

THE RIGHT OF PRIVATE DEFENCE IN *PP V DATO' BALWANT SINGH*¹

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Abstract

This note discusses a case that dealt with the issue of private defence in a murder of a motorcyclist by the defendant who claimed that he was assaulted by the deceased prior to a fatal shot causing his death. In the trial, the prosecution has proved a prima facie case against the accused but as illustrated in the Penal Code, the conduct of the accused may well fall under private defence but the court must ensure that the defence exercised fits the description of sections 97, 100 and 102 of the Penal Code. The court needs to determine whether the accused has not exceeded his right to private defence when he shot the deceased who was only armed with a tree branch. This casenote is a descriptive study that analyses the testimony of witnesses and how private defence was then consistently established by the accused. It also highlighted a case where a claim of private defence was denied by a court for the purpose of comparing it with the present case in which the court decided in favour of the accused.

THE BACKGROUND AND THE CHARGE

When Dato' Balwant Singh showed his gun to an angry and aggressive man, his intention was merely to pacify and frighten him. Unfortunately, the situation went worst that caused him to fire a warning shot and later, a fatal shot.

The accused in the present case was charged in the High Court for an offence under section 302 of the Penal Code for murdering Gobala Krishnan a/l Rajamugundan, on 7.6.2002, at 4.30 pm in Jalan Maarof, Bangsar, Kuala Lumpur.

In the alleged incident, the accused and the deceased were involved in an argument, which took place in broad daylight beside a traffic-congested road. According to the accused, he was in his car, driven by his daughter-in-law (DW5) when the confrontation with the deceased who was riding a

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motorcycle sparked. She hooted the horn to a car but was mistakenly misunderstood by the deceased. The deceased then abused them using vulgar words. As the accused car stopped at Jalan Maarof, the accused was pulled out of the car by the deceased (as claimed by the accused), who was holding a stick. Fearing for his life and safety (the deceased was acting very aggressive and angry while poking the stick to him which hurt his upper arm), the accused showed the deceased his gun. That only made the deceased more aggressive and he plunged the stick forcefully to the accused's chest while repeating threatening words. The accused then fired a warning shot in the air. As the deceased was still not frightened the accused fired another shot intending to incapacitate him. The fatal shot hit the deceased on his right shoulder.

THE ISSUE

This is a case of private defence in criminal law where self defence is a lawful defence against criminal charges including murder. Private defence is where a person defends his body and property of the body and property of others by inflicting harm to an aggressor/ trespasser, to the extent of causing death. Section 96 of the Penal Code made it clear that nothing is an offence when it is done in the exercise of the right of private defence. A person does not only have the right to defend his own body and property but it extends to the body and property of other person as provided under Section 97. The paramount issue to be answered was whether there is a reasonable cause for the accused to apprehend that the assault committed or to be committed by the deceased will cause death or grievous hurt. The next vital question is whether the accused had sufficient time to have recourse to the protection of the public authorities before he could exercise his right of private defence (Section 99) that have caused death and, whether the shot was fired during the continuance of the right of private defence (Section 102). If the answers are positive the accused is said to have exercised his right of private defence according to the law and shall not be found guilty of murder.

THE PROCEEDINGS

Accused statement made under section 112 of the Criminal Procedure Code (exh. D43) inadmissible.

After the incident, the accused made a statement under section 112 at the police station and signed it. The statement was tendered to court by the defence to corroborate the testimony of the accused. However there are some contradiction between the statement and evidence of the accused. In considering the admissibility of the statement the court had to see whether it satisfied the requirements of section 157 of the Evidence Act 1950 which provides, "*in order to corroborate the testimony of a witness,*

any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved". The statement was referred to the accused at the close of his examination-in-chief, which is an appropriate stage to do so but it was not properly proved making it inadmissible as PW 12 the police officer to whom the statement was made was not recalled and because the statement does not corroborate evidence given by the accused due to contradiction between the relevant parts in the statement and evidence of the accused.

The prosecution submitted that D43 is admissible to challenge the credit and credibility of the accused. They however did not confront the accused of the inconsistency of the statement made by him. There was also no attention being drawn to the accused to those parts of the previous statement, which are to be used to contradict him and thus, section 145 of the Evidence Act was not complied with. No reference was made to the accused for explanation resulting in grave irregularity rendering the contradictory part inadmissible.

The Accused is a credible witness notwithstanding inadmissible statement.

Since the court decided that the statement and the contradictory part of the statement made by the accused to the police is inadmissible, it does not affect the credibility of the accused. The court also resolved that the deceased did not utter the words 'Kasilah Mati-Lu" and " Lu Mati" before the first shot as claimed by the accused. Even though the court was of the view that by saying so the accused tried to embellish the impact of his plea of self-defence, it was insufficient to discredit the accused nor was his claim to PW7, a police corporal that the deceased had tried to rob him which was not admissible in court has any detrimental effect on his credibility.

The evidence adduced and findings of the court.

The prosecution called 12 witnesses and the defence called six. PW 9, PW10 (both PW (& 10 are working at a showroom facing the place where the fatal shoot occurred), DW 4 (daughter-in-law of the accused) and DW5 (the accused) were four eyewitnesses to the said incident. The court decided that the prosecution have succeeded in proving a prima facie case and called the accused to enter his defence. At the end of the examination of all witnesses the court made the following findings:

a. Difficulties To Determine The Point Of Time PW9 and PW10 (eyewitnesses) Were First Attracted To The Incident

Due to inconsistencies of evidence given by PW9 and PW10, the court found that it is difficult to determine the precise point of time that both PW9 and PW10 were first attracted to the incident and thus weaken their evidence on crucial points as detailed hereafter.

b. The Accused Was Pulled Out From The Car

Both PW9 and PW10 did not know whether the accused was pulled out from the car. The accused claimed that the deceased opened the car door and dragged him out forcefully by catching hold of the collar and it was supported by evidence of DW5 who denied a suggestion by the prosecution that the accused came out of the car by himself while holding the gun. The prosecution also did not put to the accused that he was not dragged/ pulled out of the car. The vague evidence of DW4, which is not emphatic, is an indication that his evidence is not a fabrication as suggested by the prosecution. The court found that the deceased pulled the accused out of the car.

The Accused's Explanation On The Point Of Time That He Took Out The Pistol being held to be Acceptable.

Both PW9 and PW10 did not know the exact point of time when the accused took out his pistol.

The court accepted the evidence of the accused when he said that when the deceased kept assaulting him he showed the deceased his gun but the deceased continued to assault him and hurt his upper arm. The accused was frightened for his life and took out his gun and fired a warning shot. This evidence was corroborated by DW5 who said that the accused lifted up his shirt when the deceased was assaulting him to show the gun but denied a suggestion that the accused came out of the car by himself holding the gun.

The Deceased Had The Stick With Him Before The First Shot Was Fired By The Accused

PW9 gave firm evidence that the deceased took the stick after the first shot. PW10 however gave different evidence, that the deceased had the stick with him before the first shot. Therefore, the prosecution evidence on this issue is contradictory.

In the examination-in-chief the accused said that as his car was moving near the junction of Jalan Maarof/Jalan Tempenis he saw the accused picking up a stick. The following cross-examination continued on the basis that the deceased had the stick with him before the first shot. The court accepted his evidence as this was consistently supported by reliable evidence of DW4 and DW5. It is therefore the court finding that the deceased had the stick with him before the first shot.

The Stick Touched the Accused Before The Two Shots Were Fired

Evidence of PW9 and PW10 showed that the stick held by the deceased did not touch the accused at any time but the deceased moved the stick up and down, pointing it towards the face of the accused and was in various

positions at different times and moving from one position to another. There is no evidence that at the time of the second shot the stick was pointed downwards.

DW5 saw the deceased swinging the stick trying to hit the accused and it landed on his upper left arm and that the deceased jabbed the accused's chest. After that the first shot was fired. The deceased kept on jabbing the accused and just before the second shot the deceased was about to swing the stick at the accused, she heard the second shot. Evidence of DW4 was consistent with the evidence of DW5 and of the accused. DW3 who examined the accused on that day said that the two injuries on the accused are consistent with his complaint of having been assaulted with a wooden stick. The court did not conclude that the accused used the stick violently but it did touch the accused.

Events Preceding The Shooting Incident At The Junction Of Jalan Maarof/ Jalan Tempenis

The significant evidence from PW9 and PW10 was that the accused shot at the deceased at close range deliberately, which leads to the irresistible inference that it, was done with the intention to cause death.

The accused, DW4 and DW5 gave a detailed account and generally consistent evidence as to what happened prior to the shooting incident at the Jalan Maarof/Jalan Tempenis junction. It started when DW5 hooted the horn when another car came close to them at the Railway Station on Jalan Raja. The deceased abused them when they stopped at the traffic light near the Syariah Court using vulgar words. The deceased was ahead of them on his motorcycle but he turned round and came to the driver's side of their car against traffic flow. When the red light turned green DW5 drove on but the deceased was already waiting for them at the bus stop near the museum. The deceased asked them to stop but they proceeded.

The deceased continued following them and at the junction of Jalan Travers and Brickfields the deceased was ahead of them. He then turned back, came towards them and abused them again and looked very aggressive, angry and threatening. When the traffic light turned green the deceased disappeared and they proceeded. At the junction of Jalan Bangsar/Jalan Maarof the traffic light was showing red and the deceased was there waiting at the junction on the left. He came to the car and abused them again. The traffic light turned green again and they moved on. About 30 feet away from the Petronas Petrol Station DW5 signalled to turn left into Jalan Tempenis but the accused noticed the deceased at the junction of Jalan Tempenis and asked DW5 to proceed straight but could not do so as the traffic had stopped. Meanwhile, the deceased went up Jalan Tempenis and picked up a stick and then did a U-turn and came back to the junction and his car. Unfortunately the accused's car had stopped at the centre of the junction and the deceased walked towards the car waving

the stick and looked very angry and aggressive, shouting and yelling abusive words. He kicked the car, opened the door and dragged the accused out of the car by his collar.

The accused's efforts to explain matters to the deceased fell to deaf ears and he continued to poke the accused including his face with the stick he was holding. The accused warded off the stick with his hand and as a result the stick landed on his upper arm but the deceased kept on poking and jabbing the accused's chest. Hence, the accused got the impression that the deceased was going to cause him grievous harm or even kill him. Intending to frighten the deceased the accused then showed his gun so that he will stop but the deceased became more aggressive and angry and swung the stick again to hit the accused. This time it landed on his upper left arm. At this point the accused became really frightened for his life and took out his gun and fired a warning shot in the air. Instead of retreating the deceased lunged the stick forcefully at the accused's chest.

Consequently the accused genuinely feared for his life and thought that the deceased was either going to cause him grievous hurt or even kill him or that the deceased might dislodge the gun from him and use it to shoot him. The deceased continued shouting, threatening and intimidating and the accused thought that he should disarm the deceased or the deceased would assault him further. The accused fired the second shot intending to injure the deceased but unfortunately the shot was fatal.

THE DEFENCE

The accused raised the plea of private defence. Sections 96, 97, 99, 100 and 102 of the Penal Code provide the ruling on private defence. Section 96 provides that anything done in the exercise of private defence is not an offence while section 97 stated that every person has a right, subject to the restrictions contained in s. 99, to defend his own body, and the body of any other person, against any offence affecting the human body. The 3 exceptions to the general rule were elaborated in section 99 which stated that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith and there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith, though that direction may not be strictly justifiable by law. There is also no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Section 100 gave the right of private defence of the body to the extent of voluntarily causing the death or any other harm to the assailant, if the offence fit any of the following descriptions including; such an assault as may reasonably cause the apprehension that death will otherwise be the

consequence of such assault; such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault and an assault with the intention of kidnapping or abducting.

According to section 102, 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.

PRINCIPLES OF PRIVATE DEFENCE APPLIED IN THIS CASE

The judge had considered the application of sections 100 and 102 of the Penal Code and found that the accused is right in his defence although it extended to the voluntary causing of death to the deceased as the assault has reasonably caused the apprehension that death or grievous hurt will otherwise be the consequence of such assault.

The judge was right when deciding that the accused had the right to exercise private defence the moment that there is a reasonable apprehension of danger to the body and his right continues as long as he has the apprehension that the danger still subsists. This is due to the fact that the accused has a history of a bypass operation and that the stick held by the deceased which was a thick branch did touch him accompanied by threats from the deceased.

The court also followed principles³ of private defence established and applied in previous case laws when considering that the accused is exercising his right to private defence as provided by the law.

The court's decision further confirmed that in exercising private defence a person does not have to wait for his assailant to strike the first blow or wait until he is actually attacked or inflicted with injury before reacting and that before defending himself a person is not obliged to run away or measure his blows. The right of private defence begins immediately when there is an apprehension of danger and a person does not have to be inflicted with serious injury. These principles when applied had supported the accused in his defence.

The accused can make sure that his defence is effective to counter the aggressor. Therefore the use of a gun is permissible. Matters to be considered in justifying his defence are not confined to the injuries already inflicted but also the injuries the attacker might inflict if the defender does not exercise his right of self-defence. Looking at the physical condition of the accused who is more than 70 years old and his medical history, it is utterly right for the accused to shoot the deceased because he was not only armed with a thick and long branch (more than four feet) which could inflict serious injury and even cause death (it could cause a crack in the skull according to an expert witness) but was also very aggressive in his conduct. The accused also does not have to wait until the attack is repeated

3 Ibid, pg 345-346

and when he is facing with a reasonable apprehension of danger to his body or life, he is not obliged to retreat, he may pursue his adversary to ensure that he is out of danger, and if in doing so he happens to kill, it is justifiable.

CASE DISTINGUISHED

The present case shall be distinguished from the case of *Public Prosecutor v Lee Poh Chye & Anor* [1997] 4 MLJ 578, in which the respondents were found guilty of an offence punishable under Section 304; culpable homicide not amounting to murder.

The deceased in this case was struck by a wooden stool by the first respondent for several times and he went into the kitchen to get a kitchen knife and defended himself. The second respondent then joined the first respondent and attacked the deceased with a stick repeatedly that the stick broke. The deceased was further attacked even when he had retreated to a staircase and the attack only stop when the deceased suddenly fell down from the stairs.

The defence claimed by the respondents; private defence was rejected. The retaliation of the respondents had been proved to be in excess of what is reasonably necessary to avert a threat by the deceased. In fact the court found that

“the respondents had bludgeoned the deceased’s head even after the deceased could offer no resistance, let alone threat; the extensive abrasions on the shoulder joint and the back of the deceased showed that the deceased was struck unrelentingly even when his back was turned to his assailants (the respondents)”.

The respondent has failed to prove self-defence and even if there was a self-defence, the retaliation was beyond the limit of legitimate self-defence.

CONCLUSION

The apprehension of danger that the accused had to his body and life was reasonable and thus, he was entitled to exercise private defence. The prosecution had failed to prove murder; they need to show beyond reasonable doubt that the accused did not shoot the deceased in self-defence. Even if the prosecution succeeded in proving that the accused person’s shot was not out of defence, the court will consider whether there was the necessary intention to constitute the crime of murder. According to the court, even when there is a reasonable doubt about the existence of the right of private defence, the accused can be acquitted. The court held that on a balance of probabilities, the defence had proved that the accused had acted in the exercise of the right of private defence and therefore had not committed any offence. The accused was acquitted and discharged.