

(2001) 08 AHC CK 0132**Allahabad High Court****Case No:** Criminal Appeal No. 285 of 1981

Amar Gond and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 30, 2001**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 235(2), 313
- Penal Code, 1860 (IPC) - Section 300, 302, 304, 307, 323

Citation: (2002) CriLJ 1234**Hon'ble Judges:** S.K. Agarwal, J; J.C. Gupta, J**Bench:** Division Bench**Advocate:** A.D. Giri and D.R. Chaudhary and Shashank Shekhar, for the Appellant; A.G.A. and A.N. Misra, for the Respondent**Final Decision:** Partly Allowed

Judgement

J.C. Gupta, J.

This appeal is directed against the judgment and order dated 29/11/1981 passed by the then III Addl. Sessions Judge, Deoria in Session Trial No. 108 of 1978 whereby appellant No. 3 Hari Shanker Pandey has been convicted and sentenced to imprisonment for life u/s 302, IPC to " undergo R.I. for six months u/s 323 read with Section 34, IPC and 7 years R.I. u/s 307 read with Section 34, IPC. Remaining appellants have been convicted and sentenced to imprisonment for life u/s 302/34, IPC 6 months R.I. u/s 323/34 and 7 years R.I. u/s 307/34, IPC. All the sentences have been ordered to run concurrently.

2. Deceased Prahlad was son of Laxmi Narain, P.W. 1 the first informant of the present case. Appellant Jagannath Pandey, Hari Shanker Pandey and Santan Pandey are collaterals of Laxmi Narain. It is alleged that on account of litigation there existed enmity between first informant and members of his family on the one hand and the aforesaid appellants on the other. Appellant Amar Gond was also a resident

of the same village and his field was situated to the west of the field of first informant.

3. It is said that Prahlad deceased had gone to Deoria, a day before the present occurrence and Laxmi Narain had himself gone to Bhaluni for his own house hold work. Taking advantage of their absence, appellant Amar Gond while ploughing his own field broke the Mend (demarcation wall) of the field of Laxmi Narain and encroached upon a portion of his field. It is alleged that on 28/10/1977 at about 7 a.m. when Laxmi Narain and his son Prahlad were setting the Mend back to its original position, appellant Amar Gond came there and forbade them from doing so. When the first informant and his son did not listen to him, he went away threatening both of them with dire consequences. Soon after, Amar Gond along with appellants Jagannath Pandey, Hari Shanker Pandey and Santan Pandey came to the field of Laxmi Narain. At that time Jagannath Pandey and Amar Gond were armed with lathi while Hari Shanker Pandey and Santan Pandey were having spears. Jagannath Pandey called upon his companions to kill the first informant and his son whereupon appellant Santan Pandey made an attack on the first informant by his spear but Prahlad pulled Laxmi Narain back as a result of which, Laxmi Narain escaped any injury. Meanwhile appellant Hari Shanker Pandey hurled his spear on Prahlad which struck him on his chest and he fell down bleeding. Thereafter Jagannath Pandey and Amar Gond assaulted Laxmi Narain by means of lathi. Alarm raised by Laxmi Narain and his son Prahlad, attracted Harihar Pandey, Vishwanath Pandey, P.W. 2, Ram Manohar Pandey, Indra Sen Pandey, Ram Kawal Pandey, Dineshwar Tiwari and others to the scene of occurrence. When Vishwanath Pandey intervened, he too was assaulted with lathi. Prahlad was carried to P.H.C. Bhaluni by his father Laxmi Narain with the help of witnesses where he was declared dead. Dead body of Prahlad was then carried to police out post Bhaluni and Laxmi Narain Pandey lodged a written report Ex. Ka 4 which he had dictated to Dineshwar Tiwari. On the basis of written report, Check FIR was prepared and case was registered against all the present appellants u/s 302, IPC.

4. S.I. Kameshwar Chaubey, P.W. 8 who was posted at the out post immediately started investigation and held inquest on the dead body of Prahlad at the outpost which was already brought there by the first informant. Dead body was sent for post mortem examination through constable Bashir Ahmad and home guard Pheru Singh. The said S.I. also took into his possession deceased's "lungi" which was stained with blood. Before holding inquest he had recorded statement of Laxmi Narain Pandey. He also recorded statement of injured Vishwanath Pandey. Since Laxmi Narain Pandey and Vishwanath Pandey had injuries on their person both of them were sent for their medical examination.

5. Inspector Ram Pratap Singh, P.W. 7 was the Station Officer of P.S. Khukhundoo. After receiving papers from out post Bhaluni he reached the out post at 10/12 p.m. He then took up investigation in this own hands from S.I. Kameshwar Chaubey. He

recorded the statements of Harihar Pandey and other witnesses and then came to the scene of occurrence along with Laxmi Narain Pandey, other witnesses and S.I. Kameshwar Chaubey and prepared site plan Ex. Ka 15. The Investigating Officer then made search of the houses of accused persons and recovered one Spear Material Ex. 4. The blade of spear did not have stains of blood and to him it appeared to have been recently washed. Similarly from the house of Jagannath Pandey another Spear Material Ex. 5 and Lathi Material Ex. 6 were recovered. On 8111977 he interrogated accused Jagannath Pandey, Santan Pandey and Hari Shanker Pandey inside the jail as they had surrendered in Court and had been sent to jail. On completion of Investigation a charge sheet, Ex. Ka 24, was submitted against all the nominated accused and they were sent for trial.

6. Post mortem on the dead body of Prahlad was conducted by Dr. R.S. Singh, P.W. 4 on 28101977 at 445 p.m. Deceased was aged about 27 years. He was of average built and rigour mortis was present all over the body. The deceased had only one following ante mortem injury :-

Punctured wound 3/4" x 1/2" x abdominal cavity deep on the left side of abdomen 3 1/2" below the left nipple in between the ribs. On incision clotted blood was found present underneath the skin and muscles.

7. In the internal examination, pleura was found lacerated on left side at its lower end. Left lung was also found punctured under injury No. 1 at lower end and about 400 cc of blood was found present in the thoracic cavity. Stomach was also punctured. Cause of death was reported to be shock and hemorrhage as a result of above ante mortem injury. The post mortem report is Ex. Ka 10. Dr. R.S. Singh in his deposition before the trial Court has also opined that the ante mortem injury found on the deceased was sufficient in the ordinary course of nature to cause his death and the injury could be of a spear.

8. Dr. Raj Bahadur Rai P.W. 5 medically examined injured Laxmi Narain Pandey on 28101977 at 1205 p.m. and found following injuries :

1. Reddish contusion 4 1/2" x 1" present over the anterior aspect of the right fore arm, 1" proximal to the wrist joint.
2. Linear abrasion 1" in length present over the anterior aspect of right fore arm, 2 1/2" distal to the lateral epicondyle of right elbow joint.
3. Red contusion 3" x 1" present over the anterior aspect of the right shoulder.
4. Red contusion 4" x 1 1/2" present over the outer aspect of right thigh 4" proximal to the right hip joint.
5. Red contusion 5" x 1" present over the body of the left scapula.
6. Traumatic swelling 3" x 2" present over middle and anterior aspect of the left thigh.

7. Complain of pain over the left side of chest.

9. All the injuries were simple in nature and caused by blunt object. Their duration was fresh. Injury report of Laxmi Narain is Ex. Ka.12.

10. The same doctor also medically examined Vishwanath Pandey on the same day and found the following injuries :

1. Red contusion 5" x 1" present over left side of the shoulder starting from the lateral end of left clavicle and below the shoulder joint.

2. Red contusion 3" x 1" present over the anterior lateral position of right thigh, 4" below the right hip joint.

3. Traumatic swelling 4" x 3" present over anterior aspect of the left thigh 6" above the left knee joint.

11. All the injuries were simple in nature and caused by blunt object. They were fresh in duration. Injury report of Vishwanath Pandey is Ex. Ka13.

12. Dr. Rai in his statement before the Court below has also opined that injuries of both the injured could be caused by lathi on 28101977 at about 7 a.m.

13. In support of its case prosecution produced 8 witnesses before the trial Court, they were P.W. 1 Laxmi Narain Pandey, P.W. 2 Vishwanath Pandey, P.W. 3 Head Constable Ramapat Tewari, P.W. 4 Dr. R.S. Singh, P.W. 5 Dr. Raj Bahadur Rai. P.W. 6 Constable Bharat Singh, P.W. 7 Inspector Ram Pratap Singh and P.W. 8 S.I. Kameshwar Chaubey.

14. In their statements recorded u/s 313, Cr. P.C. accused persons denied the prosecution allegations and stated about their false implication due to enmity. They produced five witnesses in defence, namely, D.W. 1, Ram Autar, D.W. 2 S.K. Mukherji, D.W. 3 Smt. Bana, D.W. 4 Chandrabhan Singh and D.W. 5 Agnu.

15. Accused persons also filed a number of documents which are Ex. Kha.1 to Ex. Kha 36.

16. Learned Sessions Judge placing implicit reliance on the testimony of Laxmi Narain P.W. 1 and Vishwanath Pandey, P.W. 2 came to the conclusion that the incident occurred in the manner as alleged by the prosecution and case against the appellants has been established beyond reasonable doubt. Accordingly the learned Sessions Judge has convicted and sentenced all the appellants as aforesaid.

17. Shri A.D. Girt, Sr. Advocate, appeared for the appellants while learned A.G.A. argued on behalf of the State.

18. Factum of homicidal death of Prahlad by a single spear injury has neither been assailed nor disputed before us by the learned counsel for the appellants. This fact is also otherwise established from the post mortem report and the statement of Dr.

R.S. Singh, P.W. 4. The post mortem report indicates that the deceased Prahlad had sustained only one punctured wound measuring 3/4" x 1/2" and the wound was in abdominal cavity deep on left side 3 1/2" below the left nipple. Internal examination further revealed that pleura, left lung and stomach were all punctured on account of this injury. Thus it is fully established that Prahlad died a homicidal death on account of a single penetrating injury.

19. It was submitted by Shri A.D. Giri, the learned counsel for the appellants, that the prosecution has suppressed true facts regarding the genesis of the origin of the incident and from the evidence on record greater probability is created that the disputed portion of land was in settled and peaceful possession of accused party and the circumstances appearing in the case revealed that right of private defence of property and person had accrued consequently to the accused. On the other hand learned A.G.A. submitted before us that no such right of private defence was specifically pleaded by the appellants before the trial Court and their case was of total denial. According to him all the appellants had assembled at the scene of occurrence under a premeditated plan and not only caused the murder of Prahlad but in furtherance of their common intention caused injuries to Laxmi Narain and Vishwanath Pandey also.

20. Before engaging ourselves into a discussion on the evidence brought on record at the outset we will like to dwell upon the submission of the learned A.G.A. that the right of private defence could not be availed by the appellants because such a right had not been pleaded by any of the appellants in their statements u/s 313, Cr.P.C. On this point the law is now well settled. The rule of pleadings in civil law does not apply to criminal cases. Unlike a civil case, it is open to a criminal Court to give benefit to the accused of a plea even where the same was not stated by him in his statement u/s 313, Cr.P.C. In a given case where the accused has not raised the plea of an Exception, but if it is found from the evidence brought on record from the prosecution side and from the circumstances appearing in the case that the exception is available to the accused and he had acted within the confines of the exception, benefit of that exception is his dichotomy and it cannot be denied to him. In the case of State of U.P. Vs. Lakhmi, it was held that the burden of proving an exception is certainly on the accused. But the mere fact that the accused adopted another alternative defence during his examination u/s 313, Cr.P.C. without referring to Exception I of Section 300, is not enough to deny him of the benefit of the Exception, if the Court can cull out materials from the evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right of accused to rely on the Exception once and for all.

21. It is also well settled that the standard of proof which lies upon the prosecution to prove its case is stricter than what is required from an accused in support of his plea of right of private defence. The onus of proving all the ingredients of an offence

is always upon the prosecution and at no stage it shifts to the accused. It is only when this burden is discharged that it is for the accused to explain or controvert the essential elements in the prosecution case which would negative it. Even in such a case the standard of proof is not the same as which rests upon the prosecution. Where the evidence on record probablises his plea, the accused will be entitled to the benefit of reasonable doubt. It is enough for him to succeed if he establishes facts either from his own evidence or from the prosecution evidence itself which on the test of preponderance of probabilities rationalize his defence plea and thereby makes it acceptable.

22. In short, one may say that even where right of private defence has not been specifically pleaded by the accused u/s 313, Cr.P.C. but necessary basis for that plea was laid down in crossexamination or by adducing defence evidence, the burden gets discharged by showing preponderance of probabilities in favour of that plea on the basis of the material, on record. An accused, thus has three ways to prove his defence regarding applicability of any of the exceptions to Section 300, IPC or any other exception such as insanity etc. These are (1) by adducing evidence oral and documentary, (2) from the own evidence of the prosecution and (3) from the probabilities available from the circumstances discernible from the evidence brought on the record. It is the preponderance of these probabilities which may tend the scale on their side.

23. Bearing in mind these sanguine principles, we now proceed to examine the evidence which has been brought on record of this case.

24. In this case prosecution produced two witnesses of fact, namely, P.W. 1 Laxmi Narain Pandey and P.W. 2 Vishwanath Pandey. As per prosecution case both of them suffered injuries in the same incident in which Prahlad Pandey had received a punctured wound in his abdomen. P.W. 1 Laxmi Narain is the father of deceased Prahlad Pandey. He stated that in the consolidation operation, he was allotted chak No. 100. In the west of his chak, lies the chak of accused Amar Gond. A "mendh" (demarcation wall) separated these two chaks. Accused Santan Pandey, Hari Shanker and Jagannath are his "pattidar" and they were having litigation since before the incident in question. Accused Amar Gond is "jajman" of Amar Nath Pandey. He has also proved some documents in order to show that the parties were on inimical terms. A litigation was also pending before consolidation authorities. As per his statement his son Prahlad Pandey had gone to Deoria on 27101977 to attend a date in the consolidation case while he himself had gone to village Bhaluni. When he came back and went to his field in the morning of 28101977 he found that Amar Gond had included some portion of his chak No. 100 in his own field after dismantling the intervening "Mendh". He told this fact to his son Prahlad when he came back home. Thereafter both of them went to their field and started refixing the "Mendh" at its original place. It was about 630 a.m. Amar Gond accused arrived there. He asked them why there were reconstructing "Mendh". They replied "why

you have broken our "Mendh". Amar Gond then went back and after 1012 minutes reappeared along with Jagannath Pandey, Santan Pandey and Hari Shankar. Jagannath Pandey and Amar Gond were armed with lathi while Hari Shanker Pandey and Santan Pandey were having spears. Jagannath accused exhorted his companions whereupon accused Santan made an attack by spear on this witness but he escaped any injury as he was pulled back by his son Prahlad. Immediately thereafter accused Hari Shanker Pandey attacked Prahlad with spear which struck him on his abdomen and he fell down. Accused Jagannath and Amar Gond started assaulting Laxmi Narain with lathi. On the cries raised by Laxmi Narain and his son Prahlad, witnesses were attracted and when Vishwanath Pandey P.W. 2 intervened he was also assaulted by lathiwalas. Thereafter all the accused persons ran away. With the help of the witnesses Prahlad was taken to Primary Health Centre Bhaluni where he was declared dead. Laxmi Narain thereafter carried the dead body of Prahlad to police out post Bhaluni and lodged written report Ex. Ka. 4 which was scribed by Dineshwar Tiwari on his dictation. He further stated that from police out post he and Vishwanath Pandey were sent to Bhaluni Hospital where they were medically examined.

25. P.W. 2 Vishwanath Pandey is yet another injured witness. According to him on the day of occurrence he was present at the door of his house where Harihar Pandey and Ram Manohar Pandey were also sitting. They saw that Amar Gond and Jagannath accused armed with lathi and Santan and Hari Shanker with spear were running towards the place of occurrence. Seeing this he along with other witnesses followed them. He saw that Laxmi Narain Pandey, P.W. 1 and his son Prahalad were relaying their "Mendh" at its proper place. All the four accused persons reached there and on the exhortation of Jagannath, Santan Pandey hurled a spear on Laxmi Narain Pandey but the same did not strike him as he was pulled back by his son Prahlad. Immediately thereafter accused Hari Shanker inflicted a spear blow on Prahlad which caused him an injury below his chest. Amar Gond and Jagannath started assaulting Laxmi Narain Pandey with lathi and when he tried to save him he was also assaulted by those two very accused with lathi, whereby he also suffered injuries.

26. Injuries of Laxmi Narain Pandey and Vishwanath Pandey were examined by Dr. Raj Bahadur Rai, P.W. 5 on the same day at 1205 p.m. at P.H.C. Bhaluni. The injuries sustained by both these injured have already been detailed in earlier part of the judgment and their injury reports have been proved as Ex. Ka12 and Ka13 respectively. Dr. Rai in his statement before the Court further stated that injuries of both the injured were simple in nature and were caused by blunt object like lathi. They were fresh in duration and could be caused in the same morning at about 7 a.m. From the statements of Laxmi Narain Pandey and Vishwanath Pandey coupled with the statement of Dr. Rai there could be no doubt that Laxmi Narain Pandey and Vishwanath Pandey suffered blunt object injuries like lathi at about 7 a.m. in the same incident in which Prahlad Pandey was assaulted by a spear. As both these

witnesses themselves sustained injuries their presence at the scene of occurrence is not open to doubt. Their evidence that they were assaulted along with deceased when Prahlad and his father Laxmi Narain Pandey were reconstructing intervening "Mendh" is further corroborated by site plan Ex. Ka 15 prepared by the investigating officer when he made inspection of the scene of occurrence. Thus the prosecution case upto this extent is fully established. Shri Giri, learned counsel for the appellants has also not seriously doubted the occurrence of the incident and of the deceased and injured persons receiving injuries at the hands of appellants at the time and place as alleged by the prosecution. However, main thrust of his argument is that from the evidence on record and the circumstances appearing in the case it appears more probable that the accused persons acted in exercise of right of private defence of their property. According to him it is proved from the evidence on record that on the day of occurrence accused party was in possession of the disputed portion of land, which according to the prosecution had been included by the accused party in their chak and it were the complainant party which was trying to rehabilitate back that portion to their own chak by restoring the "Mendh" to its past position and thus accused party had every right not to allow the complainant party to do the same and recapture their land.

27. We have already held above that even where right of private defence has not been specifically pleaded by the accused in their statements recorded u/s 313, Cr.P.C. and necessary basis for that plea has been laid down in crossexamination or by adducing defence evidence or showing from preponderance of probability from the circumstances the accused cannot be denied the benefit of that plea.

28. In the present case as per own verison of the prosecution even before the day of occurrence accused party had taken over possession of some area of complainant's chak No. 100 and included the same in their own chak No. 1 lying in the west of complainant's chak. While according to the defence evidence an area of about 12 decimals from chak No. 100 had been included in chak No. 1 of accused Amar Gond in demarcation proceedings about three months prior to the occurrence in question. According to P.W. 1 Laxmi Narain Pandey this was done by accused persons in the absence of himself and his son Prahlad when they had gone out of their village. No witness has been examined by the prosecution to establish that the accused party had trespassed over a portion of complainant's chak No. 100 after demolishing their intervening "Mend" only a day prior to the incident in question. Even Vishwanath Pandey does not state so. On the other hand, we have on record statement of D.W. 1 Ram Autar. Consolidation Lekhpal who has stated on oath that on 21/7/1977 he had gone to village Bhaluni for measurement and on the basis of documents available in the summoned record of consolidation case No. 1199/863 he further stated that chak No. 1 is of accused Amar Gond and to the east of this chak is chak No. 100. At the time of his measurement he had found an intervening "Mendh" in between these chaks. As per the order of D.D.C. he had included an area of 12 decimal in chak No. 1 of accused Amar Gond from chak No. 100 and thereafter he

had got affixed pegs to the east of intervening "Mend". From the statement of Ram Autar D.W. 1 it is thus apparent that much before the present incident on 2171977 on the basis of order of D.D.C. he had gone for boundary demarcation and had demarcated fresh boundary in chak No. 1 of accused Amar Gond and chak No. 100 of the complainant. During demarcation he included 12 decimal of land in chak No. 1 from complainant's chak No. 100 and got new boundary pegs affixed. It is also admitted to both the prosecution witnesses that before the incident in question accused party had ploughed chak No. 1 up to the extended area which had been demarcated earlier by Lekhpal D.W. 1. As already pointed out above there is no evidence on record to substantiate the prosecution allegation that the accused party had trespassed over the disputed area of 12 decimal only a day prior. Thus it looks to be more probable that the accused party had been given possession of 12 decimal of land from chak No. 100 during the demarcation proceedings and they had come in peaceful possession some more than three months before the present occurrence. Even as per prosecution own case on the day of occurrence the complainant and his son Prahlad were reconstructing the intervening "Mend" which existed between chak No. 100 and chak No. 1 before the demarcation proceedings. The site plan Ex. Ka15 prepared by the Investigating Officer also supports this conclusion inasmuch as in the east of chak of Amar Gond a portion of complainant's field was found ploughed. P.W. 7 Ram Pratap Singh, Inspector, the investigating officer in his statement has stated that when he visited the scene of occurrence he had found about 1415 paces of land ploughed towards the field of complainant and intervening "Mend" was also found ploughed. It is nobody's case that it was ploughed after this incident. He further stated that about 3/4th part of intervening "Mend" was found freshly reconstructed. It has also been stated by him that according to the witnesses incident had occurred at place "A" in the area of land which was found ploughed. We have carefully gone through the statement of the prosecution witnesses and Lekhpal and to us it appears more probable that much before the incident in question a portion of land of chak No. 100 of complainant party had been included in the chak of accused Amar Gond during the demarcation proceedings held by Lekhpal. On the day of occurrence the complainant and his son Prahlad were reconstructing their Mendh with the object of restoration of possession of the land to themselves which had been included earlier in chak No. 1 of accused during demarcation proceedings to themselves. This act of complainant and his son was certainly unlawful and thus the accused party had a right to defend their property and to use for as was necessary to repel the aggression against their property.

29. The next question that arises for our consideration is as to whether appellants or any one of them exceeded the right of private defence of property. So far as Jagannath and Amar Gond are concerned they are alleged to have assaulted P.W. 1 Laxmi Narain Pandey and P.W. 2. Vishwanath Pandey with lathi. According to the statement of Dr. Raj Bahadur Rai, P.W. 5 the injuries of both these persons were

simple in nature. Therefore, these appellants cannot be said to have exceeded the right of private defence of their property. Similarly Santan Pandey also cannot be held liable for exceeding the right of private defence inasmuch as he is not alleged to have caused any injury either to the deceased or other injured witnesses.

30. Coming to the case of appellant Hari Shankar Pandey, we find that from the evidence on record it is fully established beyond any doubt that he alone is the author of the only injury suffered by Prahlad deceased. As per our above discussion and findings it looks more probable that the land in dispute had come in possession of accused party during demarcation proceeding much before the present occurrence and the quarrel arose on that day because the complainant party in an unlawful manner was trying to recapture that portion in their land, which had been included in the chak of accused by the order of D.D.C. and demarcated on the spot by the Lekhpal by relying the intervening "Mend" and did not desist inspite of objections raised by appellant Amar Gond. Therefore, accused persons had a legitimate right to the use of reasonable force to defend their property. The right of private defence falls under two categories i.e. (1) As a total defence and (2) As a partial defence. In the first category, there will be no offence but in the 2nd category by virtue of Exception 2 to Section 300, IPC the offence of murder is reduced to the offence of culpable homicide not amounting to murder. It is well settled that even where accused exceeds right of private defence and causes fatal injury in good faith where in fact it was not so necessary, then under Exception 2 to S; 300, IPC, it will be still a lesser offence than murder, if the intention of the accused was to do no more harm than which in his behalf was necessary and he did not act with a vengeful motive in the purported exercise of his right. In the present occurrence even as per the own case of prosecution this appellant gave a single spear blow on Prahlad deceased. Blow was not repeated nor any other harm was caused to the deceased when he fell on the ground on receiving spear blow in his abdomen. This act of the appellant Hari Shanker Pandey thus will fall neither u/s 302 nor u/s 304 Part I of the IPC as there was no intention on his part to cause his death or such bodily injury as was likely to cause death of Prahlad but having regard to the seat and kind of injury it can be safely inferred that he exceeded his right of private defence in inflicting the spear blow with the knowledge that his act was likely to cause death. Accordingly he is held guilty of the offence punishable under 2nd part of Section 304, IPC.

31. Next question that arises for consideration is as to what could be just and appropriate sentence which should be awarded to appellant Hari Shanker Pandey with regard to his conviction u/s 304, Part II, I.P.C. A perusal of the judgment and record of the trial Court leaves no room of doubt that the learned Sessions Judge has not made due compliance of the provisions of Section 235(2), Cr.P.C. which interalia require that accused has to be given an opportunity to bring on record evidence and other material having a bearing on the question of sentence. In this case the trial Court merely heard oral submission of the counsel for accused on the quantum of punishment on one and the same day. It is well settled that "hearing" as

contemplated u/s 235(2), Cr.P.C. is not confined merely to hearing of oral submission but the same extends to affording an opportunity to the parties to place before the Court facts and material relating to the various factors having bearing on the question of sentence vide Santa Singh v. State of Punjab AIR 1976 SC 2386 and Allaudin Mian v. State : AIR 1989 SC 1456 : 1989 All WC 911 :. It is further well settled that in judging the adequacy of sentence, the nature of offence, the circumstances of its commission, the age and character of the offender, injury to individual or the society, effect of the punishment on the offender, are some amongst many other factors which should be ordinarily taken into consideration by the Court Ramashraya Chakravarti Vs. State of Madhya Pradesh, While selecting a just and appropriate sentence it is the duty of the Court to give due weight to the mitigating as well as the aggravating circumstances placed before it. In the present case we have already found above that it were the complainant party who had trespassed over the land of accused and were bent upon to reconstruct boundary wall with an object of recapturing the possession of that area of land which in demarcation proceedings had been included in the chak of accused Amar Gond from their own chak. The appellant Hari Shankar Pandey though was having right of private defence of property but he exceeded that right by inflicting a spear blow in the chest and abdominal region of deceased Prahlad. It was so forceful a blow that it had punctured left lung at its lower end. Stomach was also got punctured by the same blow. Pleura was lacerated too. The incident occurred on 28/10/1977. In the statement recorded u/s 313, Cr.P.C. on 8/2/1979, appellant Hari Shanker Pandey stated his age was 28 years meaning thereby that at the time of incident he was a young man of about 26 years of age. He was granted bail during trial even before the date of commitment i.e. 15/4/1978. After conviction he remained in jail only for about a week. The fact that blow was not repeated by him is a strong mitigating circumstances in his favour. There is also nothing on record to indicate that the appellant was having any criminal history. Bearing all these factors in mind, in our view sentence of three years R.I. and fine of Rs. 10,000/- shall meet the ends of justice. In default of payment of fine appellant Hari Shanker Pandey shall under go a further sentence of imprisonment for six months.

32. For the reasons stated above the appeals of appellants Amar Gond, Jagannath Pandey and Santhan Pandey are allowed. Their conviction and sentence as recorded by the trial Court are set aside and they are acquitted of the offences charged for. They are on bail, they need not surrender, their bail bonds are cancelled and sureties charged.

33. Appeal of Hari Shankar Pandey Is allowed in part. His conviction and sentence of imprisonment for life u/s 302, I.P.C. are set aside instead he is convicted u/s 304 Part II and is sentenced to three years R. I. and a fine of Rs. 10,000/-. In default of payment of fine appellant Hari Shankar Pandey shall under go a further sentence of imprisonment for six months. His conviction and sentence under all other counts are set aside. He is on bail, he shall be taken into custody forthwith to serve out the

sentence as modified by this Court. Copy of this judgment be sent to the C.J.M. concerned for immediate compliance.