt that probably the case may be falling within Exception 2 or Exception 4 of Section 300 of the IPC, as the case may be. So only for this limited purpose, notice was issued.

12. He further submitted that the ocular version of the eye-witnesses is consistent with the medical evidence on record. He took us through the deposition of PW-6 i.e. Dr. P.B. Gujral. In the last, he submitted that all the eye-witnesses could be said to be true, trust worthy and reliable eye-witnesses and there is no good reason to disbelieve their version. In such circumstances referred to above, the learned counsel prayed that there being no merit in the appeal the same may be dismissed.

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment. We must first look into the evidence of one of the eye-witnesses. By and large, all eye-witnesses have deposed the same and are consistent in their version. Therefore, we look into the evidence of PW-1 – Sidhiq S/o Abdul Rahman. PW-1 in his examination-in-chief has deposed as under:-

> **"I am residing at Kuzhalmannam Thekkekkara, Perukunnam I know Narayanan S/o. Edathudi Rakkandi. He died. He was stabbed to death. On 6.4.07, at the house compound of Narayanan. The incident must have been around 13½ hours during the day. I also witnessed. Babu @ Ratish Kumar and Ramakrishnan did that. They are present in the court. IDENTIFIED both accused. I went there to make the fencing. I used to go for the fencing work of Narayanan and his elder brother Sukumaran. We were making the fencing on the west side of Narayanan's compound, from south to north. An aged lady named Chinna was also with me for making the fencing. It was on the south side of the compound of Narayanan. WITNESS CORRECTS. Ratish and Ramakrishnan are residing on the west side. The compound of Narayanan and the compound of Ratish are adjoining compounds. The compound of Srinivasan is also on the west side of the compound of Narayanan. We started the fencing Work at 8½ hours. While we were doing the fencing job, in between 1O½-**

11½, Ramakrishnan came two times and left. Ramakrishnan did not say anything. He checked and left. Then nobody came. Further the deceased Narayanan came to check whether the fencing job is completed or not. That time it must have been 12¾. That time Chinna was not present. She left after the job. Ramakrishnan came when Narayanan arrived. Ramakrishnan told that the fencing should be shifted. Narayanan replied that it is his father's property. There was an altercation. There was a push and pull. Ramakrishnan exhorted Babu to come by running. Babu is Ratish Kumar. Ratish kumar came from behind the house. Ramakrishnan caught Narayanan on his neck. Babu caught Naryanan on his shirt collar immediately on his arrival. He took out the knife from his hip and stabbed Narayanan on his chest. There was a pattika stick on the bottom of the fencing. When I took the same and was about to hit Babu, Babu caught hold of the same and took it from me. when he went to stab for the second time, Shibu from the neighboring house, came by running. Shibu is the son of Srinivasan. Shibu came from the house of Shibu. When Shibu came to prevent, Babu pushed him aside. Babu stabbed Narayanan on his rib cage side. First stab was on the chest side. The second stab was below that. I prevented him, when I felt that he may stab for a third time. That time Babu gave me beating with the pattika stick. I suffered the beating on my right hand, on my shoulder. The father and son told me to run away. Babu and Ramakrishnan told me so. Babu gave me beating on my back, using the pattika stick. I ran for 10 feet and turned back and saw that Babu giving beating to Narayanan, two three times. He gave beatings on his left and right hand. When the wife of Narayanan came by running, they dropped the stick and ran to their house. When I ran for 10 feet, Hemachoodan and wife of Narayanan were present. The incident took place in the house compound of Narayanan. There is a 'stone of Daivam' at the place of incident. Babu and Narayanan left after leaving the stick. Narayanan fell down at the second stabbing. Myself and Shibu lifted Narayanan and laid him on his house verandah. The mundu that Narayanan was wearing was removed and the same was tied on the wound. Santha Kumaran Mash (CW-3) came that way. Myself, Santha Kumaran Mash and Shibu took Narayanan to the NH. From there, he was loaded into an auto and Santha Kumaran Mash, Shibu and Mini also got inside. They went to Palana hospital. One Rinu came from the south side. I accompanied the auto on the bike of Rinu. We went 50 meters. At Chettimukku, we saw a car coming. The car was stopped. The persons who were in the auto shifted to the car. I got on to the front seat. The car went to Palana hospital. Narayanan was taken for treatment. We remained there with him. After about one hour, the

doctor came and told that Narayanan is dead. That time it was 2 ½ hours. About 10-50 persons were assembled at that time.

Sukumaran, the elder brother of Narayanan advised to intimate the police. I went to Kuzhalmannam police station in the car of Sivadasah. I reached there after 3 o'clock, may be 3 ½ hours. SI and police persons were present. I told them about the death. I told them as to how the incident happened, they recorded the same. It was read over to me. I put my signature on the same. This is the same. MARKED EXHIBIT P-1. The same bears my signature. Shown.
I went to the house of Narayanan from the police station. People were assembled therein. About 6-6¼ police came to the house of Narayanan. Circle Inspector, SI of Police and 4-5 persons were present. As instructed by the circle inspector, I pointed out the place of incident. They made writings. They recovered the pattika stick, slippers and a pen (made of steel). Two people were there with me. CW-14 Unni Krishnan and CW-15 Prabi das were present. Signatures of Unni Krishnan and Prabi Das were obtained. Myself, the police persons, Unni Krishnan and Prabi Das came to the house of Narayanan. Therein the police asked me about the past incidents and recorded the same in writing, the same was read over to me. Police left about 8 o'clock. After one month, police questioned me at Kuzhalmannam Police station. The knife was shown to me at that time. It was a steel knife with a black handle.

Q. Have you seen it earlier?

A. No.

This is the said knife. M0-1 MARKED. The end of the black handle is little curved and the end is little sharp. I saw the M0-1 knife when Ratish Kumar stabbed Narayanan.

Q. Was it this knife?

A. Yes. It is.

Police recorded my statement. I gave statement to the judge, before the court. It was one month after the knife was shown to me. STATEMENT SHOWN. The signature on the same is my signature.

Marking opposed on the ground that not recorded administration of oath, no endorsement by the

> **Magistrate at foot note, witness is not enlightened that he is not bound to make the statement, he is not enlightened that the statement can be used against him, not sent to the Magistrate concerned forthwith and procedure under Section 164 Cr.P.C. not followed by the Magistrate. MARKED AS EXT. P-2. Subject to the objections.**
>
> **This is the pattika stick used for giving beating to Narayanan by Ratish Kumar. M0-2 MARKED. The other end is sharpened. This is the slipper seized by the police. M0-3 MARKED. This slipper is of Narayanan. It is of his left foot. It is of biscuit color. This is the pen made of steel seized by police. M0-4 MARKED. This pen belonged to Narayanan. I have studied up to class IV. I am a daily wager. Ratish Kumar is called Babu by all in the local place."**

14. We also looked into the cross-examination of PW-1 – Sidhiq S/o Abdul Rahman. Nothing significant could be elicited from the cross-examination to discredit this particular eye-witness.

15. Having regard to the nature of the oral evidence on record more particularly, the evidence of the eye-witnesses and the genesis of the occurrence, it is difficult for us to take the view that the case falls within Exception 2 of Section 100 of the IPC. It is true that the High Court in its line of reasoning has given an indication that the appellant herein was trying to act in exercise of his right of private defence but in the process, he exceeded in the same. To this extent also, we are not in agreement with the High Court.

16. Section 96 of the IPC provides that nothing is an offence, which is done in the exercise of the right of private defence. Section 97 of the IPC further provides that every person has a right of private defence to defend his own body and the property, subject to the restrictions contained in Section 99. Section 99 of

the IPC provides that there is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done, or attempted to be done, by a public servant, or by the direction of a public servant, acting in good under colour of his office, though that act may not be strictly justifiable by law. This provision further provides that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Sections 100, 101, 102, 103, 104 and 105 respectively of the IPC further provide as under :

> **"100. When the right of private defence of the body extends to causing death - The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :-**
>
> **First. - Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;**
>
> **Secondly. - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;**
>
> **Thirdly. - An assault with the intention of committing rape;**
>
> **Fourthly. - An assault with the intention of gratifying unnatural lust;**
>
> **Fifthly. - An assault with the intention of kidnapping or abducting;**
>
> **Sixthly - An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.**
>
> **101. When such right extends to causing any harm**

other than death - If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

102. Commencement and continuance of the right of private defence of the body - The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. When the right of private defence of property extends to causing death - The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :-

First. - Robbery;

Secondly. - House-breaking by night;

Thirdly. - Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly. - Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. When such right extends to causing any harm other than death - If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

> **105. Commencement and continuance of the right of private defence of property - The right of private defence of property commences when a reasonable apprehension of danger to the property commences.**
>
> **The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.**
>
> **The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.**
>
> **The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.**
>
> **The right of private defence of property against house breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues."**

17. Now, the question that arises for our consideration in this appeal is as to whether in the facts and circumstances of the case, the appellant-convict was justified in causing injuries to the deceased with a knife, as mentioned above, in his self defence and defence of property, which resulted into death. It is a settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case. The court, while deciding this question of fact, is to take into consideration various facts,

like the weapon used, the manner and nature of assault, the motive and other circumstances.

18. This Court in Darshan Singh v. State of Punjab and another reported in (2010) 2 Supreme Court Cases 333, while considering its various previous judgments on the subject, has summarised the following principles regarding the right of private defence :

> **"(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.**
>
> **(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.**
>
> **(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.**
>
> **(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.**
>
> **(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.**
>
> **(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.**
>
> **(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.**
>
> **(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.**
>
> **(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an**

offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.”

19. The first important question is whether the appellant-convict at the relevant time was having a reasonable apprehension of death or grievous hurt or danger to his property at the hands of the deceased, and was justified in causing fatal injuries to the deceased in his right of private defence; and the second question would be that if the appellant was justified in causing injuries to the deceased in his right of private defence, whether he had caused more harm than it was necessary.

20. The Court should take an overall view of the case and if a right of self-defence is made out from the evidence on record, that right should not be construed narrowly because the right of self-defence is a very valuable right and it has a social purpose.

21. As regards the first question, in the given circumstances, it is difficult to discern any reasonable apprehension of imminent danger on the part of the accused. The law is well settled in this regard. The impending danger must be present, real or apparent. According to the testimony of PW-1, an altercation occurred between the deceased and the appellant’s father, leading to a ‘push and pull’. Following this, the appellant’s father called for the appellant. Upon arriving at the scene, bearing a knife, the appellant found his father already holding the deceased by the neck. These facts do not provide any basis to suggest that the

appellant had a reasonable apprehension of imminent danger to justify causing the death of the deceased. Moreover, the defense argument claiming protection of property appears unfounded in this context, as the facts do not support any imminent threat to the appellant's property.

22. What was the appellant-convict trying to protect? Was he trying to protect the life of his father or his own life? Was he trying to protect his property? To a very specific question put by us to the learned counsel appearing for the appellant-convict in this regard the reply was that the appellant-convict was trying to protect his property. We tried to understand from the learned counsel as to what was that imminent threat to his property that the appellant-convict had to go to the extent of using knife and stabbing the deceased to death. The oral evidence on record indicates that the deceased wanted to put up a fence on the West side of his farm. The compound of the deceased and that of the accused convict are adjacent to each other. It is not the case of the appellant-convict that the deceased trespassed into his own land and tried to put up a fence. If that was the case, then the appellant-convict should have led evidence in that direction. He should have put specific questions in this regard to the prosecution witnesses more particularly the eyewitnesses who were present at the spot. The appellant-convict has failed to clarify as why he himself and his father vehemently opposed putting up a fence by the deceased. This aspect has not been explained by the appellant-convict even in his further statement recorded under Section 313 of the CrPC. If that be so, then why such hue and cry was raised on the issue of fence.

23. In V. Subramani and Another v. State of Tamil Nadu reported in (2005) 10 SCC 358, this Court went on to observe:

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

24. With this principle in mind, we turn to the second question: whether the accused caused more harm than was necessary. The testimony of the eyewitnesses provides critical insight into this issue. As per the oral evidence, the accused even after inflicting two stab wounds continued with the assault. This indicates that the level of force used by the accused exceeded what was necessary for self-defense. In the case of private defense, the actions taken must be strictly preventive, aimed at averting the danger, rather than punitive or retributive. The continued assault after the initial injury demonstrates a disproportionate use of force, which is inconsistent with the principle of self-defence. Even if we were to assume that the initial actions were taken in self-defense, although it is not the case, the subsequent assault reveals a shift in the accused's intention from protecting himself & his property to inflicting harm and wrecking vengeance upon the deceased. This shift indicates that the actions were no longer defensive in nature

but became an act of aggression.

25. The learned counsel for the appellants has not set up before us the right of private defence as a total defence.

His whole emphasis was with reference to Exception 2 to Section 300 that reads as follows:-

“Exception 2. – Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.”

26. The existence of good faith is a must before the accused claims benefit of this exception. While acting in good faith, if the accused has exceeded the right of self-defence and caused death of a person without pre-meditation and further he had no intention to causing more harm than was necessary for the purpose of the defence although in fact more harm was caused, yet the benefit of Exception 2 to Section 300 may be available if the accused was not the aggressor.

27. The presence of good faith as given in sec 52 IPC refers to actions done in the absence of due care and attention. In this instance, inflicting a murderous assault with a deadly weapon upon the unarmed deceased and subsequently continuing to beat him, even when the deceased fell to the ground, provides a clear indication that the accused had not acted in good faith and had the intention of causing more harm than was necessary.

28. Another essential for invoking Exception 2 is the lack of pre-meditation. Such pre-meditation may be established by direct or circumstantial evidence, such as previous threats, expression of ill feelings, acts of preparation to kill, etc. It is clear from the facts, that the accused was already bearing a knife when he arrived on the scene after his father called him.

29. The burden of proving self-defence is always on the accused but it is not as onerous as the one which lies with the prosecution. Such burden can be discharged by probablising the defence. The accused may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross examination of prosecution witness or by adducing defence evidence.

The principle as laid down by Section 105 Evidence Act is provided as-

> **"105. Burden of proving that case of accused comes within exceptions.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."**

30. This Court in K.M. Nanavati v. State of Maharashtra reported in AIR 1962 SC 605, laid down

> **"…But when an accused relies upon the general exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that Section the Court shall presume the absence of circumstances bringing the**

> **case within any of the exceptions, that is, the court shall regard the non-existence of such circumstances as proved till they are disproved. An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in Section 80 of the Indian Penal Code and hit the deceased resulting in his death. The court then shall presume the absence of circumstances bringing the case within the provisions of Section 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstance and the evidence adduced by the accused. But the Section does not in anyway affect the burden that lies on the prosecution to prove all the ingredients of the offence with which the accused is charged : that burden never shifts….”**

31. This Court has further in Munshi Ram & Others v. Delhi Administration reported in AIR 1968 SC 702, has observed that

> **“5. …It is well settled that even if an accused does not plead self defence, it is open to the court to consider such a plea if the same arises from the material on record — see *In re Jogali Bhaigo Naiks* [AIR 1927 Mad 97] . The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.”**

32. As outlined in the aforementioned authorities, the court presumes the absence of circumstances that would justify a defense claim, but this presumption can be rebutted by the accused. Courts have consistently upheld the principle that even if private-defense

is not formally pleaded, it may still be considered based on the material available on record, with the accused bearing the responsibility to substantiate it. In the present case, however, given the facts presented, it is difficult to establish the defense of private defense. The circumstances do not support a reasonable apprehension of imminent danger that would justify the actions of the accused, making it challenging to sustain the claim of self-defense.

33. The argument of the learned counsel as regards Exception 4 to Section 300 of the IPC should also fail. It may be that the incident occurred at the spur of a moment and in the heat of passion but we should not be unmindful of the fact that the appellant herein had a knife with him whereas the deceased had nothing with him. He was absolutely helpless at the time when he was attacked. Therefore, this amounts to taking undue advantage or acting in a cruel or unusual manner.

34. In the overall view of the matter, we are convinced that no case is made out to interfere.

35. We are conscious of the fact that the incident is of the year 2007. We are also conscious of the fact that appellant herein was in jail first as an under-trial prisoner and thereafter, as a convict for a period of almost nine years. In such circumstances, we leave it open for the appellant herein to prefer an appropriate representation to the State Government for remission of sentence in accordance with its policy. If the case of the appellant is falling within the remission policy of the State of Kerala then the authority concerned shall look into the same. The appellant is on

bail. He shall now surrender before the jail authorities to serve his remaining sentence within a period of four weeks from today. The bail bond stands cancelled.

36. The appeal is, accordingly, dismissed.

37. Pending application(s), if any, shall stand disposed of.

……J.
[J.B. PARDIWALA]

……J.
[R. MAHADEVAN]

NEW DELHI;
09th JANUARY 2025

ITEM NO.109 COURT NO.14 SECTION II-B

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s).1049/2018

RATHEESHKUMAR @ BABU **Appellant(s)**

VERSUS

THE STATE OF KERALA & ANR. **Respondent(s)**

Date : 09-01-2025 This appeal was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE J.B. PARDIWALA
HON'BLE MR. JUSTICE R. MAHADEVAN

For Appellant(s) **Mr. Adolf Mathew, Adv.**
Mr. Sanjay Jain, AOR
Mr. Sajjan Singh Nahar, Adv.

For Respondent(s) **Mr. Nishe Rajen Shonker, AOR**
Mrs. Anu K. Joy, Adv.
Mr. Alim Anvar, Adv.
Mr. Santhosh K., Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeal is dismissed in terms of the signed reportable order.

Pending application(s), if any, shall stand disposed of.

(SAPNA BISHT) **(POOJA SHARMA)**
COURT MASTER (SH) **COURT MASTER (NSH)**
(Signed reportable order is placed on the file)