HIGH COURT OF GUJARAT (*D.B.*)

STATE OF GUJARAT

Versus

PANDYA PREMASHANKER @ BACHUBHAI REVASHANKER

Date of Decision: 23 September 1998

Citation: 1998 LawSuit(Guj) 514

Hon'ble Judges: J N Bhatt, A L Dave

Eq. Citations: 1999 CrLJ 1841, **1999 3 GLR 2271**, 1999 CrLR 634, 1999 4 GCD 2783

Case Type: Criminal Appeal; Criminal Appea

Case No: 296 of 1993; 878 of 1995

Subject: Criminal

Editor's Note:
Penal Code, 1860 - Secs 97, 100 - When injured person tried to dispossess the accused of property armed with knife, accused gave Dharia blow on head of the deceased - Accused exceeded right of private defence - Appeal disposed of

Acts Referred:
Indian Penal Code, 1860 Sec 100, Sec 97

Advocates: A J Desai, R C Jani

J. N. BHATT, J.

[1] The main question which has surfaced in both these appeals is whether the conviction and sentence of original accused persons of the offence punishable under Sec. 324, I.P.C., in the impugned judgment and order in place of original charge under Sec. 307 read with Sec. 34, I.P.C., can be said to be justified ? Criminal Appeal No. 296 of 1993 is preferred by the State for enhancement invoking powers under Sec. 378 of the Code of Criminal Procedure, 1973 ('the Code'), whereas Criminal Appeal No. 878 of 1995 which is preferred by the original accused persons invoking powers under Sec. 374 of the Code which, as such, was originally preferred before the Sessions Court at Surendranagar being Criminal Appeal No. 4 of 1993 which came to be transferred and is given Criminal Appeal No. 878 of 1995. In substance, both the appeals arise out of

one order of conviction and sentence between the same parties. Therefore, they are being disposed of by this common judgment and order.

[2] Respondent Nos. 1 and 2 in Criminal Appeal No. 296 of 1993 are the original accused; whereas appellants in Criminal Appeal No. 878 of 1995 are the same persons. Therefore, for the sake of convenience and brevity, the parties are hereinafter referred as they were originally arraigned like that accused Nos. 1 and 2. By virtue of the impugned judgment and order, accused No. 1 Premshanker is sentenced to undergo R.I. for six months and to pay fine of Rs. 1,500/- and in default, to undergo further R.I. for six months; whereas, accused No. 2 Dinesh who is also the brother of accused No. 1 is sentenced to undergo three years' R.I. and to pay fine of Rs. 3,000/- and in default, to undergo further R.I. for one year and eight months, after holding them guilty by the learned Additional Sessions Judge, Surendranagar in Sessions Case No. 14 of 1990 by passing the order on 21-12-1992 for having committed offence under Sec. 324 read with Sec. 34 I.P.C. Since both the parties have questioned the legality and validity of the conviction and sentence order recorded in the impugned judgment, it would be appropriate to first have a close look into the few material and important relevant facts giving rise to the present appeals.

[3] The prosecution case has been that the incident in question occurred on 30-6-1989 at 9-30 a.m., in the agricultural property (field) situated at village Kichada of Dasada Taluka of Surendranagar district. One compLalnant Rama Kanu along with injured Hari Lakhu and one P.W. Deva Pathu went to the disputed field which was purchased by injured Hari from one original owner Jivtiben. There was some dispute in respect of boundaries. Therefore, the compLalnant, injured and Deva Pathu had gone to ascertain the said boundaries of the field purchased by Hari.

[4] In the course of visit by the aforesaid three persons, the accused persons emerged and there was exchange of words between the injured and the accused. There was also a scuffle. Accused No. 1 thereafter is alleged to have given Dharia blow on the head of the injured Hari. Accused No. 2 is alleged to have given two knife blows on the abdomen of the injured. Fortunately, the injured survived from major mishap. He was shifted to the Community Health Centre at Patdi where the injured was examined by Dr. S. M. Makwana who referred the patient to V. S. Hospital, Ahmedabad where the patient was kept as indoor patient and during the course of treatment, he was operated upon and was discharged on 12-7-1989. In the meantime, upon the compLalnt of Rama Kanu, P.W. 3 who was along with the injured at the relevant time, offence came to be registered against the accused persons and investigation thus had commenced. In the course of investigation, medical evidence was obtained and deep-seated motive was also found. Therefore, upon completion of the investigation, the accused persons came to be charge-sheeted and were sent up for trial before the

Sessions Court at Surendranagar where the charge came to be framed at Exh. 3 on 6-8-1991 for the offence punishable under Sec. 307 read with Sec. 34, I.P.C. and in the alternative, each accused came to be charged for the offence punishable under Sec. 307 to which the accused denied and came to be tried.

[5] In order to substantiate and fortify the charges against the accused persons, the prosecution placed reliance on the evidence of 20 witnesses. Prosecution also relied on documentary evidence. The version of defence is that the accused persons were in lawful possession of the disputed field known as Borwala field as they had entered into an agreement to sell Exh. 93 dated 26-3-1984 from the original owner Jivtiben. On the day of the incident, accused No. 1 was not present. Thus, there is total denial insofar as accused No. 1 is concerned. However, insofar as accused No. 2 is concerned, the defence was that injured Hari and two other persons in order to take illegal possession of the disputed field, committed criminal trespass and thereafter injured Hari, to accomplish his desire who was armed with a knife, attempted to use the knife against accused No. 2 who was left with no alternative but to defend himself and the disputed property and had given a bite on the shoulder of the injured Hari and in order to thwart the attempt of knife blow, there was scuffle between the injured and accused No. 2 which resulted into injuries to the injured Hari.

In order to substantiate this, the defence relied on the defence witness Vasantrai Gohil, Exh. 95 and also the sale deed with regard to agricultural property bearing Survey No. 131 produced at Exh. 96 and also other documentary evidence to which reference will be made by us as and when required hereinafter.

[6] Upon analysis and evaluation of the evidence on record and the defence version, the trial Court reached the conclusion that the prosecution has not successfully established the offence punishable under Sec. 307 read with Sec. 34, I.P.C. However, the trial Court found that the accused persons are guilty of offence punishable under Sec. 324 read with Sec. 34, I.P.C, and inflicted the quantum of sentence as narrated hereinabove, which both the sides have questioned before us.

[7] We have heard dispassionately and at greater length the learned Addl. P.P. Mr. Desai for the State and learned Advocate Mr. Jani for the accused in defence. In the course of submissions before us, we have been taken through the testimonial collections and documentary evidence. We have found the following aspects unimpeachable :

1. The accused persons who are brothers and injured Hari had a dispute with regard to some area of the field known as Borwala field.

2. The accused persons had in their favour an agreement to sell dated 26-3-1984, a copy whereof is produced at Exh. 93 in respect of the disputed field which was executed by the original owner Jivtiben.

3. Injured Hari had purchased a part of the disputed field by virtue of a registered sale deed dated 1-3-1984, a copy whereof is produced at Exh. 23 from Jivtiben. The incident occurred within four months thereafter as there was dispute between the accused persons and the injured with regard to possession of the disputed field.

4. The field which was in actual physical possession of the accused persons was partly sold by Jivtiben to P.W. Deva Pathu who was the Sarpanch of the same village. The actual physical possession of the field purchased by Deva Pathu, being part of the original agricultural property belonging to Jivtiben was cultivated by the accused persons at the relevant time.

5 Injured, compLalnant and Deva Pathu had gone to the disputed field on the day of the incident in the morning for settling the dispute about the boundaries of the field purchased by injured Hari from Jivtiben.

6 The eastern portion of the agricultural property purported to have been purchased by injured Hari and the western boundary of the field of Deva Pathu being common between the field of Hari and field of Deva Pathu, it was, as such, in reality actually in physical possession of the accused and they were cultivating the same at the relevant time.

[8] P.W. 1 compLalnant-Ramabhai Kanubhai is examined at Exh. 14 in whose evidence, the compLalnt is proved and produced at Exh. 15. Injured Hari Lakhu is examined at Exh. 22, whereas P.W. 5 Deva Pathu who is also an eye-witness is examined at Exh. 25. We have also seriously considered the medical evidence relied on by the prosecution at Exh. 10, 74 and 75 and also the documentary evidence together with the defence evidence in the course of submissions and hearing of the appeals.

[9] As such, there is no dispute about the fact that injured Hari sustained injuries in the incident. The dispute is about the method and mode in which the injuries were sustained. We have successfully noticed that the injuries sustained by the injured Hari were grievous injuries. The prosecution case is that original accused No. 1 Premshanker inflicted one Dharia blow on the head of the injured; whereas accused No. 2 Dinesh caused two injuries to the injured with a knife. The evidence of injured Hari P.W. 4 examined at Exh. 22 is relied on by the trial Court. He had sustained three injuries. According to the evidence of injured, the head injury was on account of infliction of Dharia blow given by accused No. 1 and two injuries on the abdomen were given by accused No. 2 with knife. This is supported by the medical evidence.

[10] Initially, the injured was shifted to the Community Health Centre at Patdi where Dr. S. M. Makwana examined him and found the following three injuries :

1. Sharp-edged wound just below umbilicas about 2 x 1.5 x 1 cm.

2. Sharp-edged wound near lower end of sternum about 2.5 x 2.0 x 1.0 cm.

3. Sharp-edged wound on parietal region about 4 x 1.5 x 1 cm.

The medical certificate is produced at Exh. 75.

10A. Dr. Makwana had examined the injured on 30-6-1989 at 1 p.m. He referred the patient for better medical treatment at Ahmedabad. P.W. 18, Dr. Makwana has clearly testified in his evidence at Exh. 74 that the aforesaid three injuries were possible by a sharp-edged weapon. It is also very clear from his evidence that the head injury was possible by infliction of a Dharia blow and two injuries on abdomen were possible by sharp cutting instrument like knife. Article 4 is Dharia and Article 7 is knife and he has fully supported the prosecution case that the aforesaid injuries were possible by sharp-cutting instrument like Dharia and knife. No doubt, it is true that it is admitted by him in the cross-examination that the head injury was possible by fall on agricultural equipment like 'RAANP' (weeding plough-small hoe) and injuries on abdomen were possible in case of fight between two persons by snatching away knife as the knife injuries were not very deep. Reliance is, therefore, placed on this part of admission in the cross-examination which will be highlighted hereinafter.

[11] Dr. P. B. Shah of V. S. Hospital, Ahmedabad, examined at Exh. 83 has stated in his evidence that he had examined, as injured patient, injured Hari on the day of the incident like that, on 30-6-1989 in the V. S. Hospital.

The medical certificate was also issued by him. It is produced at Exh. 85. The injured was discharged on 12-7-1989. It is very clear from his testimony that two abdominal injuries were possible by sharp-cutting instrument like knife and the head injury was possible by sharp-cutting instrument like Dharia. Of course, no fracture was found on medical examination. However, in view of the abdominal injuries, the injured was advised operation which was performed. It is also very clear from his evidence that all the three injuries were grievous in nature. The medical case papers of V. S. Hospital, Ahmedabad are produced at Exh. 86.

[12] We have, therefore, found from the medical evidence that the evidence of injured Hari is reinforced by the medical evidence that he had sustained three grievous injuries, one on head and two on the abdomen. It is also clearly supported by eye-

witness P.W. 5 - Deva, examined at Exh. 25. After having considered the evidence of injured witness Hari, P.W. 4 at Exh. 22 and the evidence of two eye-witnesses, viz., the compLalnant P.W. 3 Rama, Exh. 14 and also Deva, P.W. 5 at Exh. 25 coupled with the F.I.R. produced at Exh. 15, it is clearly established that injured Hari had sustained three grievous injuries on his person in the incident which occurred on 30-6-1989 at 9-20 a.m., out of which, the injury on head was caused by accused No. 1 by giving a Dharia blow and remaining two abdominal injuries were caused on account of knife blows given by accused No. 2. The prosecution has also successfully shown that there was motive for commission of the crime in question. Therefore, the defence of accused No. 1 that he is falsely involved and he was not at all present at the time of the incident is falsified.

[13] Next, it will lead us to consideration of the question of right of private defence. As contended by the learned Advocate Mr. Jani for the defence, we agree with him that it is not necessary for the accused to specifically raise plea of private defence and if the Court finds from the evidence, right of private defence can be considered. Therefore, it would be necessary at this juncture to examine as to whether the accused persons were entitled to exercise the right of private defence of body and property which is general parameter, and if yes, whether right of private defence exercised had exceeded or not.

[14] Insofar as legal proposition is concerned, it may be noted that Sec. 96 of the I.P.C. provides for one of the general exceptions by way of right of private defence in Chapter IV of I.P.C, providing general exceptions. Section 96 clearly prescribes that nothing is an offence which is done in the exercise of the right of private defence. Section 97 prescribes right of private defence of body and property. It may be noted Sec. 99 enumerates the acts against which there is no right of private defence. Section 100 provides as to when the right of private defence of body extends to even causing death. In the present case, there is no case of causing death and, therefore, the relevant sections will be Sec. 101 which provides when right of private defence extends to causing any harm other than death. Section 103 provides the circumstances when right of private defence of property extends to causing death; whereas, Sec. 104 provides when such right extends to causing any harm other than death. Here, we are vitally concerned with Sec. 104 which provides that 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 Sec. 99, to the voluntary causing to the wrong-doer of any harm other than death. Section 104,

therefore, becomes material and relevant in view of the contention of right of private defence in the present case.

Section 102 provides that 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; whereas, in Sec. 105, provision is made about commencement and continuance of the right of private defence of property. Since, in the present case, right of private defence of body and property both has been raised, the aforesaid provisions would be very relevant to be examined in light of the facts of the present case. Before we advert to the relevant facts of the case, it may also be emphasised that right of self-defence is not available to a person who is aggressor. In short, right of private defence is a defensive right. It is neither a right of aggression nor reprisal. A person can avail the right of private defence when there is attack or aggression or attempt for such offence. Again, it has to be exercised within the prescribed parameters. It cannot be invoked by a person against a wrong-doer regardless of nature of offence anticipated or apprehended. Again, it may be clarified that in case of free right also, right of private defence is not available. In case of free right, each party will be accountable for wrong committed or the offence done individually for his own act. Right of private defence is available only to one who is suddenly confronted with immediate necessity of impending danger which is not of his creation. Therefore, the contention of right of private defence of body and property in the present case has to be adjudicated upon in light of the aforesaid proposition of law and in the background of the facts of the present case. Needless to state, it is a case of defence of agricultural property (field) which is disputed was in possession of the accused persons at the relevant time and the injured in company of two other persons committed trespass in the disputed field under the guise of settling the boundary dispute and attempting to dispossess the accused persons and in that process, imminent danger of life and of being dispossessed, the accused exercised the right of private defence.

[15] After having taken into consideration dispassionately the evidence of the injured, compLalnant and eye-witness Deva Pathu, we find some substance in the contention of the defence that there was right of private defence of body as well as the property. The question whether this right of private defence was properly exercised or is exceeded, will be dealt with hereinafter. At present, we are dealing with right of private defence, as alleged. We are of the opinion that since, in view of the clear evidence on record accused persons were in possession of the disputed field by virtue of agreement to sell dated 26-3-1984, produced at Exh. 93 executed by original owner Jivtiben, the

accused persons, therefore, were enjoying possession and occupation of the disputed field at the relevant time and as such, they were doing cultivation work. No doubt, injured Hari also cLalmed ownership over the disputed part of the field upon the basis of having become the owner by virtue of the sale deed executed by the original owner Jivtiben, Exh. 23 on 1-8-1984. Admittedly, there was dispute between the accused persons on one hand and the injured Hari on the other hand. It is also found from the evidence that injured Hari had not taken any legal action for obtaining legal possession of the disputed field after having obtained sale deed in his favour. Therefore, it appears that injured Hari in an attempt to clear his position, in respect of the part of the disputed field and for settling the boundary dispute, along with two other persons, viz., Ram Kanu, compLalnant and eye-witness Deva, went to the disputed filed. The injured, as such, entered into the disputed field which was in actual physical possession of the accused persons. The injured was armed with knife. There was scuffle between both the sides. There was also exchange of hot words. It is in this context that the contention of right of private defence has to be examined. Of course, even if the accused committed criminal trespass, the occupier cannot exercise the right of private defence against the real owner if he had been in legal possession who came to be dispossessed. The position is other way round in the present case. Insofar as the factual scenario is concerned, the accused persons were enjoying occupation and were doing cultivation in the disputed part of agricultural field since 1984 by virtue of sale deed. Therefore, thing is crystal-clear that there was bona fide dispute about the right of enjoyment and possession in respect of the disputed field. It also appears that the injured instead of pursuing legal remedies permitted under law, or following the procedure for settlement of boundary dispute under the revenue law, attempted to dispossess the accused persons and that too when he was armed with knife and again in company of two associates. In the circumstances, obviously, the accused persons were entitled to cLalm right of private defence of body as well as the property against injured Hari who was found wrong-doer at the relevant time. It cannot be conceived even for a moment that the accused persons were aggressors as such. It is, on the contrary, clearly ascertained even from the evidence that before the incident accrued, both the accused persons were deeply engrossed in agricultural operations and injured Hari after committing trespass into the field and the area in actual possession of the accused persons since 1984, attempted to dispossess them even by using force. It was, therefore, a clear case of right of private defence of body as well as property. Infliction of Dharia blow by accused No. 1 on head of the injured and infliction of knife blows on abdomen by accused No. 2, are established without any shadow of doubt. Nonetheless, the injuries inflicted by the accused persons were not motivated or out of aggression. They were caused in purported exercise of right of private defence of body as well as property by the accused persons. Therefore, we are in agreement with the

contention raised by Mr. Jani for the accused in defence that the accused were entitled to right of private defence of body and property.

[16] The second question which leads us to consideration is as to whether in exercise of right of private defence of body and property, the accused were justified in causing the injuries sustained by the injured. In other words, whether the accused persons were justified or had exceeded the right of private defence ? Despite the fact that the injuries were caused by the accused after the scuffle, after exchange of hot words, in order to protect their right of body and property, the extent of injuries caused on the vital part of the body of the injured with deadly weapons like Dharia and knife, cannot be said to be justified. Thus, the accused have exceeded the right of private defence. Obviously, in the factual scenario of the present case, justification for causing serious injuries on the vital part of the body with knife and Dharia by the accused could not be established. Thus, we are of the clear opinion that though the accused persons were entitled to exercise the right of private defence of body and property, they, in giving a Dharia blow on the head and two knife blows on the abdomen of the injured, were not justified in causing such injuries. No doubt, we have noticed that accused No. 2 after teeth-bite to the injured on his shoulder, in an attempt to thwart and avoid infliction of knife blows on his person by the injured, who was also armed with a knife, for security, having snatched it away, inflicted two knife blows on the injured. Had it been a case of one knife blow in security for protection of his right of private defence of body, it would have been a different case. The facts do not justify the second blow with knife which was grievous. It becomes, therefore, clear that accused No. 1, in giving a Dharia blow on the vital part of the body like head of the injured and causing injuries to the extent as found by the medical officer grievous in nature which required hospitalisations as indoor patient for a period of 12 days, was not justified and, therefore, while inflicting Dharia blow and causing such injuries such injuries had exceeded the right of private defence. Likewise, accused No. 2 cannot be said to be justified in giving second knife blow though he had snatched it away from possession of the injured. Infliction of second knife blow which was also as deep as almost just near sternum, cannot be said to be justified since knife was snatched away and for protection of his body, accused No. 1 had also given one blow. Therefore, accused No. 2, in our opinion, has also exceeded the right of private defence. In the circumstances, the contention that the case is fully covered by the right of private defence of body as well as property and there was no, as such, an offence in case of general exception, cannot be accepted in its entirety. In our opinion, on the basis of facts, in the background of relevant proposition of law, though the accused persons were entitled to exercise right of private defence, they had exceeded the same in causing injuries sustained by the injured, by inflicting Dharia blow by accused No. 1 on the head and two knife blows on the abdomen by accused No. 2.

[17] Lastly, it would lead us to consideration as to whether under what provisions of law and general nature of findings in the circumstances of the case, the accused are liable to be punished. Earlier, it is clarified that the charge against the accused persons was under Sec. 307 which, in the opinion of the trial Court, was not justified and, therefore, the trial Court recorded the conviction and sentence for the offence punishable under Sec. 324. With due respect to the learned trial Judge, we may point out that there would not arise any question of offence being punishable under Sec. 324. Section 324 prescribes punishment for voluntarily causing hurt by dangerous weapons or means. In the present case, the accused have caused grievous hurt. It is clearly and succinctly established by the medical evidence that any of the injuries caused by the accused persons was grievous and not simple. It cannot be said even for a moment that Dharia or knife is not a deadly weapon. Therefore, when there is a case of grievous injuries by infliction of dangerous and deadly weapons like Dharia and knife, even in absence of right of private defence, provisions of Sec. 324 would not be attracted. Section 325 provides for punishment for voluntarily causing grievous hurt; whereas Sec. 326 prescribes punishment for voluntarily causing grievous hurt by dangerous weapons and means. We have not been able to comprehend from the judgment as to why provisions of Sec. 326 were not brought to the notice of the learned trial Judge. Be that as it may, we are also not concerned with provisions of Sec. 326 as we have found that the accused persons are liable for punishment for exceeding their right of private defence. Therefore, had there been death on account of injuries sustained by the injured Hari, the case would have been culpable homicide not amounting to murder in view of Exception 2 to Sec. 300. It may be mentioned at this juncture that in Chapter XVI, provisions are made for punishment of offences affecting human body. Section 299 prescribes what is culpable homicide. Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Except in cases of exceptions, culpable homicide is murder, if the act by which the death is caused is done with intention of causing death or, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury. However, there are exceptions which provide that culpable homicide is not amounting to murder. In this connection, it would be interesting to refer to Exception 2 to Sec. 300 which says that 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. In the present case, we have noticed that had there been death because of injuries, it would not have been a case of culpable homicide amounting to murder but it would have been culpable homicide not amounting to murder as the accused were entitled to right of private defence of body and property. Since the injured survived from major mishap and the injuries did not cause death in the present case, the question would arise as to under what provisions in a case of attempt to commit murder which is culpable homicide but not amounting to murder, the present case would fall ? Of course, in the present case, charge under Sec. 307, as per the prosecution case, was framed. Section 307 prescribes attempt to commit murder. To justify a conviction under Sec. 307, even bodily injury is not required to cause death. Although the nature of injury actually caused may give considerable assistance in coming to a finding as to the intention of the accused. The prosecution has not been able to establish that the accused persons in causing grievous hurt with the help of Dharia and knife was nothing but to commit murder. There was no premeditation. There was no pre-concert. In fact, the accused persons were actually busy in agricultural operations at the relevant time on the day of the incident. They were taken by surprise when injured Hari and two persons entered part of the disputed field and the injured tried to dispossess the accused persons followed by scuffle and exchange of hot words between the accused and the injured. The injured was also armed with knife which was snatched away by accused No. 2. Since we have found that the accused persons have exceeded the right of private defence, the question will arise as to under what provisions of law, the accused persons are liable for punishment ? In this connection, we may point out that provisions of Sec. 308 provides for punishment for attempt to commit culpable homicide not amounting to murder.

It becomes very clear from the provisions of Sec. 308 which reads as under :

"Whoever does any act with such intention of knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

That a person who has committed such offence with intention or knowledge and under such circumstances that, if he by that act caused death, he would have been guilty of culpable homicide not amounting to murder, he could be punished for

attempt to commit murder by causing injuries resulting into death, but in case of surviving injured, when hurt is caused to such person by such act, the offender could be punished with either description of term which may extend to seven years or with fine or with both if for an attempt to commit culpable homicide, injuries are caused. Obviously, in the present case, injuries are caused. Therefore, second part of provisions of Sec. 308 will be attracted.

[18] In the result, in our opinion, after considering all relevant facts and circumstances and the proposition of law, the accused persons are liable for conviction for the offence punishable under Sec. 308 which prescribed maximum imprisonment of seven years. The question now arises is about the quantum of sentence. Insofar as the mandate of Sec. 235(2) of the Code is concerned, the learned Additional Sessions Judge has already given an opportunity of hearing to the accused and the learned Advocate on the quantum of sentence. The trial Court has also considered personal facts and circumstances referable to each accused. Since the accused persons are found liable for conviction under Sec. 308 which prescribes maximum punishment for seven years or fine or both which is more than the prescribed maximum sentence prescribed for offence punishable under Sec. 324 which is imposed by the trial Court, we have again heard the learned Advocates for the accused in defence and the learned Addl. P.P. Learned Advocate Mr. Jani submitted that in case of accused No. 1, a lenient view is required to be taken since he was already about 61 at the time of conviction by the trial Court and thereafter almost a decade has elapsed and it will be too harsh for him to undergo any amount of quantum of sentence at this age and stage. He also submitted that he is reported by the accused persons that the dispute between the parties has been resolved and possession of the disputed field has already been parted by the accused to the injured. In this behalf, he further submitted that two days' time may be granted so as to bring the parties and ascertain the nature of compromise, if any, and to place it on record to which the learned Addl. P.P. Mr. Desai has rightly not objected. Since we are dealing with the question of quantum of sentence and the contention other than those raised earlier before us, the new issue of compromise between the parties obviously will have a bearing, being an important aspect affecting the quantum of sentence. We deem it expedient to adjourn imposition of sentence to 23rd September 1998. Hence, the matters are posted to 23rd September, 1998.

[19] Upon request of Ms. Rekha Maharaja, learned Advocate appearing for Mr. Jani for the accused, the matter is adjourned to 25th September 1998. However, we may place it on record that respondent No. 1 original accused No. 1 Premshanker is present in Court who incidentally mentions that the dispute with the compLalnant has been settled and possession of the disputed field has been handed over to the compLalnant. He also stated that he is aged 69 and he has family relations with the compLalnant.

[20] We have today heard the learned Advocate for the accused in defence. The learned Addl. P.P. for the State as also the learned Advocate for the accused persons who are present in Court, on the question of quantification of punishment. Section 308 under which the accused persons are found guilty prescribes punishment for attempt to commit culpable homicide in two parts. In an attempt to commit culpable homicide, if hurt is caused, the accused can be punished with imprisonment of either description for a term which may extend to 7 years of with fine or with both.

[21] The learned Advocate for the accused persons has submitted the following aspects for taking a liberal and sympathetic view in the matter :

(i) Accused No. 1 is aged about almost 70 and physically and virtually infirm;

(ii) Accused No. 1 is doing work of Pujari and he has no regular source of income;

(iii) That he has undergone one month's imprisonment as under-trial prisoner;

(iv) That accused No. 2 is also economically very poor who is living in another village and not jointly with his father;

(v) That he has to shoulder responsibility of large family including six daughters and a son and wife; whereas, accused No. 1 has to shoulder the responsibility of 4 to 5 members in the family as he has a widowed sister with him depending on him.

Needless to state there is purpose and policy behind the provisions of Sec. 235(2) of the Code of Criminal Procedure, 1973 which came to be introduced in this Code which commands that the Court is obliged to take into account various facts and circumstances peculiar and personal to the accused before determining the quantum of sentence like (i) age, (ii) economic status, (iii) nature of employment or avocation; (iv) character; (v) nature of offence; (vi) the mode and manner in which the weapon came to be employed during the course of offence.

In view of the statutory mandate contained in Sec. 235(2) of the Code and the modern trend prevalent in the penology, the sentencing portion is, as such, otherwise very delicate and difficult. The approach of the Court till conviction is recorded ought to be totally objective; whereas, after crossing the stage of conviction, when the Court enters into the arena of sentencing, the approach of the Court ought to be objective as well as subjective, in the sense, peculiar facts and circumstances referable to the accused persons ought to engage the attention of the Court and it is obligatory for the Court to view into focus all the relevant facts and circumstances as it has not only with a view to keeping in mind the deterrent or retributive factors but rehabilitative and reformative factors too. In short, the

duty of the Court during the process of sentencing is equally important and has to be exercised bearing in mind all the aforesaid peculiar facts and circumstances, the proposition of law and existing prevailing policy and philosophy of criminology and penology without being oblivious to the vitality and has to strike the balance so that the sentence does not become disproportionate to the harm caused in the offence and at the same time, too lenient or inadequate that it may be affect to an extent, social good.

21 A. In the light of the fact and circumstances and the entire evidence on record, we are of the opinion that the period of imprisonment undergone by the accused persons would strike the balance keeping in mind the aforesaid aspects as also the length of time after which we are in exercise of sentencing process, for the offence under Sec. 308, I.P.C., without disturbing the amount of fine already paid.

[22] In the result, the accused persons are held guilty for the offence punishable under Sec. 308, I.P.C., instead of Sec. 324, I.P.C., as held by the trial Court. The period of imprisonment undergone is held to be sufficient and reasonable in the circumstances of the case. The accused persons have, already, paid the fine. Therefore, their bail bonds shall stand cancelled forthwith. Appeal No. 296 of 1993 filed by the State and Appeal No. 878 of 1995 filed by the accused persons shall stand disposed of accordingly.

Appeal No. 296 of 1993 allowed; Appeal No. 878 of 1995 dismissed.