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**(1999) 01 MP CK 0048**

**Madhya Pradesh High Court**

**Case No:** Criminal A. No. 119 of 1988

Jagdish and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

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**Date of Decision:** Jan. 22, 1999

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 105, 148, 149, 307, 325

**Citation:** (1999) CriLJ 2326 : (1999) 2 MPJR 400

**Hon'ble Judges:** S.P. Khare, J

**Bench:** Single Bench

**Advocate:** S.C. Datt, for the Appellant; P.C. Jain, Panel Lawyer, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

S.P. Khare, J.

Appellants Jagdish, Khemchand and Munna have been convicted under Sections 148 and 307/149, I.P.C. and sentenced to rigorous imprisonment for two years and ten years respectively. Appellants Bandobai and Ramarani have been convicted under Sections 147 and 307/149, I.P.C. and sentenced to rigorous imprisonment for one year and ten years respectively.

The prosecution case is that on 4-7-1985 at 4 p.m. Jaggu (P. W. 4) and his harvaha Damodar (P.W. 5) were going in their village Erora. Accused Bandobai and Ramrani caught hold of Jaggu (P.W. 4) and started beating him. Accused Khemchand came out from his house armed with a ballam and struck it on the head of Jaggu (P.W. 4). Accused Munna attacked him with Katarna and accused Jagdish dealt an axe blow on him. He sustained injuries on his head and became unconscious. The incident was witnessed by Damodar (P.W. 5), Nanhelal (P.W. 6), Pannalal (P.W. 8), Hakam (P.W. 9) and Shantilal (P.W. 13), Pannalal (P.W. 8) lodged the report Ex. P-3 at the police station. Jaggu (P.W. 4) gained consciousness after 25 days and remained in the hospital for about 11/2 months. The motive for the offence was land dispute.

Accused persons pleaded not guilty. Their defence is that Jaggu (P.W. 4) came armed with a ballam and he was first to strike a blow from its blunt portion on accused Jagdish causing grievous injury to him. Thereupon accused Khemchand in exercise of the right of private defence of his brother Jagdish dealt a single ballam blow on Jaggu (P.W. 4) in order to disable him to continue his act of aggression.

The trial Court held that the accused persons were members of unlawful assembly and in prosecution of the common object of that assembly attempted to commit murder of Jaggu. There was a counter case u/s 325, I.P.C. against him.

In this appeal it is argued that accused Khemchand acted in self-defence and that is proved by preponderance of probability as the grievous injury sustained by accused Khemchand has not been explained by the prosecution witnesses.

The evidence on record has been scanned by this Court. Dr. V. P. Brijpuria (P.W. 1) has deposed that on 4-7-1985 at 8.15 p.m. he had examined Jaggu (P.W. 4) and found the following injuries on his body as per report Ex. P-1 :-

1. Incised wound 3" x 1/2" x 1" longitudinally placed on the vault of the scalp over frontoparietal left region- 2" away from midline. Edges clear cut and sharp. Fracture of parietal bone suspected. Advised X" ray.

Bruise 3" x 2" over left temporal-parietal region of the scalp.

Abrasion 1" x 1/4" on left frontal region of the scalp just at frontal hairline  
Ecchymosis of left upper eye-lid.

The patient was semi conscious. Injury was dangerous to life. Injury No. 1 was caused by sharp cutting object and injuries Nos. 2 and 3 caused by hard and blunt object. The bed head ticket is Ex. P-7.

Dr. V. P. Brijpuria (P.W. 1) has further deposed that on the same date at 11.20 p.m. he had examined accused Jagdish and found the following injuries on his body as per report Ex. D-4:-

1. Bruise 3" x 2" on dorsum of left hand. Advised X"ray of left hand.

Bruise 2" x 2" on scalp in the middle.

Bruise 1" x 1" on right hand..

Dr. K. D. Baghel (P.W. 14) has stated that he had operated upon the head injury of Jaggu who remained in Jabalpur hospital from 11-7-1985 to 14-8-1985 as per report Ex. P-8. There was fracture in his left parietal bone.

Dr. O. P. Dube (P.W. 2) has deposed that on 2-8-1985 he had taken X"ray of the left hand of accused Jagdish and found fracture in the fifth metacarpal bone. His report is Ex. D-6.

From the medical evidence it is proved that Jaggu (P.W. 4) and accused Jagdish had received grievous injuries in the same incident.. Each of them had sustained three injuries. The head injury of Jaggu (P.W. 4) was more serious.

Now the oral evidence is to be analysed. Jaggu (P.W. 4) has deposed that a piece of land was allotted by the Government to Sunderbai (P.W. 1), a member of the scheduled tribe. She was not having the bullocks for cultivation of this land and she gave this land to him adhia. He was in possession of this land for two years. Accused Khemchand and his brother Jagdish asked him eight days before this incident that he should not plough this land. They had objected to the cultivation of this land by him earlier. In cross-examination he has stated that he gave half of the produce to Sunderbai (D.W. 1) for two years but now he is not giving her any thing and keeping the land in his possession. He has denied the suggestion that he had taken forcible possession of the land and he was not giving any produce to her from the very beginning. In para 9 he has denied the suggestion that accused Khemchand and Jagdish made a request to him to leave the land belonging to a woman of the scheduled tribe but he declined to do so.

Sunderbai (D.W. 1) has deposed that she is a widow and she was allotted two acres of land by the Government but this land was forcibly taken possession of by Jaggu (P.W. 4). She has further stated that he was not giving anything to her. He has still not left possession of that land. She had requested accused Jagdish to persuade Jaggu (P.W. 4) to restore the land to her or to give some produce to her but Jaggu (P.W. 4) said that he would not tolerate the intervention of anyone. The evidence of Sunderbai (D.W. 1) appears to be reliable. It is established that Jaggu (P.W. 4) had taken forcible possession of the land of Sunderbai (D.W. 1). Accused Jagdish tried to resolve this dispute but Jaggu (P.W. 4) did not listen.

Jaggu (P.W. 4) has further stated that he was returning to his house with Damodar (P.W. 5) and when he reached near the house of Khillu the two lady accused came and grappled with him. One was the mother and the other was wife of accused Jagdish. Thereafter Khemchand, Munna and Jagdish also came out. Khemchand struck ballam on his head, Munna dealt a Katarna blow and Jagdish attacked him with a knife. He fell down and became unconscious. In cross-examination he has stated that the house of accused Jagdish is just adjacent to the house of Khillu. Thus, the incident took place near the house of Jagdish. He has also stated in cross-examination that his cousin Pannalal (P.W. 8) threw a piece of stick on the party of the accused but he does not know if that stick hit anyone or not. He has admitted that earlier he was accused in a murder case but he was acquitted.

Damodar (P.W. 5) who was servant of Jaggu (P.W. 4) has deposed that Jaggu (P.W. 4) was coming on the road hurling abuses and when he reached near the house of Jagdish he continued his abuses. This witness has further stated that Jaggu (P.W. 4) dealt two lathi blows on Jagdish and thereupon accused Khemchand who is brother of Jagdish came out and gave a ballam blow on the head of Jaggu (P.W. 4). This

witness has been declared hostile but his evidence on this point that Jaggu (P.W. 4) was first to strike lathi blows on Jagdish appears to be trustworthy as that is corroborated by the medical evidence. As discussed above Jagdish had sustained grievous injury in this incident. Jaggu (P.W. 4) fell down when he was injured at the hands of accused Khemchand and therefore, the reasonable inference is that he must have first dealt the lathi blows on Jagdish.

Nanhelal (P.W. 4) has also been declared hostile. He has also stated that Jaggu (P.W. 4) opened the fight. Pannalal (P.W. 4) is cousin of Jaggu (P.W. 4). He has supported him but in cross-examination he states that he himself was empty handed. Later on he adds that he threw a piece of stick on accused persons but he does not know whether it fell upon anyone or not. He says that Jagdish was not injured. Thus this witness also does not explain the injury of Jagdish. It appears that he reached the place of incident when it was over. Hakam (P.W. 9) is son and Shantilal (P.W. 13) is wife of Jaggu (P.W. 4). They also appear to have reached the place of incident when the incident was over.

From the evidence on record it is proved that Jaggu (P.W. 4) had forcibly taken possession of the two acres of land which had been allotted to Sunderbai (D.W. I) by the Government. She was a widow and belonged to scheduled tribe. Jaggu (P.W.-4) was not giving any produce to her and he was also not prepared to quit possession of the land. She requested Jagdish to do something in the matter Jagdish remonstrated Jaggu (P.W. 4) for his unbecoming conduct but he did not mend his way. He dealt two lathi blows on Jagdish on the date of incident causing three injuries to him including a grievous one. At that moment Khemchand struck ballam on his head. It was a single blow given by him. It is more probable that Khemchand acted in defence of his brother Jagdish. There was apprehension of grievous injury to Jagdish and he did in fact sustain a grievous injury. Appellants Bandobai and Ramrani did not participate in the incident. Bandobai was an old lady and Ramrani was pregnant by eight months. Accused Munna and Jagdish did not cause any injury to Jaggu (P.W. 4).

It is contended on behalf of the prosecution that the injury sustained by Jaggu (P.W. 4) was very serious and therefore it should be held that Khemchand was aggressor or he exceeded the right of private defence. The Supreme Court has held in [Vijayee Singh and others Vs. State of U.P.](#), that the general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstances. Then the initial presumption against the accused regarding the

nonexistence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. In the present case the defence has proved its case by preponderance of probabilities.

Accused Khemchand cannot be said to have exceeded the right of private defence. He: saw his brother Jagdish being assaulted by Jaggul (P.W. 4) with a lathi who sustained a grievous injury. Khemchand struck a single blow on Jaggu (P.W. 4). In the heat of the moment and faced! with imminent peril to his brother Jagdish he was; not expected to modulate his right of private defence step by step. He could not weigh the situation in "golden scales". It has been held by the Supreme Court in [Puran Singh and Others Vs. The State of Punjab](#), that the right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation. It is also observed that the question whether a person having a right of private defence has used more force than is necessary would depend on the facts and circumstances of a particular case. In the present case keeping in view all the facts and circumstances of the case accused Khemchand cannot be said to have used more force than was necessary.

In the result this appeal is allowed. The conviction and sentence of the appellants are set aside and they are acquitted of all the charges.