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# Private Defence: A Look at Definitional Aspects and Burden of Proof

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**Abstract**

This paper examines the contemporary definitional elements of "reasonable apprehension" and the role executed by the Supreme Court of India while exercising its criminal jurisdiction in matters concerning private defence of the body under the criminal laws of India. While looking at the totality of factors, this paper makes an assessment of the guidelines which courts have adopted in their pursuit of a fair trial, such as avoiding a microscopic scrutiny of the conduct of the accused and substituting its own hindsight for the foresight of the accused in the circumstances as they existed. One of the notable departures from its general conduct of proceedings is the heavy pro-accused tilt of the court, a feature writ large across the criminal justice system. This paper will examine how the judiciary changes the conventional adversarial model to carve out a greater space for itself in the trial. This paper also examines the burden of proof which rests on the accused. A concerning trend in private defence is the susceptibility of the right to misuse whereby a person may provoke another into a rash attack and use this attack to retaliate in turn, something for which the Indian Penal Code has not provided explicit safeguards. Subsequent to this analysis, the conclusion is presented along with the observations and suggestions of the author.

**Keywords:** Reasonable Apprehension; Right of Private Defence; Burden of Proof; Indian Penal Code; Supreme Court

## Introduction

The right of private defence is available to every citizen of the country. It is a right which is inherent in an individual and can be used for protection from bodily harm and harm to property, to the extent as regulated by and defined in the laws of the country. Sections 96 to 106 of the Indian Penal Code pertain to the right of private defence in India. They authorise a person to exercise necessary force for the protection of his/her physical well-being and property as well as the protection of physical well-being and property of the person's neighbour when there is reasonable apprehension of danger and/or imminent death and recourse to public authorities is not possible. The right of private defence is not available under two situations; where disproportionate force is used to retaliate and where recourse to public authorities is possible. Reasonable apprehension of danger can be to both person and property.

## "Reasonable Apprehension": When the Right of Private Defence of the Body Arises

Section 102 of the Indian Penal Code provides for the commencement and the continuance of the right of private defence of the body. It states that the right commences as soon as a 'reasonable apprehension' of danger to the body arises and that apprehension can be from either an attempt or even a threat to commit the offence, even though the offence may not have been committed as yet. It further provides that the right of private defence continues as long as this apprehension of danger to the body continues.

### Reasonable Apprehension as opposed to Actual Danger

The extent of the exercise of the right does not depend on actual danger but rather, or whether there was a reasonable apprehension of danger. There must be some attempt or a threat to commit an offence from which such reasonable apprehension arises. It must not be an idle threat or every apprehension of a rash or timid mind [1]. There must be some reasonable grounds for the apprehension to arise, a cause, which in the mind of reasonable person, would instil such fear as to lead to the belief that there was a danger of imminent death or grievous hurt. An illustrative example of the same would be the case of a man who is walking down the street and is challenged by a small child. He cannot attack the child on the basis of that challenge and say that there was reasonable apprehension because it would be patently clear that the child posed no to threat to him. Present and imminent danger is what seems to be implied in the Code.

The danger or the apprehension of danger must be present, real or apparent. The right of private defence is available when one is suddenly confronted with the immediate necessity of averting an impending danger that is not the individual's own creation [2]. The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension [3]. It is also important to point out that even under such reasonable apprehension, the right of private defence still fundamentally remains a defensive (and not retributive) right. It has been stated that reasonable apprehension is enough to put the right of self-defence into operation. It is not needed, that the offence being threatened, has been committed, and is sufficient if the accused has apprehension that such an offence is contemplated, and likely to be committed if he or she does not act [4].

### Recourse to Public Authorities must not be Available

Furthermore, the right of private defence is available only when recourse to the public authorities is not available to the person [5] who

is then per force, required to exercise force for the protection of the physical well-being of self and/or neighbours. The force must be necessary to repel the attack but defense cannot be turned into offense to inflict further injuries on the assailants.

### Care taken to avoid Microscopic Scrutiny

The courts have held that "the right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly" [6] and expressly stated that situations have to be judged from the subjective point of view of the accused concerned in the circumstances. There is an accompanying excitement and confusion along with the attack and the person has to act swiftly to save him or herself from harm. Furthermore, the decision on the course and means of the response is taken in a moment of peril (reasonable apprehension) and that the decision so influenced should not be subjected to a microscopic or pedantic scrutiny by the court. The court has to peer into the mind of the accused and compare the individual's actions to that of reasonable person placed in the same situation, under the same perils and with the same means available. The court also said that the detached objectivity of a courtroom should not be adduced as a state of mind to the accused. The court stated [7]:

"The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances…"

In order to shed light on the accused's apprehension, the injuries received by the accused, the imminence of threat to the person's safety, the injuries caused by the accused, the circumstances as to whether the accused could approach the public authorities or not etc [8] all play a major role.

The apprehension or threat of imminent danger of death or grievous hurt has a very wide scope. An accused can legally exercise the right of private defence of the body, even when he or she has not been attacked, if the person is able to prove that he or she was under such apprehension. For instance, a man and his brother had attacked another man and members of the latter's community assembled together and proceeded towards the house of the accused for talking out the matter, as per the prosecution story. All the accused ran out of the house and attacked the deceased with four of them catching hold of the deceased and another then proceeding to stab him fatally. The accused did not adopt the plea of private defence, but another co-accused did stating that the deceased had marched towards the house in retaliation for the earlier incident and launched an attack against the inmates within. The Supreme Court said that merely because the accused had adopted a different line of defence was no ground for denying him the plea of private defence and that when a large crowd marched towards a person's home and when that large crowd has people in it against whom the accused had previously fought, it is but natural to presume that the fear arises in the mind of the person that he is in grave danger [9].

The Supreme Court further reiterated the need to avoid a microscopic scrutiny by emphasising the need for the court to subjectively examine the nature of apprehension which the accused can reasonably entertain in such circumstances which require an immediate response as when one is suddenly attacked, by keeping in mind what happens on the spur of the moment, the flight or fight question, and the normal course of human conduct [10].

The Supreme Court also refused to frame parameters on what the state of mind of an accused must be like to enable the person to claim the right of private defence. The refusal was presumably guided by the consideration that all possible situations might not be within the contemplation of the court and that limitations might exclude a valid plea of private defence and thereby condemn an innocent individual. It said that abstract parameters expressing the state of mind of the accused should be avoided as an answer to such a question would depend on a host of factors like the prevailing circumstances, the person's feelings at the relevant time, his or her heightened emotions, confusion and excitement, the nature of assault etc.

The court also stated that merely because an accused has received injuries, it cannot be taken for granted that the deceased or the injured person was the aggressor and thus, the accused was compelled to engage in self-defence by inflicting injury on the deceased or injured person [11]. The right of private defence does not arise in this case, just like in those cases where the act was done by or on the direction of a public servant, the accused was the aggressor or if there was a free-for-all fight or recourse to authorities was possible.

## Burden of Proof in Cases of Private Defence of the Body

"The analogy of estoppel or of the technical rules of civil proceedings is inappropriate and the courts are expected to administer the law of private defence in a practical way with reasonable liberality so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive [12]."

It has been clearly stated by the courts that the civil law rule of proceedings does not cover the rights of a accused in a criminal trial and a criminal court, unlike in a civil case, may find in favour of an accused, on a plea not taken up by the person, and by doing so, it does not invite the charge that it has made out a new case for the accused. This is based on the principles of absolute presumption of innocence and that the motive and role of the criminal justice system must be in favour of helping the accused and in ensuring that an innocent citizen should never be sent to prison. A court can also find that the action of the accused, which is an offence, may not actually be an offence because the accused was acting in the exercise of the right of private defence or that the offence is mitigated because while the right of private defence has been exercised, it has also been exceeded.

Secondly, during the course of proceedings, if it emerges that there were certain circumstances which might have existed and could enable the action of the accused to fall within any of the general exceptions as specified in the IPC, the burden is on the accused to prove the existence of those circumstances. Even then, the prosecution still has to discharge its initial burden as if the circumstances never existed save when a statute displaces the presumption of innocence. Furthermore, if the accused cannot absolutely prove the existence of those circumstances, but can show such facts and circumstances under Section 105 of the Evidence Act as are sufficient to cast a reasonable doubt on the case of the prosecution and thus negative one or more ingredients of the offence, the person is entitled to an acquittal. This is similar to the nature of proceedings in a civil case as it is enough for an accused to show that the preponderance of probabilities is in one's favour. Therefore, it can be concluded that the burden which rests on an accused to prove the exception is not of the same rigour as the

burden on the prosecution to prove the charge beyond reasonable doubt [13].

## Examining the Duty of the Accused to Provide Evidence

An accused may not need to produce evidence to prove the exception, but can merely rely on the evidence produced by cross-examining the witnesses of the prosecution and co-relating them to the totality of the facts and circumstances arising from the case [14].

An accused can place the necessary material on record, either personally or by cross-examining the prosecution's witnesses. The question in such a case would be a question of assessing the true effect of the prosecution's evidence and not a question of the accused discharging any burden. The accused may exercise the choice of producing evidence unlike the prosecution, which necessarily has to produce evidence to back up its story [15].

## Nature of Defence as laid down by the Court

Whenever the right of private defence is exercised, the defence must be reasonable and probable to the extent that it satisfies the court that the harm caused by the accused was necessary for either warding off the attack, or for reducing the apprehension of imminent danger to the accused. The court further says that while the burden of proving this plea is on the accused, the burden stands discharged when the accused can show that the preponderance of probabilities is in his or her favour. It is not the duty of the accused to prove the plea, the circumstances and the exception to the court beyond reasonable doubt. Therefore, all that the accused has to do is cast doubt on the prosecution's case and the moment the person succeeds in casting this doubt on the prosecution's side of the story, the burden is discharged, and the person is entitled to an acquittal on the basis of the maxim "innocent until proven guilty" [16].

An accused may exceed the right of private defence by a certain degree, and such force, if not disproportionate, would not invalidate or mitigate the right of private defence as in the heat of the moment, the accused cannot be expected to weigh in "golden scales" the exact degree of force required to dispel the threat or counter the attack. Courts have recognised the human factor that comes into play in such circumstances where a person, in sheer fear of death or grevious injury, acts instinctively in self-preservation. Therefore, the court says that a hyper technical approach has to be avoided and due weightage has to be given to what happens on the spur of the moment and that normal human conduct and human action and reaction has to be kept in mind. The court dealing with the plea has to weigh the material to conclude whether the plea as acceptable. Notably, it is a finding of fact by the court, which is not the role of a court in a civil trial [17].

## Injuries on the person of the accused

Non-explanation of the injuries on the person of the accused by the prosecution may not affect the prosecution case in all cases, however, this principle applies to cases where the injuries sustained by the accused are minor and superficial or "where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit- worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries [18]."

The inability of the prosecution witness to explain injuries on the person of the accused may affect the prosecution case if the Court is satisfied that the injuries [19]:

(i) are also of a serious nature; and

(ii) must have been caused at the time of the occurrence in question.

In the same case, it was held that "where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood," the prosecution's failure to explain injuries on the accused cannot be the sole basis for rejection of the testimony of the prosecution witnesses.

Therefore, the courts have held that while it is desirable for the prosecution to prove all facts of the case, including injuries on the person of the accused, the prosecution is not bound by law to prove those injuries. It is not a canon of evidence that if the prosecution fails to explain those injuries, it will mean that the prosecution has suppressed the truth and "also the origin and genesis of the occurrence [20]."

The courts have said that the prosecution case will not be defeated by a single failure to explain the injuries of the person of the accused if other factors are proved to the satisfaction of the court [21]. If other factors giving due regard to the possibility that the injuries might have been self-inflicted [22]. the complete version of the

## The Question of "Interested" Witnesses

The Supreme Court has said that there is no bar in examining any family member or any other person as a witness because, as happens in most of these cases, they are the first to respond to the situation. It is a family member or a friend who comes to the rescue of the injured and they are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Particularly when the statement of witnesses is trustworthy and corroborated by other witnesses or documentary evidence of the prosecution, there is no reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or person known to the affected party. There have been cases where it was but inevitable to question them, because, "as the events occurred, they were the natural or the only eyewitnesses available to give the complete version of the incident [23]."

Neither the legislaturethe Legislature (S.134 of the Indian Evidence Act, 1872) nor on the judiciary mandate that a given number of witnesses must be present to record an order of conviction. "Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses" [24] and the court has discretion to either rely on the statement of just one witness and convict an accused or to acquit an accused in spite of the statements of several witnesses if it was not satisfied by their testimony. As Justice B.S. Chauhan so aptly noted, "evidence must be weighed, not counted [25]."

It was also held that the witness cannot be said to be "interested" merely because the person happens to be related to the injured, or the deceased. The term "interested" seems to imply that there is some indirect motive on the part of the witness to get the accused convicted at all costs and thus, that contention cannot be held.

Again, the Supreme Court said that merely because the witness is not independent is no ground to dismiss the prosecution case and a conviction can be upheld if no substantial reason has been shown for the statements to be discredited [26] and merely because a witness is "interested," it cannot be said that the person would shield the real culprit and give evidence against another innocent person. The testimony of a witness who has been injured in the occurrence is

accorded a very high importance in the eyes of the court as "he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone" and extremely strong and convincing evidence is required to discredit such a witness.

### When Cases Go Into Appeal

In appeals in cases involving the exercise of the right of private defence, the point has been expounded that an appellate court must examine the entire evidence on record to determine whether the judgement of the trial court was correct or not. It further states that an appellate court may not reverse the judgement of acquittal of the trial court where two views of the situation are possible; even if the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or even considered evidence brought on record contrary to law. The court says that even if the view of the appellate court is more probable, it would not reverse the decision of the trial court since the trial court has the benefit of watching the demeanour and mannerisms of the witnesses and thus, is better placed to judge their credibility "where two views of the evidence are reasonably possible, High Court is not justified in reversing the acquittal".

The court also says that if too many accused, who are actually guilty, are acquitted, it would lead to a very harsh and strict penal law, which would then impact the judicial protection offered to the innocent. It would also affect the faith of the public in the courts. The court says that it is much better to acquit a guilty person than to condemn an innocent to prison and it further says that all reasonable doubts must operate to the advantage of the accused.

## Misuse of the Right of Private Defence of the Body

The court has clearly stated that the right of private defence, be it to defend body or property, is available against an offence. Thus, there is no right of private defence against an action which is not an offence. Moreover, the right of private defence cannot be utilised in circumstances where the actions of the other party are lawful, no matter how much of a nuisance they may be. Since this is not a civil trial and the decision here is capable of affecting the life and liberty of a person, the court takes a very strict view.

It is also pertinent to note that since this statute is the only one which would justify an act of aggression and even killing of another individual by a person, courts have sought to regulate its use in an effort to prevent the misuse of this right by unscrupulous individuals who provoke an individual into an act of aggression and then use that as an excuse for murder. For instance, if the accused were aggressors, then it would be no defence to say that they used their gun only after their co-aggressors had been injured by those resisting the aggression.

It is a right for the purposes of defence and not retribution and may not be used as a retaliatory measure. Acknowledging that the IPC has built-in safeguards to avoid providing a license to murder, the Code has failed to account for the situation whereby an attack may be provoked as pretence for killing. The Apex Court expressly stated that the right of private defence "is available in the face of imminent peril to those who act in good faith and in no case can be conceded to a person who stage manages a situation wherein the right can be used as a shield to justify an act of aggression." In the same case of it was further asserted that "while providing for the right of private defence, the Penal Code has surely not devised a mechanism whereby an attack may be provoked as a pretence for killing."

The court also noted that the right of private defence is available only against an offence under the Code.

## Conclusion

The right of private defence is available when there is a reasonable apprehension of danger. There must be some attempt or a threat to commit an offence from which such reasonable apprehension arises. The apprehension of danger must be present, real or apparent. It is important to note that the right of private defence is available only when recourse to public authorities is not possible. No case of reasonable apprehension may be made if, in the given situation, the assistance of public authorities can be obtained. The Supreme Court has time and again stressed on the need to avoid a pedantic and microscopic scrutiny of the situation. It has clearly stated that the court must subjectively put itself in the situation in place of the accused and thus objectively examine the actions of the accused by comparing them to the standard of a reasonable person. The apex court has recognised the human element in play and by extension, has asked for due consideration to be given to all actions of the accused on the basis of the circumstances, the emotional turmoil in the mind of the accused, the nature of the assault etc.

It has further been enumerated in a number of cases that the civil law rule of proceedings does not cover the rights of an accused in a criminal trial, and that a criminal court can find in favour of an accused even when the plea of private defence has not been taken by the person. The initial burden of proving the circumstances which necessitated the exercise of the right of private defence falls on the accused but that burden can be discharged by the accused merely on the preponderance of possibilities rather than proving them beyond reasonable doubt. The accused need not provide evidence and can rely on the cross-examination of evidence and witnesses of the prosecution to buttress his or her case. The prosecution is not bound by law to prove all injuries on the person of the accused and failure of the prosecution on this aspect would not lead to an automatic dismissal of their case.

The right of private defence grants to the individual, in extreme situations, the right to cause the death of another. As such, it can be, and in fact is, open to abuse. The sections of the Indian Penal Code dealing with the right of private defence (Ss. 96-100) speak nothing about the situation where an individual provokes an assault so as to use it to kill the "aggressor" and this lacuna in the law has on occasion been used by unscrupulous individuals.

Two aspects consequently emerge: one would be that it cannot be denied that a clear, comprehensive statute on the issue would clarify the entire situation to a vast extent and the other would be that, with some exceptions, the exercise of the right of private defence has been admirably regulated by the courts. While the Indian Penal Code does not clarify the terms used in the sections dealing with the right of private defence such as "reasonable apprehension" and "necessary force" etc. (as has been done in other sections which specifically clarify the particular phrases they use), the courts have, through extensive deliberation, formalised principles to regulate this right. It may further be argued that the wording of the sections need no further clarification than has already been done by the courts as it was the foresight of the legislature to grant such wide discretion to the courts that they may

cover within their ambit, the entire gamut of situations which might arise and meet the ends of justice.

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