

validly convicted u/s. 504. [AIR 1964 Mys 200] cannot be regarded as trivial matter. [(1998) 1 East Cr C 151 (Pat)]

4. Sentences. Under this section, the effect of the provision is that the act charged as an offence is not an offence at all and if the Court considers that the section applies, the accused should be acquitted. But even in case of conviction, the relatively trifling nature of the offence may be taken into consideration while awarding the sentence. [1891 Bom U Cr C 564]

5. Offence under other laws. The section has no application unless the act in question amounts to an offence under the Code. Even where the offence is of a very trivial nature, where a prosecution has been started and judicial proceedings have been commenced, the law must take its own course till the case ends in a conviction or acquittal, unless there is a provision for compromise and the case is compromised in accordance with such provision. The effect of such composition, if any, will depend on the provisions of the particular law applicable. [AIR 1967 SC 895] Adulteration of food, even if it be of a slight extent, is not a trifling matter to the consumer as his health is likely to be injuriously affected by consumption of such food. The provisions of s. 95 is not applicable to the offences committed under the provisions of the Prevention of Food Adulteration Act. [1989 Cri LJ 648]

Of the Right of the Private Defence

96. Things done in private defence.—Nothing is an offence which is done in the exercise of the right of private defence.

Right of private defence—Ss. 96 to 106—Summary. Sections 96 to 106 of the Code comprised in the sub-heading "Of the Right of Private Defence", codify the rules, extent and limitations imposed on the exercise of right of private defence which are found derived from English Law. The crux and cardinal principle being that it is the first duty of the man to help himself.

Says Russel on Crimes:

"... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

"The right of self-defence" says *Bentham's*:

".....is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men." [Bentham's Principle of Penal Laws]

As held by the superior Courts of the Subcontinent:

"The law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. The right of self-defence as defined in ss. 96 and 97, Penal Code, contemplates that if a man is attacked he would be justified in the eye of law if he holds his ground and delivers a counter-attack provided always that the injury which he inflicts in self-defence is not out of all proportion to the injury with which he was threatened." [51 Cr. LJ 654 (Lah); AIR 1953 All. 338 p.339]

3 Notes for ss. 96 to 106 P.P.C. given after illustration of s. 106.

clearly entitled himself to acquittal if upon a consideration of the evidence as a whole, a reasonable doubt is created in the mind of the Court as to whether the accused is or is not entitled to the benefit of the exception. [PLD 1965 Quetta 33] Accused taking clear stand while making statement u/s. 342, Cr.P.C. that he was first attacked by deceased and injured with sharp edged weapon and that in order to save his life accused caused injury on person of deceased after picking up a churri from house where occurrence took place. Sufficient evidence on record that accused was injured during occurrence at hands of deceased but prosecution suppressed these material facts. Defence version appearing to be more closed to truth than prosecution version. Accused held not acted by giving injuries to deceased. He would have been done to death if not exercised right of self defence of his person. [1988 P.Cr.L.J. 1753] When in a state of panic right of self defence is being exercised, action on the part of the person cannot be measured in golden scale. [PLD 1988 S.C. 25]

97. Right of private defence of the body and of property.—Every person has a right, subject to the restrictions contained in section 90, to defend:

First. His own body, and the body of any other person, against any offence affecting the human body;

Secondly. The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of the theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

SYNOPSIS

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| 1. Right to defend one's body and property. | 11. Extend of harm. |
| 2. Right to defend body. | 12. Act of private defence not to be measured in golden scale. |
| 3. Exchange of abuses. | 13. Aggressor's right of private defence. |
| 4. Private defence of property. | 14. Number of person. |
| 5. Trespasser. | 15. Against whom right of private reference can be exercised. |
| 6. Settled possession. | 16. Onus to prove. |
| 7. Criminal trespass. | 17. Duty of the Court. |
| 8. Offence of theft and robbery. | 18. Reduction in sentence. |
| 9. Shooting of animals. | |
| 10. Acts of mischief. | |

Clause First

1. Right to defend one's body and property. Section 97 of the Pakistan Penal Code provides that every person has a right, to defend his own body and the body of any other person against an offence affecting the human body or the property, whether movable or immovable of himself or any of the other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit these offences, subject to the restrictions contained in s. 90 of the Code. The right as to private defence as recognized by this section is not free, endless or discretionary but subject to the restriction contained in s. 99, which provides, to quote:

"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 under colour of his office, though that act may not be strictly justifiable by law.

[Ss. 98-99]

98. **Right of private defence against the act of a person of unsound mind, etc.**—When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z, were sane.

(b) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z by attacking A under this misconception commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

NOTES

Right of private defence against person of unsound mind. Section 98 of the Code provides that right of private defence is not lost by reason of misconception on the part of doer, or by reason of the youth, or for want of maturity of understanding or on account of unsoundness of mind of the actor or if the law breaker is a drunk intoxicant. In other words right of private defence exists irrespective of the physical or mental incapacity of the person against whom it is asserted. The section makes it clear that a person does not lose his right of private defence of property merely because the opposite party is under a misconception. [AIR 1959 All 790] Where A enters upon property under a misconception as to his possession thereof, B, the person in actual possession, would have a right of private defence against A, he cannot have any right of private defence against the exercise by B of his right of private defence which is a lawful act on his part. [1967 Ker LT 463] B was in possession of land as tenant of A. A tree which was on the land was blown down by the wind and B cut the fallen tree and stacked it for the purpose of using it himself. A tried to remove the wood so stacked and B obstructed it under a misconception that he was entitled to it as having been platend by his father. It was held that A had a right of private defence against B. [A 1914 Nag 7] If a drunken man breaks the law and attacks either the person or the property of other people, any member of the public is entitled to exercise the right of private defence against such attack, even though the drunken man himself may be entitled to protection of the law. [AIR 1927 Rang 121]

99. **Acts against which there is no right of private defence.**—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 under colour of his office, though that act may not be strictly justifiable be law.

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 under colour of his office though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1. A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

12. **Co-owners.** Plot of land jointly owned by several co-owners being ploughed by one set of co-owners while the other set of co-owner came armed with sharp edged pointed and blunt weapons to make the ploughers to stop ploughing the plot. While there was time to have rescue to the protection of authorities and one of the co-owner who came armed was killed in the fight which ensued, it being doubtful who struck the first blow. In the circumstances, conduct of the parties which came to stop the ploughing was clearly aggressive and that when this party attempted forcibly to eject the other, the later had the right to defend themselves and their property. [PLD 1956 Pesh 71]

100. **When the right of private defence of the body extends to causing death.**—The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

First. Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. An assault with the intention of committing rape;

Fourthly. An assault with the intention of gratifying unnatural lust;

Fifthly. An assault with the intention of kidnapping or abducting;

Sixthly. An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he be unable to have recourse to the public authorities for his release.

SYNOPSIS

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| 1. Right of private defence. | 13. "Voluntary causing of death". |
| 2. Homicide—Classification. | 14. Reasonable apprehension of death. |
| 3. Extent. | 15. Reasonable apprehension of grievous hurt. |
| 4. A restricted right. | 16. Reasonable apprehension of death. |
| 5. Sudden fight. | 17. Assault with intention to commit rape. |
| 6. Extent of right—How to be decided. | 18. Intention of gratifying unnatural lust. |
| 7. "Free fight". | 19. Intention of kidnapping or abduction. |
| 8. Right of self defence not available. | 20. Intention of causing wrongful confinement. |
| 9. Instances where plea of right of self-defence available. | 21. Burden to prove plea of right of private defence. |
| 10. Instances where plea of right of self-defence not available. | 22. When benefit of self defence be given to accused. |
| 11. Instances where right of private defence exceeded. | 23. Benefit of doubt. |
| 12. Instances where right of private defence not exceeded. | 24. Duty of Court. |

[S. 101]

101. When such right extends to causing any harm other than death.—If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

SYNOPSIS

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| 1. Right of private defence when extends to causing harm other than death. | 3. Right of private defence not available. |
| 2. Burden to prove. | 4. Instances. |

1. Right of private defence when extends to causing harm other than death. Section 101 is co-relates to the proceeding section, i.e., ss. 100 and 99. Section 100 provided instances where even causing death to the assailant was justifiable in exercise of right of private defence, but the restriction imposed by s. 99 still remained the same. This section provides that if the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death. The extent of the right of private defence given by this section is again subject to the restrictions in s. 99. While u/s. 100 the right extends to the voluntary causing of death of the assailant, the right under this section extends to causing of any harm including grievous hurt short of death. Thus right of private defence available under this section is subject to two limitations:

- (i) In exercise of right of private defence u/s 101 any kind of hurt can be caused but not death, and
- (ii) The use of force should not exceed the minimum required to save the person for whose defence the force is used. [AIR 1971 S.C. 1491]

Wrongful confinement of accused by deceased and witnesses, would give him right of private defence. Murder committed by the accused in such circumstances would be justified. Act of deceased/witnesses in catching hold of accused is not justified u/s. 59. [NLR 1985 UC 426] Where accused committing no offence, act of blocking way and catching hold of or apprehending him is not justified u/s. 59, Cr.P.C. Attempt to apprehend accused, amounted to attempt to confine accused wrongfully. Accused gets a right of private defence u/s. 101, P.P.C. [1986 P.Cr.L.J. 2833]

2. Burden to prove. The burden which rests on the accused to prove that any of the general exception, is attracted does not absolve the prosecution from discharging its initial burden and it never shifts save when a statute displaces the presumption of innocence. [AIR 1974 SC 1570] Accused whose two brothers had already been murdered by the complainant party naturally apprehended danger to his life when the deceased and others on appearing in the Emergency Ward of the hospital started firing. Extent of apprehension of accused in such a situation cannot be weighed in golden scale, accused had exercise his right of self defence available to him under the law. [1997 MLD 980]

3. Right of private defence not available. Private person attempt to arrest offender, offence committed in view of such person ultimately fell u/s. 30, P.P.C which was cognizable but bailable. Attempt to arrest not justified. [PLD 1953 Lah 207] Deceased first attacking with stick, apprehension of simple hurt, right of self defence does not extent to cause death. [PLD 1954 Lah 89]

4. Instances. Where A seeing a woman assaulted by an assailant amounting to outraging her modesty tried to go to her assistance but was prevented by an intervener on whom he inflicted injuries, A was justified in doing so u/s. 97 read with s. 101. [(1912) 13 Cri LJ 53 (Upp Bur)] Where a public servant had lawfully arrested a person and a mob threatened to rescue him and caused apprehension of danger to the public servant, whereupon the latter, in order to secure his own safety discharged his gun and wounded one of the aggressors, it was held that the public servant acted in the exercise of the right of private defence. [1901 Pun Re (Cri) No.

5 p. 11 (18)] Where the complainant party tried to damage the crop sown by the accused persons in the field, the accused persons were in their right to defend their property and persons and in that circumstance if the beating was given to complainant party by the accused persons it cannot be said that they had exceeded right of private defence. [(1989) 2 Rajasthan LR 772] Where there existed a dispute between the accused party and the complainant party over the possession and allotment of a *Ahata* and the accused party who were then in possession of the *Ahata* on finding that the members of the complainant party who were not armed had assembled in the *chowk* near the *Ahata*, started firing at them even before the complainant party could advance towards the disputed *Ahata* and as a result two persons of the complainant party died, it could not be said that the accused apprehended grievous hurt and were within their right in killing two persons. The case falls u/s. 101 and the accused had exceeded their right of private defence. [PLD 1983 S.C. 251] Where the deceased trespassed into the house of deceased, armed with weapon and inflicted incised wound on the accused persons thus initiated attacks, the case of the accused would be covered by general exception u/ss. 96 to 106. [(1987) 1 Crimes 799 (DB) (Gau)] Where accused inflicted fatal injury on deceased though there was no case for reasonable apprehension in mind of accused that death or grievous hurt would be caused to members of defence party, he would be deemed to have exceeded limit of right of private defence. [AIR 1997 SC 496]

102. Commencement and continuance of the right of private defence of the body.—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.

SYNOPSIS

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| 1. Commencement of right of private defence. | 3. "Attempt or threat to commit the offence". |
| 2. "Reasonable apprehension of danger to the body". | 4. A continuing right. |
| | 5. Right of private defence cannot continue after assaulter has been disarmed. |

1. Commencement of right of private defence. Section 102 commands commencement and continuance of the right of private defence of the body. It says 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. In other words the right of private defence of body commences as soon as a reasonable apprehension of danger to the boy arises from an attempt or threat to commit an offence, though the offence may not have been committed and it continues as long as such apprehension to danger to body continues. The right of private defence of body commences the moment a person apprehends danger from with assailant, he need not wait to be attacked first. If an assailant comes forward with a dagger in hand to attack another, the later having a reasonable apprehension of danger need not wait till the assailant had actually delivered the blow,. If the person stacked forestalls the assailant and deliver a blow to him the later has no right of private defence. He cannot excuse his fatal blows delivered with the dagger on his victim by taking the plea that he had only exceeded the right of private defence. [PLD 1956 Pesh 74] The right of private defence rests on three ideals;

firstly, that there must be no more harm inflicted than is necessary for the purpose of defence;

secondly, that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and

thirdly, that the right does not commence until there is a reasonable apprehension. [AIR 1971 SC 1208 (1210)]

2.1 **Question of fact.** The question whether an apprehension is reasonable or not is always a question of fact (1968) 34 Cut LT 1107. (The mere fact that the deceased and his companion were armed did not entitle the accused to go to the extent of killing the deceased apprehending that they would kill him.) [(1957) 1 Andh WR 181 (188)]

3. **"Attempt or threat to commit the offence".** Every attempt or threat to commit the offence would not entitle a person to take up arms. He must pause and reflect whether the threat is intended to be put in execution immediately. [AIR 1925 Nag 260] Where the deceased first picked up a quarrel with the accused, who were sitting in front of his house and thereafter inflicted a stick blow on the head of accused, the accused by virtue of provisions of ss. 100, 102 and 97 had the right of private defence. [(1998) 1 Mah LJ 54 (Bom)]

4. **A continuing right.** The right of private defence of body continues so long as the apprehension of danger to the body continues, [1972 Cri LJ 1150 (Mys)] so long as the opponent has the weapon in his hand. [1974 Cut LR (Cri) 348 (353) (DB)]

5. **Right of private defence cannot continue after assaulter has been disarmed.** Where the accused's own version of the incident was that after he had disarmed the deceased, he caused injuries to him. Held, as soon as the deceased has been disarmed and the accused was holding the knife, the right of private defence of person which accrued to him in the beginning could not be said to continue. After the deceased had been disarmed the accused causing no less than 18 incised wound with the knife taken from the deceased on the different parts of body of the deceased. The number and nature of injuries shows that the accused intended to cause the death of the victim and as the act which caused death was not merely in excess of the right of private defence, not a palpable pretext of the exercise of that right, the case fell within the definition of murder entailing conviction u/s. 302, P.P.C (old). [PLD 1956 Lah 33] Where the apprehension of danger is over but a person nevertheless continues his attack he exceeds the right and will not be protected by the section. [AIR 1974 SC 1570] Where a dispute started in a field and the deceased returned home and was killed there, it cannot be said that there was any justification for the crime on any theory of right of self-defence. [1956 Madh BLJ 500 (DB)]

103. **When the right of private defence of property extends to causing death.**—The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm, to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely;

First. Robbery;

Secondly. House-breaking by night;

Thirdly. Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property;

Fourthly. Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

SYNOPSIS

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| 1. Right of private defence when extends to cause death. | 5. Mischief. |
| 2. Extent. | 6. Theft, mischief or house-trespass. |
| 3. Robbery. | 7. Right of private defence not available. |
| 4. House-breaking by night. | 8. Right of private defence available. |

104. When such right extends to causing any harm other than the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, the theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrongdoer of any harm other than death.

SYNOPSIS

1. Scope.
2. Recourse to the public authorities.
3. Criminal trespass (s. 441, P.P.C).
4. Sentence.

1. **Scope.** Section 104 of the Code relates to s. 103 as section 101 related to s. 100. The section provides that if the offence the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, the theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section i.e., s. 103, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrongdoer of any harm other than death. Section 102 defined the commencement and continuance of the right of private defence against personal injuries, this section describes the right in protection of property. As such these two sections are complementary to each other both of these sections are in harmony with English Law. Though section 105 closely follows the wording of s. 102 the commencing period for the two rights differ with the object they are intended to achieve the right of private defence. The right of private defence against the specified offences against property commences as soon as a reasonable apprehension of danger to the property commences. It is not necessary that an offence or an attempt to commit an offence should have been actually committed. Provisions of s. 97, P.P.C have given every person a right to defend movable or immovable property belonging to himself or to any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or attempt to commit such offences. Provisions of s. 103, P.P.C have defined the right of private defence of property which extends to causing death in certain cases whereas s. 104 has limited the harm to be caused to the assailant in the exercise of right of self defence if property to any injury or harm but certainly not that, if the danger to the property is not given as envisaged by s. 103, P.P.C. Right of self defence of the accused would fall within the four corners of s. 104, P.P.C which does not envisage right of self defence to the extent of causing death but restricts to causing of any harm other than death. [PLD 2001 Lah 219]

In the case of theft, mischief or criminal trespass not of the description enumerated in s. 103, the right of private defence under this section does not extend to the voluntary causing of death but to the voluntary causing of harm other than death. If in the case of theft mischief or criminal trespass not of the description enumerated in s. 103, if death is caused, the right is exceeded, [AIR 1973 SC 665] and the Court has to see whether the case comes under Exception 2 to s. 300 and unless the case can be brought under the Exception the accused would be guilty of murder provided the other conditions of s. 300 are complied with. [1962 Ker LT 868 (DB)] Where in an incident arising out of land dispute the deceased and his sons went to the land in possession of accused group and the accused persons on exhortation given by their mother murderously assaulted deceased with deadly weapons, the action of the deceased only amount to criminal trespass and, therefore, the right of the accused persons extended only to causing harm other than death. [AIR 1999 SC 1083] If, in the exercise of the right of private defence of property by the accused, such resistance is offered by the trespasser as creates a reasonable apprehension to him that death or grievous hurt would be the result, another right, that is, the right of private defence of person accrues in favour of the accused and that right extends to the causing of any harm including death. [AIR 1955 NUC (Lab) 3501] One of the restrictions on the right under the section is that the right of private defence of property in no case should extend to the causing of more harm than it is necessary to inflict for the purpose of defence. In the exercise of right the force must be regulated according to the nature of the action which is taken by the opposite party. The question as to what extent force may be used is a question of fact.

3. **Criminal trespass (s. 441, P.P.C).** There is a right of private defence of property to the extent of causing at least grievous hurt in case of criminal trespass. [1969 P.Cr.L.J. 533 (Lah)] the rightful owner of the land has the right to eject the trespasser with the use of minimum amount of force in exercise of the right of private defence. [PLD 1959 Lah 606] Where the accused on the land, armed with deadly weapons, on the exhortation given by their mother murderously assaulted the deceased when the deceased and his sons came to irrigate the land, they were held not entitled to protection of section 104, it being a case of criminal trespass within the meaning of section 411, right of accused persons did not extend to causing death but, extended only to causing of harm other than death. [1999 Cri LJ 1634 (S.C.)]

4. **Sentence.** There were exchange of abuses, throwing of clods of earth on accused, clods were collected for raising wall in dispute. Both events namely commission of mischief with regard to property and throwing of clots affecting person of accused, sufficient to give right to accused to use force short of causing death. No background of ill will, element of premeditation or planning, malice, aforethought being present, extreme punishment of death not called for [1984 SCMR 887]

4.1 **Composition of offence.** Case pending before Supreme Court, complainant himself appearing and stating that incident took place eleven years ago and that accused was related to him and had young children and that he had forgiven him from his heart. A fit case for reduction of sentence. [1984 SCMR 1323]

105. Commencement and continuance of the right of private defence of property.—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

9 The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

SYNOPSIS

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| 1. Commencement and continuance of right of private defence of property. | 4. Para 2—Robbery. |
| 2. Para 1—Theft. | 5. Para 3—Criminal trespass. |
| 3. "Till offender has effected his retreat with the property". | 6. Para 4—House-breaking. |
| | 7. Burden to prove. |

1. Commencement and continuance of right of private defence of property. Section 102 *infra* regulated the commencement and continuance of the right of private defence against personal injuries. This section provides for the commencement and continuance of the right of private defence of property. As such, these two sections are complementary to each other both of these sections are in harmony with English Law. Though section 105 closely follows the wording of s. 102 the commencing period for the two rights differ with the object they are

[S. 106] right to arrest the thief even when he found him in possession of the property and if he made any such attempt he could not claim a right of private defence of person or property at that stage. [1970 P.Cr.L.J. 236] The High Court of Azad Jammu & Kashmir has held that where person actually seeing thief in possession of his goods, he need not run to seek protection of public authorities, he is entitled to use a reasonable force short of causing death to deprive thief of booty. [PLD 1963 AJ&K 90] Deceased after receiving first blow with *kassi* while in bending position unable to turn his face and attack accused when accused repeated blow. Quantum of force implied and repeating of blow on head of deceased with a heavy weapon like *kassi* by accused was out of all proportion that situation actually demanded. [1984 P.Cr.L.J. 1080]

4. **Para 2—Robbery.** In case of robbery the right of private defence continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

5. **Para 3—Criminal trespass.** In case of criminal trespass or misusing the right of private defence continues as long as the offender continues in the commission of criminal trespass or mischief. Where certain persons armed with hatchet and *lathi* forcibly took two carts loaded with sugarcane through the field while transporting it to a public passage and when they had yet to cover a short distance to reach that passage, the owner of the field protested against the conduct of those persons in damaging the standing crops on his field, it was held that the fact that they could not leave the field without committing further trespass did not give them any right for insisting that they must continue the criminal trespass and beat the owner to death. [AIR 1961 SC 1541] A trespasser cannot be said to continue the trespass after he is physically disabled from getting out, [AIR 1956 Sau 77] or after he has run away. [AIR 1961 All 38 (45)] The right of private defence is available even against a public servant but in keeping the officer locked up far beyond the limits dictated by the need to protect the property and prevent criminal trespass, the accused commits the offence u/s. 342, Penal Code. [1952 Cri LJ 1023 (DB) (Mad)] Where one of several co-sharers in constructive possession of joint land commits the offence of criminal trespass and mischief by digging a part of the land for appropriating it for his exclusive use, in spite of opposition by the other co-sharers who are also in constructive possession, the opposing co-sharers will have every right to prevent such an act of digging by the former co-sharer. [AIR 1934 All 829 (2)] Once the mischief is completed, the right of private defence against it comes to an end. [(1869) 12 Suth WR (Cri) 43. (DB)]

6. **Para 4—House-breaking.** In case of house breaking by night the right of private defence continues as long as the house-trespass which has been begun by such house-breaking continues. The duration of the commission of house-breaking by night must be limited to the time during which criminal trespass continues which forms an element of house-trespass which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time. [1882 Pun Re (Cri) (No. 2) p.2 (2,3) (DB)] The owner of a house is justified in using a weapon against a house-breaker so long as he remains on his premises but he is not justified in running after the thief and killing him with that weapon in the open lawn after the house-trespass has ceased. [(1868) 10 Suth WR (Cri) 9 (10)]

7. **Burden to prove.** Where accused has taken the plea of self defence, burden would shift upon him to prove the same. [2001 SCMR 51; PLD 1991 S.C. 520; 1992 SCMR 2047 ref.]

106. Right of private defence against deadly assault when there is a risk of harm to innocent person.—If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempts to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

Right of private defence against deadly assault. Section 106, P.P.C provides the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk. This section contemplates an assault which reasonably causes apprehension of death and this provides exercise of right of private defence at the right of harm even to an innocent person. The provisions relating to the law of private defence of person and property in this country codified in ss. 96 to 106 are complete in themselves and the words used in the sections must be looked to for finding the extent and limits of the right. While s. 100 of the Code extends the right of private defence of the body against an assault, under the conditions mentioned therein, to the voluntary causing of death of the assailant, this section extends that right, further to running the risk of harm to an innocent person it that right cannot be effectually exercised without running that risk. The right under this section cannot be used as a pretence for causing harm to another person nor for causing more harm than is necessary for the purpose of the defence. When the accused inflicting a single blow by stick in self-defence, when attacked by his brother at midnight, and the blow accidentally striking his father's head, who suddenly intervened at that particular moment, he is entitled to protection u/s. 106. [1993 Cri LJ 3808 (3812)] In this section the expression 'harm' can only mean physical injury. [AIR 1966 SC 1773] Accused at the time of incident appearing to have been so situated that he was not in a position to effectively exercise the right of private defence without risk of harm to those who were nearer or around his father including the two deceased persons who according to the complainant had also come there in the mean time after hearing the alarm. Case of the accused held covered by s. 106 so as to entail his acquittal. [1994 SCMR 1161] But where accused was being chased by some person having no arms there was no occasion for the accused to stab the deceased from behind in the absence of any apprehension of death, case would not fall within the ambit of s. 106 so as to provide right of private defence to the accused. [1976 Jab LJ 351]