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The Exercise of Self Defence to Cause Death: A Legal Analysis under the Malaysian Penal Code

*Mohamad Ismail bin Mohamad Yunus**

Abstract

On December 7, 2015, Mohamad Zulkifli Ismail, 50, allegedly stabbed two men who were trying to rob him at his house in Kampung Labohan, in Kerteh, Terengganu, causing the death of one of the men. Upon the arrest of Zulkifli, he claimed the act was in self-defence. The case was investigated under s 302 of the Penal Code that constitutes murder.¹ Had the killing exceeded the right of self-defence? Thus, the main objective of this article is to analyse and discuss the relevant issue as to what extent does the law allow a person to exercise his right of self-defence to cause death? Is there any defence available if the accused person exceeded the right of self-defence?

1. Introduction

The right of self-defence is absolutely necessary for the protection of one's person, habitation or property against the assailant who manifestly intends and endeavours to take them away. No doubt, it is the primary duty of the state to protect the life and property of its individuals but no state, no matter how large its recourse might be, can depute a policeman to watch the activities of each and every individual and protect him against every criminal act.

There may be situations where help of the state authorities cannot be obtained in order to prevent an unlawful aggression either because no time is left to ask for such help or for any other reason. Therefore, in order to meet such exigencies, law has given the right of self-defence to every individual.²

The *Chambers English Dictionary* defines "self-defence" as defending one's own person, right etc. Instead of the term private defence, the word self-defence was used. This is the simplest definition of self-defence; i.e. any act which is done in relation to defend oneself and his rights. The "rights" here refers to human rights.³

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1 <http://www.nst.com.my/news/2015/12/119881/police-respond-viral-selamatkan-zulkifli-infographic>.

2 KD Gaur, *The Penal Law of India* (Allahabad: Law Publisher Ltd, 1982), p 194.

3 Schwarz, CM, *Chambers English Dictionary* (Edinburgh: Chambers, 1988), p 1335.

Expatiating on self-defence, LB Curzon states that:

Where a person commits a tort in defence of himself or his property, he is not necessarily liable if the act has been in the circumstances of a reasonable nature.⁴

*Osborn's Concise Law Dictionary*⁵ also has defined "self-defence" as:

An action taken in reasonable defence of one's person or property. It can be pleaded as a defence to an action in tort. The right of self-defence of one's family and probably of any other person from unlawful force.

The words "self-defence" and "self defence" are used interchangeably in this study. Both words carry similar meaning. Nevertheless, most people prefer to use the words "self defence" rather than "self-defence". Most jurists are of the opinion that the phrase self-defence is much more appropriate since it involves the protection of an individual not only of himself, but also other persons and property.⁶

2. General overview on the right of self-defence

2.1 The importance and significance of the right of self-defence

Self-defence came into being due to the competing interest of the aggressor and the defender, as modified by the important fact that the aggressor is the party who is responsible for the fight; i.e. as the party morally at fault for threatening the defender's interest. The aggressor is entitled to lesser consideration in balancing process.⁷

However, the defensive force must be reasonable and proportionate to the threat. There are times when deadly force might be necessary to avert a minor result. Therefore where it is clearly disproportionate to the threat, it becomes impermissible.

In other words, the act of the defender, which may be an offence in nature, may be justified by the fact that he is doing it to defend himself against the attack. In the matter of self-defence, the law takes into consideration the lesser of the two evils. It is also a justification on account of the need to protect the legitimate interest of the defender coupled with protection of public harmony and the legal system from a transgressor.⁸

4 Curzon, LB, *A Dictionary of Law* (Kuala Lumpur: International Law Book Services, 1989), p 289.

5 Bird, Roger, *Osborn's Concise Law Dictionary* (New Delhi: Universal Book Traders, 1983), p 278.

6 Simester and Brookbanks, *Principles of Criminal Law* (New Zealand: Brooker's, 1998), pp 410-439.

7 Kenny, *Outlines of Criminal Law* (New Delhi: Universal Law Publishing Co Pvt Ltd, 2002), pp 206-222.

8 Yeo, Stanley MH, *Compulsion in the Criminal Law* (Sydney: Law Book Co, 1990), p 106.

Self-defence is justified because society regards the conducts of the defender as preferable compared to the conduct of his aggressor. The reasons are:

- (1) Society views the aggressor's wrongful conduct as rendering his life as less valuable than the defender's life.
- (2) The defender is exercising his natural right to resist aggression. This right is highly protected by his society.
- (3) The defender is protecting the general peace of the community.⁹

2.2 Principles of right of self-defence

There are some basic principles governing the right of self-defence which can be summed up as follows:

- (a) The right is available against an offence and so an aggressor cannot claim the right of self-defence.
- (b) The right of self-defence cannot be used as a shield to justify an act of aggression.
- (c) The right is allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose.
- (d) In no case does the right extend to inflicting more harms than necessary to inflict for the purpose of self-defence.
- (e) The right of self-defence is not a right to take revenge nor is it a right of reprisal.
- (f) There is no right of self-defence in cases in which there is time to have recourse to the protection of public authorities.

The right to self-defence is a highly prized gift to citizens to protect themselves by effective self-resistance against unlawful aggression. There must be a liberty to use force for the purpose of self-defence. The corollary of this is that an attacker may, by threatening the life of another, forfeit his own right of life. In this context therefore, there are two principal requirements for a successful plea of self-defence: that the defensive act must be reasonably necessary (no other recourse rule) to prevent the threatened criminal harm and that the injury risked by the defensive act must be in reasonable proportion to that harm (proportionality and reasonableness rule).¹⁰

⁹ Ibid.

¹⁰ Smith and Hogan, *Criminal Law: Cases and Materials* (London: Butterworth, 1996), pp 314-324.

2.3 No other recourse

The first is that the force should have been necessary rather than employing non-violent means of self-protection. The rule in s 99(3) of the Malaysian Penal Code provides that "there is no right of self-defence in cases in which there is time to have recourse to the protection of the public authorities", when an individual's purpose in a threatening situation is to save himself from any injury or death; it cannot be necessary for him to inflict harm on his assailant if there is a safe avenue of withdrawal open to him.¹¹

In the Malaysian case of *PP v Ngai Ming Sean*¹² a police detective was given a benefit of self-defence because there was no way out for the accused as he was cornered in a small place near the toilet. The assault by the deceased had indeed assumed a dangerous form and the accused was placed in a situation of such great peril that he had no time to think or do anything else but to open fire from his revolver.

2.4 Proportionality and reasonableness

The second requirement is that the amount of force should have been no more than necessary for the purpose of self-defence.

Section 99(4) of the Penal Code provides the right of self-defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence. It demands a sense of proportion between the harm inflicted and the harm thereby prevented. For the right of self-defence is intended to be one of defence and not of punishment.

The principle of reasonable proportionality plays a restrictive and vital role in the law of self-defence. It requires essentially a rough approximation between the apparent gravity of the attack or threatened attack and the style and severity of the defensive actions. This rule is based on sound policy considerations.

The extent to which the exercise of the right of self-defence is justified under the Penal Code depends very much on the reasonable apprehension of death or grievous hurt to the person exercising the right. The crucial element is the apprehension perceived by the accused; it does not matter whether the injuries inflicted on him are trivial or whether he had any injuries at all. In injuring another in self-defence, there must be no more harm inflicted than is necessary for the purpose of defence and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence.

In deciding whether the right of self-defence has been exceeded, regard must be had to the manner of the attack, the means used in the attack and the

¹¹ Mohamad Ismail Yunus, *A Commentary on Criminal Law and Evidence* (Kuala Lumpur: Marsden Law Book, 2014), pp 361-380.

¹² [1982] 1 MLJ 24, HC.

comparative physical strengths of the accused and the deceased respectively and also the antecedents of the deceased and his conduct at the time of the occurrence.

Indeed, the nature of the attack, the danger apprehended, the imminence of such danger and the real necessity of inflicting harm by retaliation for the purpose of self-defence are all matters to be taken into consideration in dealing with the issue of self-defence.

2.5 Acts of public servants

Section 99(1) and (2) of the Penal Code deals with the question of the right of defence against public servants. These two clauses of s 99 take away the right of defence against certain acts of public servants not attended with the serious consequences, done in good faith under the colour of their office, though those acts may not be strictly justifiable by law.

Explanation 1 and 2 to s 99 must be read together with clause 1 and 2 respectively. The first clause refers to the acts of public servants that they can do on their own authority; whereas clause 2 speaks of acts done by the public servants under the direction by some superior authority.

The first clause of s 99 protects a public servant against the right of self-defence even if the authority were defective in minor particulars.

In the case of *Mohamed Ismail*,¹³ it was held that, where a police officer acting bona fide under colour of his office, arrests a person but without authority, the person so arrested has no right of self-defence against the officer.

It is observed that, the right of self-defence against an injury apprehended to be done by a public servant extends only to those cases in which there is a reasonable cause of apprehension of death or of grievous hurt being caused by the act of such public servant.

In another case of *PP v Kok Khee*,¹⁴ the respondent was charged with the offences of hawking vegetables without a licence, and using criminal force on a police constable in the execution of his duty, an offence punishable under s 353 of the Penal Code.

According to the facts, the constable saw the accused selling vegetables without a licence. He approached him and told him of the offence. The accused put up a struggle and took up a scale stick and assaulted the constable causing injury to him.

¹³ (1935) 13 Ran 754.

¹⁴ 1963] MLJ 362, HC.

The learned judge was of the opinion that the respondent was justified in putting up a struggle since he was resisting an illegal arrest or justifiable use of force towards him.

It is noted from this case that, where a public servant acted without good faith in execution of his duty, his action give rise to a right of self-defence on the part of the person thus arrested illegally.¹⁵

3. The right of self-defence of property under the Malaysian Penal Code

3.1 Introduction

Article 13 of the Federal Constitution emphasises that:

No person shall be deprived of property save in accordance with the law.

Therefore, where any transgression is committed against the individual's own property as well as against the property of others, the individual has a right to self-defence. In other words, the right to defend arises only when wrong is actually committed. Thus, where the process of transgression does not exist in practice, the act of the person assailed does not constitute a defence.

The right of self-defence of property comes into operation only when certain specified offences against property are committed or are attempted to be committed. The right arises not only when the offences enumerated in the section are committed but also when an attempt to commit or a threat any such offence is made.

Sections 96 to 106 of the Penal Code deal specifically with the right of self-defence. This portion of the Code constitutes the most exhaustive defence under the general exceptions in the sense that the framers of Code have gone into detail and great precision in laying down the limits to which one can defend himself and his property legally.¹⁶

3.2 Scope of the defence

The statutory recognition of the right of self-defence is stated in s 96 of the Penal Code as:

Nothing is an offence which is done in the exercise of the right of self-defence.

Section 97 of the Penal Code confers a right of self-defence on every person to defend his own property or the another property against any act which

15 Koh, KJ., Clarkson and Morgan, *Criminal Law in Singapore and Malaysia: Texts and Materials* (Kuala Lumpur: Malayan Law Journal, 2003), pp 113-134.

16 Ibid.

is an offence falling under the definition of theft, robbery, mischief, criminal trespasser or an attempt to do so.

Section 103 of the Penal Code describes four situations wherein the right of self-defence of the property extends to causing death. The clauses enumerated in this section are:

- (1) Robbery;
- (2) Housebreaking by night;
- (3) 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;
- (4) 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 self-defence is not exercised.

Section 104 of the Penal Code provides for when the right of self-defence of property extends to causing any harm other than death.

Section 105 of the Penal Code fixes the time when the right of self-defence of property commences and till what time it continues. By virtue of this section, the right of self-defence of property commences when reasonable apprehension of danger to property commences.

Thus, the right of self-defence of property against theft continues till the offender has effected his retreat with the property, or till assistance of the public authorities is obtained, or till the property has been recovered.

The right of self-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.

The right of self-defence against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

And the right of self-defence of property against house breaking by night continues as long as house-trespass, which has been begun by such house breaking, continues.¹⁷

3.3 Reasonable apprehension of danger

The right of self-defence under s 105 commences when a reasonable apprehension of danger to the property commences. The wording is similar

¹⁷ Stanley Yeo, Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd edn (Kuala Lumpur: LexisNexis, 2012), pp 579-608.

to that of s 102 in respect of right of self-defence to the body. However, the circumstances under which there can be said to be reasonable apprehension differ. Therefore, a mere threat is sufficient in a case of an attack on a person, whereas in a case of an attack on property there must be something more than a mere threat — it must be a threat which is so imminent as to amount to an attempt to commit an offence.

Thus, in the case of *Mohd Rafi v Emperor*,¹⁸ parties of persons including the deceased armed with deadly weapons were advancing towards the accused's house in a threatening manner. At the same time, they were shouting out threats of setting fire to the house. But they had neither torches nor inflammable materials nor were there any attempts of any kind to set fire mode. The accused who was standing in front of his house shot and fatally wounded the deceased at a distance of about 11 to 14 feet, while he was advancing towards him.

In the circumstances of present case, it would seem that, even if the allegation of the accused and his witnesses that the deceased and his party were uttering threats of setting fire to his house were true, there was no evidence about it. Therefore, the threat had not become so imminent that the accused was entitled to shoot in order to repel it.

But, since that some of the party of the deceased, at any rate, were armed with deadly weapons and their advance in a threatening manner must undoubtedly be held to have given rise in the mind of the accused to a reasonable apprehension that he was about to sustain grievous injury at their hands, he did not exceed the right of self-defence which he enjoyed under the law.

Therefore, it is submitted that the right of self-defence of property can be exercised only when the reasonable apprehension of danger as to property arises.

3.4 Commencements and continuance of right of self-defence

The right of self-defence of property under s 105 commences as soon as a reasonable apprehension of danger to property of a person himself or another person arises from an attempt or threat to commit the offence, though the offence may not have committed. And the right comes to an end as soon as the threat of assault has ceased and the apprehension has been removed.¹⁹

It is to be noted that the person entitled to exercise the right of self-defence of property can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor had started committing the offence, which occasions the exercise of the right.

18 AIR (1947) Lah 375 (HC, Lahore, India).

19 KD Gaur, *Criminal Law, Cases and Materials* (Bombay: N M Tripathi Pvt. Ltd., 1985), pp 197-198.

It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person.²⁰ Therefore, the person in possession of property is entitled to defend himself and his property by force and to collect such members and such arms as are necessary for that purpose.

If he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the person and object. It is lawful for such person if the opposite party is armed, to take suitable weapons for his defence.²¹

The second clause of s 105 of the Penal Code provides that the right of self-defence of property against theft continues till the offender has effected his retreat with the property or the assistance of the public authorities is obtained or the property has been recovered. The phrase "effect his retreat with the property" should be understood and interpreted as the material conditions and the particular situation in time and place which each case permits. Ordinarily, if the thief has reached a place of safety along with the stolen property and is completely out of the reach of the owner, then he will be taken to have "effected his retreat with the property".

It is to be noted that where the thieves leave behind the property and try to make good their escape, the accused ceases to have any right of self-defence against them. If they are subsequently attacked the owners exceed the right of self-defence. However, where a thief effects his retreat, the right of self-defence cannot be revived so as to allow stolen property to be taken by the owner from that person by the use of violence, not extending to the causing of death, which may be found necessary.

In the case of *Muhamad Shariff & Anor v The State*,²² where a stolen bullock had been brought to the house of the deceased and tethered there and after some interval had elapsed, when the appellants getting news of the loss entered the house of the deceased to effect the recovery of the bullock, it was held that this was after the stolen bullock had been safely stowed away and the thief had effected his retreat, and consequently no further right subsisted in the appellant to effect its recovery by force by way of right of self-defence of property as claimed for him.

The third clause of s 105 of the Penal Code lays down that the right of self-defence of property against robbery continues as long as the offender causes or attempts to cause to any person death, hurt, wrongful restraint, as long as the fear of instant death, instant hurt or of instant personal restraint continues.

20 Ratanlal and Dhirajlal, *Law of Crimes* (Nagpur: Wadhwa and Co, 1987), p 331.

21 Ibid.

22 (1959) PLD, Lahore, 987.

It is opined that resistance within the justifiable limits may be continued so long as the wrongful act is going on. For instance, when the robber has made escape, the principle of self-defence would not extend to killing him if met with a subsequent day. However, if the property were found in his possession, the right of defence would revive for the purpose of its recovery.²³

The fourth clause of s 105 of the Penal Code provides that, the right of self-defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief. This right extends to causing to the trespassers any harm other than death, subject to the restrictions mentioned in s 99, namely, that no more harm should be inflicted than is necessary for the purpose of defence and that there is no time to have recourse to the protection of the authorities.²⁴

However, if in the exercise of this right, such resistance is offered by the trespassers, that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, the right of self-defence of the person then arises and extends to the causing of death.²⁵

In *Hukam Singh*,²⁶ the accused forcibly took two carts loaded with sugarcane through the field of "H" in which there were standing crops, in transporting sugarcane to the public passage running by the side of H's field. It was held that by the Supreme Court that, so long as the accused were inside the field, the trespass had not come to an end and H had the right to prevent the accused from continuing to commit the criminal trespass for whatever short distance they had still to cover before reaching the public pathway.

The Supreme Court also held that the accused's party could not get out of the field without committing criminal trespass, did not give them any right for insisting that they must continue the criminal trespass; they had to abide by the direction of H.

In the case of *State v Bhima Devraj & Ors*,²⁷ the deceased entered the house of the accused with the intention of outraging the modesty of the wife of the accused. The accused beat him with a stick, as a result of which the deceased fell down, but the deceased continued to beat him even after the deceased fell down. It was held that, whatever intention the deceased entertained at the time of entering the house, it had disappeared and he continued on the premises not because he intended to commit an offence, but because he was physically unable to get out. After the deceased fell down, the accused's right of self-defence came to an end.

23 Ratanlal and Dhirajlal, *supra*, n 20, p 332.

24 *Ibid*, p 333.

25 *Ibid*, p 334.

26 (1961) AIR SC 1541.

27 (1956) Cri LJ 1234 (DB).

However, the right did not extend to the causing of anyone's death and the opposite party could only commit any offence short of death, in his attempt to save the property by preventing the complainant from proceeding towards the property.²⁸

Thus, in *Kirpa Ram & Ors v Emperor*,²⁹ where the complainant's party wrongfully entered upon the land in the possession of the accused party, committing criminal trespass and mischief by letting loose their cattle to graze on the land, and the trespass was still continuing, the accused party would be entitled to defend their possession and oust the complainant's party. No question of recourse to public authorities can arise in such a case. Section 105 applies and the accused party would be justified in turning out the cattle and preventing the grass from being damaged by use of force. If the other party causes obstruction and injuries in the exercise of the right of self-defence, the accused can cause any harm including death to the trespassing party.³⁰

Clause 5 of s 105 of the Penal Code provides that the right of self-defence against house-breaking by night continues only so long as the house-trespass continues; hence where a person followed a thief and killed him in the open, after the house trespass had ceased, it was held that he could not plead the right of self-defence.

3.5 Exceeding the right of self-defence

The right of self-defence extends to voluntarily causing of death of the assailant in cases of danger to property resulting from any one of the offences set out in s 103 of the Code, namely, robbery, house-breaking by night, mischief by fire to any building, tent or vessel used for the purpose of dwelling or custody of property, theft, mischief or house-trespass under such circumstances as may reasonably cause the apprehension that death or grievous hurt may be caused.

If a person, while exercising his right of self-defence, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence, he can claim the benefit of exception 2 to s 300, to reduce the offence of murder to culpable homicide not amounting to murder provided that the act has been done in good faith, without premeditation and without intending to do more harm than is necessary.³¹

In determining whether the right has been exceeded the entire facts and circumstances of each and every case in which the right of self-defence was exercised, the weapon used, the manner of using it, the nature of the assault and other surrounding circumstances will be taken into consideration.

28 *Ram Autar & Ors v State* (1954) AIR 771.

29 (1948) Cri LJ 503.

30 *Ibid.*, at 504.

31 Misra, SN, *Indian Penal Code* (Allahabad: Central Law Publications, 2006), pp 216-247.

follows that the causing of death in order to prevent the commission of an act which constitute an offence specified in this section will be justified only where that act is sufficient to cause a reasonable apprehension of death or grievous hurt.³²

In the case of *Gurdatta Mal & Ors v The State of Uttar Pradesh*,³³ it was held that, where several accused commit the murder of a person by doing an act or acts in furtherance of common intention, they would not be liable for the said act or acts only if they are able to establish that they had the right of self-defence to voluntarily cause the death of the person. Hence all the accused would be liable for murder if they are not able to establish that the offence which made them voluntarily cause death fell in one of the categories enumerated in the section, as all of them participated in the offence pursuant to the common intention to murder.

It is observed that the apprehension of danger must in the present. The right of self-defence cannot be extended to cover harmful actions that may be anticipated in the future. It is to be noted that the right of self-defence extends not only when the offences enumerated in the section are committed, but also when an attempt to commit any such offence is made.

4. The right of self-defence of person under the Malaysian Penal Code

Introduction

Section 97 of the Penal Code provides that a right of self-defence arises in defending one's own body, or the body of any other person, against any offence affecting the human body. The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt to commit the offence and continues as long as such apprehension of danger to the body continues. In certain circumstances under s 100 such right can extend to the causing of death; otherwise the right of self-defence extends only to the causing of harm other than death.

4.1 Scope of the defence

The statutory recognition of the right of self-defence of person is stated in s 97(a) which states as follows:

Every person has a right, subject to the restrictions contained in section 99, to defend his own body, and the body of any other person, against any offence affecting the human body.³⁴

32 Ibid.

33 (1965) AIR SC 257.

34 Penal Code, FMS Cap 45, s 97.

4.2 Reasonable apprehension of danger and mistake

English law has steered away from the objective standard of reasonableness. If the accused genuinely believes he is defending himself he must be judged according to his honest but mistaken belief. However, under s 100 of the Penal Code, reasonable apprehension of danger is to be viewed objectively, and so is a mistaken belief that caused the apprehension of danger.

In the case of *GFL Ewin v PP*,³⁵ the appellant was a police sergeant in an area near Ipoh, which was known for terrorist activity. He went with others to a mine to search for a terrorist. He entered a hut into which he believed, according to his evidence, that six "bad men" had just gone. In his own words, "I entered the hut with my stand gun at the ready fully expecting to see six armed men. It was dark inside the hut. The bed seemed to take up most of the room. I saw something move on the bed and fired ...". He shot dead a five-year-old boy.

According to Willan CJ, the main ground of appeal was that the learned trial judge had not directed the assessors that the appellant, in acting as he did under the circumstances as he, in good faith, believed them to be, might have been exercising the right of self-defence.

The assessors had been directed that, if, in the circumstances, they were of opinion that the mistake of fact under which the appellant acted (assuming that they accepted the evidence of such mistake) was such as to make it appear to him in good faith to be necessary to shoot in self-defence, they could find him not guilty.³⁶

4.3 Right of self-defence of aggressor

The right of self-defence is based on a defensive right of self-help in certain circumscribed limits. Section 97 provides that such a right arises against acts which are offences.

In the case of *PP v Abdul Manap*,³⁷ the accused was charged with voluntarily causing grievous hurt by stabbing the complainant in the course of a dispute about some rent payable by the complainant for a paddy field. Both parties had lost their tempers. The accused, being incensed by something which the complainant had said, "struck him with his fist" and on being struck the complainant, a "tall, young and strong man" hit the accused a number of times and was about to throttle him, when the accused took a dagger and stabbed the complainant once in the chest.

³⁵ [1949] MJ 279, CA (FM).

³⁶ *Ibid.*

³⁷ [1956] MJ 214, HC (KL, Malaya).

According to Briggs J, although the accused struck the first blow and the complainant was himself entitled to exercise the right of self-defence, the retaliation which the complainant in fact made for that single blow was on a much larger scale and much more serious that would possibly be justified in the circumstances. The accused was acquitted and discharged.

In *Munni Lal v Emperor*,³⁸ Dua J said:

The right of self-defence is essentially a defensive right circumscribed by statute, available only when the circumstances clearly justify. It should not be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. This right is available against an offence and, therefore, where an act is done in exercise of the right of self-defence such act cannot give rise to any right of self-defence in favour of the aggressor in return. This would be so even if the person exercising the right of self-defence has the better of the aggressor provided he does not exceed his right, because the moment he exceeds it, he commits an offence.³⁹

Thus, in the case when two parties are having a free fight without disclosing who is the initial aggressor it may be dangerous as a general rule to clothe either of them or his sympathiser with a right of self-defence. However, if one of them is shown to be committing an offence affecting the human body, then that would of course seem to give rise to such right.

4.4 Restrictions on right of self-defence

The restrictions on the right of self-defence are laid down in s 99 of the Penal Code. Where the limits are exceeded in cases of murder, any unpremeditated excess is protected under exception 2 to s 300. This section is a necessary corollary of s 99, which states that the right of self-defence in no case extends to the inflicting of more harm than is necessary for the purpose of defence.

The factors which the court must have taken into consideration in determining whether a right of self-defence arises are set out under ss 99 or 100.

In the case of *PP v Yeo Kim Bock*,⁴⁰ the accused was charged with culpable homicide not amounting to murder. The deceased, a man of better built and strength than the accused, had lent some money to the accused and had demanded its payment. He did so in a very aggressive manner, and on seeing the accused remaining calm and passive went to pick up a knife and rushed towards the accused, who had no way to escape. Finding himself in that desperate situation the accused picked up a wooden ladle and hit the knife which the deceased was carrying. The knife dropped, both the accused

38 (1943) AIR 344.

39 Ibid, at 345.

40 [1971] 1 MLJ 204, HC (Muar, Malaysia).

and the deceased started to grapple with each other and fell down rolling on the ground endeavouring to pick it up. Although there was some conflict in the evidence as to whether the accused had managed to retrieve the knife, this made no difference.

Sharma J opined:

I have no doubt that there was a reasonable apprehension of danger to the life of the accused when the deceased rushed at him with the knife in his hand and at that stage he had the right of self-defence which extended even to the killing of the deceased by the accused.⁴¹

It is noted that person claiming the right of self-defence must prove either by independent evidence or from the prosecution evidence or surrounding circumstances that what he did was in the exercise of his right of self-defence. In this case the defence had through the prosecution witnesses proved that the accused was acting in his right of self-defence. It is reasonable to suppose that the accused thought in the critical situation in which he was that the deceased might wrest the knife from his hand and use it against him. The reasonable apprehension of death at the hands of the deceased cannot thus be said to have left the mind of the accused. In the circumstances, it was held that there is no case to meet. The accused was acquitted.

5. Conclusion

It is concluded that the law provided in the Malaysian Penal Code from ss 96 to 106 deals specifically with the right of self-defence. This portion of the Code constitutes the most exhaustive defence under the general exceptions in the sense that the framers of Code have gone into detail and great precision in laying down the limits to which one can defend himself and his property legally.

For the right of self-defence for the person, the sections applicable are ss 97, 100 (when the right of self-defence of the body extends to causing death), and 101 (when such right extends to causing any harm other than death). In addition, s 102 states about the commencement and continuance of the right of self-defence of the body. Exceeding self-defence comprises a partial defence to murder under the Penal Code. If successfully pleaded, the defence results in a conviction of the lesser offence of culpable homicide not amounting to murder. The plea of exceeding self-defence is contained in exception 2 to s 300 of the Code, which provides culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by the law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without an intention of doing more harm than is necessary for the purpose of such self-defence.

⁴¹ Ibid, at 210.

Applying this exception to the present case of *Zulkifli Ismail v PP* (unreported), this defence could be dealt with by applying the following set of tests endorsed by the Singapore Court of Appeal in *Tan Chor Jin v PP*:⁴²

- a. Whether the facts of the case give rise to the right of self-defence.

If the answer is affirmative, then both the general plea of self-defence and the exception are available. However, if the answer is negative, then both defences are unavailable and the inquiry is concluded.

- b. Whether the accused person was confronted with one of the specific types of threats mentioned in ss 100 or 103.

- c. Whether the act of killing constitutes no more harm than was necessary to inflict for the purpose of self-defence.

If positive then the general plea of self-defence is likely to be available. If "no" the general plea is unavailable but Exception 2 may be available.

- d. Whether the accused's act of killing was done without premeditation and without an intention of doing more harm than was necessary for the purpose of self-defence.

If "yes" then Exception 2 is likely to be available. If "no" then the defence is unavailable.

This set of questions should assist judges to keep separate their handling of the elements for Exception 2 from those for the general plea of self defence in cases where both these pleas have to be considered.⁴³

⁴² [2008] 4 SLR(R) 306.

⁴³ Stanley Yeo, Morgan and Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd edn (Kuala Lumpur: LexisNexis, 2012), p 615.