

**CRIMINAL APPEAL (DB) No.451 OF 1988**

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Against the judgment of conviction and sentence dated 3<sup>rd</sup> August, 1988 passed by Shri Sidheshwar Narayan, Sessions Judge, Muzaffarpur in Sessions Trial No. 114 of 1985.

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Dasrath Thakur son of late Harihar Thakur  
resident of village Rasulpur, P.S. Karja,  
District Muzaffarpur

Appellant

Versus

The State of Bihar

Respondent

For the appellant : M/S Rama Kant Sharma, Sr. Advocate  
Narendra Kumar Singh, Arun Kr.  
Pandey and Rajesh Kumar, Advocates  
For the State : Ms. Shashi Bala Verma, Addl. P.P.

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**P R E S E N T**

**THE HON'BLE MR. JUSTICE SHYAM KISHORE SHARMA**


**THE HON'BLE MR. JUSTICE DINESH KUMAR SINGH**

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**S.K.Sharma**  
&  
**D.K.Singh, JJ.**

The sole appellant has challenged his conviction under Section 302 of the Indian Penal Code and order of sentence thereunder whereby he has been sentenced to undergo imprisonment for life by judgment and order dated 3<sup>rd</sup> August, 1988 passed by Sessions Judge, Muzaffarpur in Sessions Trial No. 114 of 1985.

2. The prosecution case as per fardbeyan of Jai Ram Thakur (P.W.7) recorded by Officer-in-charge, Karja Police Station on 6.4.1983 at 11.45 A.M. at the cattle shed of the informant is to the effect that at about 8.A.M. on 6.4.1983 the informant and his brother Janardan Thakur (deceased) were cutting the wheat crop in the land situated to the north of their house. Narain Thakur, after finding the informant, Jai



Ram Thakur and his brother Janardan Thakur cutting the wheat crops went to Rupauli Chowk to call Dasrath Thakur. At about 8.30 A.M., Narain Thakur and Dasrath Thakur came and objected to the cutting of the wheat crop upon which the informant's brother Janardan Thakur conveyed that it is his land and hence he is cutting the crops and on this the informant's side were abused and Dasrath Thakur asked his wife Sumitra Devi to bring spear. Consequently, the wife of Dasrath Thakur brought two spears and she gave one to Dasrath Thakur and other one to Narain Thakur, when both accused Dasrath and Narain came forward armed with spear and started abusing, on which the informant and his brother Janardan Thakur started moving away from the field, on this Dasrath gave a bhala blow to the informant's brother as a result of which he fell down and died. It is claimed by the informant that both Dasrath Thakur and Narain Thakur are his uncles, who were separated by way of partition ten years prior to the occurrence but there was dispute with regard to some land, for which litigations were going on and the accused side had lost the case and due to said




enmity, the occurrence took place. It is further claimed by the informant, that the informant and the accused side used to reside in the same house and the occurrence was seen by the father and the mother of the informant as well as the villagers i.e., Devendra Thakur (not examined) and Bhola Thakur (P.W.4). On the basis of the aforesaid fardbeyan (Ext.3), Karja P.S.Case No. 90 of 1983 was registered under Section 302/34 of the Indian Penal Code against all the three F.I.R. named accused persons.

**3.** Consequently, the cognizance was taken and the case was committed to the court of Sessions.

**4.** Charges under Section 302/34 of the Indian Penal Code were framed on 15.7.1986 against Dasrath Thakur and Narain Thakur whereas against Sumitra Devi charges under Section 302/114 of the Indian Penal Code were framed. Charges were explained to the accused persons to which they pleaded innocence and preferred to face trial.

**5.** The prosecution examined altogether 11 witnesses to substantiate the charges, out of which P.W.1, Basant Kumar Thakur, is a



witness of seizure of lathi, bhala and blood stained earth. This witness has been declared hostile, since he, in paragraph 4 of his evidence has stated that his statement was not recorded by the police. P.W.2, Suresh Thakur, is a witness to the inquest who has stated in paragraph 2 of his evidence that the inquest was prepared at the door of the informant. P.W.3 is the doctor who conducted post mortem over the dead body of the deceased, whereas P.W.4 Bhola Thakur, P.W.6 Krishnanand Thakur (father of the deceased), P.W.7 Jai Ram Thakur (informant and brother of the deceased) and P.W.8 Gauri Devi (mother of the deceased) are eye witnesses of the occurrence and they have supported the prosecution case. P.W.5 Anirudh Mishra has been declared hostile, since, he has stated in paragraph 5 of his evidence that he had not seen the accused persons at the place of occurrence. P.W.9 Raghunath Chaudhary is a Police Officer who recorded the first information report and prepared seizure list and the inquest report. P.W. 10 Nilam Devi is the sister of the deceased and she claims to have seen the occurrence. P.W.11 Bishwanath Prasad

has proved the handwriting of Raghunath Choudhary who recorded the fardbeyan and registered the first information report and prepared the inquest report and seizure list.

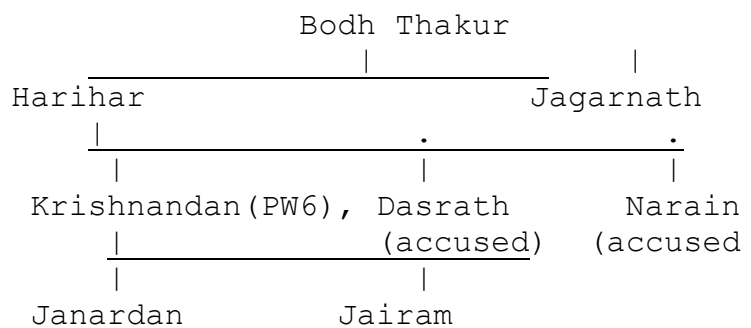
6. The learned trial court after considering the evidences, held only the appellant to be guilty under Section 302 of the Indian Penal Code and accordingly sentence was awarded to him whereas the other two accused persons namely, Narain Thakur and Sumitra Devi were acquitted, as charges against them were not found proved beyond the shadow of reasonable doubt.

7. The death of Janardan Thakur is an admitted fact and the evidence of the doctor suggests that he died due to one penetrating injury.

8. Now the question which has to be determined before this Court is whether the appellant had any intention to kill the deceased.


9. From scanning all the evidences it appears that this appellant is the own uncle of the deceased, as both sides are descendants of common ancestor namely, Bodh Thakur who had two

sons Harihar and Jagarnath, whereas Harihar had three sons namely, Krishnanand (father of the deceased), Dasrath (appellant) and Narain (accused, since acquitted) and Krishnanand had two sons namely Janardan (deceased) and Jai Ram (informant, P.W.7). The genealogical table is given hereunder for proper appreciation of relationship of the appellant and informant as also the deceased:




**10.** From the evidences on record it appears that there was land dispute between the parties which has been admitted by the informant in his fardbeyan. Though it is the specific case of the prosecution that the informant and his deceased brother Janardan were cutting wheat crop in the field situated north to their house, but neither in the fardbeyan the exact plot number has been mentioned, nor in the evidences of the prosecution witnesses, the same has come and due to non-examination of the Investigating

Officer, the place of occurrence, in our view, has not been fixed nor has been proved.



**11.** As per the first information report, the occurrence took place in the wheat field which belongs to the informant's side, whereas the inquest report reflects that the dead body was found on the boundary of tomato field of this appellant. P.W.9, during his evidence has suggested that the inquest was prepared in a field, having no crop, besides the wheat crop field of the informant, though P.W.2 who is a witness to the inquest report (Ext.7) has specifically stated in paragraph 2 of his evidence that the inquest was prepared at the door of the informant. The aforesaid facts not only prove that the place of occurrence has not been fixed or proved, by virtue of the evidence brought on record but it also creates doubt about the inquest report which is Ext.7.

**12.** The prosecution has claimed the land where the occurrence took place but no document has been brought on record to fortify their claim, though P.W.6 in paragraph 9 of his evidence has stated that one partition suit was filed by his son in which he did not file




written statement and in paragraph 10, this witness has stated that the disputed plot is the ancestral land and has specifically admitted that the informant's side has no document to prove the partition and that the disputed land was allotted to them. Since P.W.6 is the father of the deceased and own brother of the appellant, hence he was the best person to suggest about the claim of the disputed land. Hence, the prosecution has failed to prove that the disputed land belongs to the informant's side.


**13.** Learned Senior Counsel Mr.Rama Kant Sharma has submitted that the land in question was in the share of the appellant and the wheat crop was sown by appellant's side and while they were cutting the same, it was objected by the informant's side and in right to private defence, if at all, injury was caused by this appellant. It was in personal defence as well as in the defence of the property.

**14** From perusal of the evidences it appears that there is nothing on record to suggest that the defence side received any injury or defence side has brought any document





to suggest that the disputed land was in their share. However, learned Senior Counsel relied upon the evidence of P.W.4, who in paragraph 2 has stated that it was this appellant and his brother Narain Thakur who were cutting wheat crops and when it was objected by the informant and his deceased brother, then the assault took place. In paragraph 7 of his deposition, P.W.4 has specifically stated that wheat crop was sown by the appellant's side. Hence, it is submitted that by virtue of the evidence of P.W.4, it is apparent that the informant's side were the aggressors and if at all the assault was made by this appellant, then it was in the exercise of right of private defence of his property. It was further submitted on behalf of the appellant that the right of private defence does not only accrue while injury is caused to the other side, it accrues also when there is eminent danger to the life and property to the other side and in this connection reliance has been place on a judgment reported in **A.I.R. 1973 S.C.473 paragraph 5 (Deo Narain Vrs.State of U.P.)** and in this connection evidence of P.W.4 in paragraph 8 has been referred to where this witness has

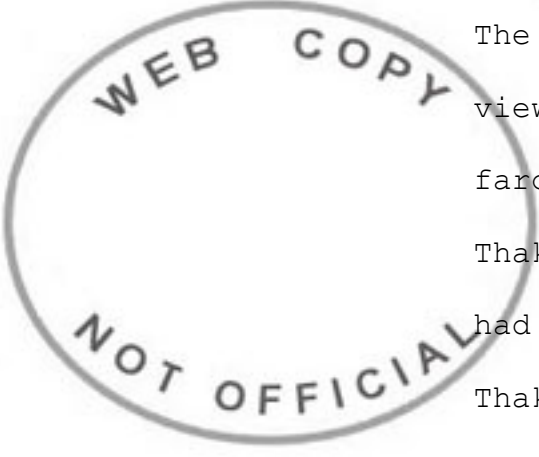


specifically stated that the informant and his deceased brother were armed with lathi and bhala. This contention further gets corroborated from the evidence of P.W.7 in paragraph 3, where the informant has specifically stated that when the deceased's father tried to intervene, then the deceased Janardan Thakur who was having bhala in his hand had chased the accused persons. Hence it is submitted that the appellant had bona fide threat not only to his life, but also to his property.

**15.** Ms. Shashi Bala Verma, learned counsel for the State submits that the plea of right to private defence has rightly been rejected by the trial court since the appellant's side have not received any injury.

**16.** To our view, the learned trial court has not appreciated the principle of right of private defence in true perspective.

**17.** The question which was to be determined by the trial court was, whether the appellant had exceeded the right of private defence of property or not. P.W.4 has not been declared hostile, but his evidence has completely changed the manner of occurrence



which creates doubt about the prosecution case. The evidence of P.W.4 cannot be brushed aside in view of the fact that the informant in his fardbeyan has specifically stated that Devendra Thakur (not examined) and Bhola Thakur (P.W.4) had witnessed the occurrence. Since Devendra Thakur has not been examined (due to his death), the evidence of Bhola Thakur (P.W.4) becomes relevant in view of the fact that the informant (P.W.7), father of deceased (P.W.6) and mother of the deceased (P.W.8) have stated in their evidence that this P.W.4 had witnessed the occurrence. From perusal of the evidence on record it appears that P.W.4 is the only independent witness as P.W.6 is father of the deceased, P.W.7 is brother of the deceased, P.W.8 is mother of the deceased and P.W.10 is sister of the deceased. Hence, from the discussions made above it is apparent that it was not proved, as to who had actually sown the wheat crop and who was actually cutting the same and whether the aggressors were appellant's side or the informant's side.

**18.** This much evidence is consistent that it was this appellant who threw spear which

caused injury to the deceased and this fact has been admitted by P.W.4 also in paragraph 2 of his evidence. Now the question is whether the appellant has exceeded the right of private defence or not.


**19.** From the evidence on record it appears that on the land in question, the appellant was not present with an intention to kill the deceased because as per prosecution case itself, the appellant was not armed with any weapon from before, rather when the hot verbal exchange ensued, then this appellant asked his wife to bring spear and thereafter assault was made. It further appears that only a single blow was given, whereas this appellant had occasion to repeat the assault, moreover the other spear was in the hand of his brother Jairam Thakur but he did not do so, rather it is the prosecution case that after throwing spear this appellant ran away from the place of occurrence which suggests that though this appellant assaulted with spear but that was at the spur of the moment, when a dispute took place and abusive languages were used by the informant's side. Moreover, the appellant had no



intention to kill the deceased, although he was aware of the fact that his spear can cause death to the victim. Hence, he had the knowledge that his action may result in death of the victim.


**20.** From the evidence of P.W.9, it appears that one bhala and one lathi were recovered from the house of this appellant and blood stained earth was also seized. The case of the prosecution is that the accused persons, after making the assault, took away the bhala. Moreover, from the evidence on record it appears that though blood stained spear was seized but it was never sent for chemical examination and in view of non-examination of the Investigating Officer, we think that it has definitely prejudiced the case of the appellant.

**21.** It has further been contended by learned Senior Counsel for the appellant that the evidence of the doctor (P.W.3) also creates doubt about the prosecution version because he has stated in paragraph 1 that he conducted the postmortem on 7.4.1983 at 4.P.M., whereas the first information report was registered on 7.4.1983 at 16.15 P.M. Moreover, the doctor found the presence of rigor mortis in upper



limbs. Though the timing of post mortem given by the doctor creates suspicion but it appears that the timing as mentioned was a mistake, though it has been recorded as such. Though immediately after death the presence of rigor mortis in the upper limb appears to be unreasonable because only after few hours of death, (i.e. six to eight hours) rigor mortis develops.


**22.** According to the prosecution case this appellant caused bhala injury to the deceased on his chest, which has also been found by the doctor and to this extent, the prosecution case is consistent. As P.W.4 has also stated that this appellant caused bhala injury on the deceased, hence, to our view, the prosecution has been able to prove this fact that this appellant caused bhala injury on the chest of the deceased and as per evidence of the doctor, that solitary injury was the cause of death. Though, it has been vehemently argued by learned Senior Counsel for the appellant that the informant's side were also armed with bhala and they were the aggressors. Hence, if at all, the appellant made assault, it was in the right



of private defence. The said right of private defence can be exercised only in case of apprehended danger to life but to our view it appears that the appellant has exceeded the right of private defence while making assault with bhala on the chest of the deceased.

**23.** From the evidences on record we are convinced that the appellant had no intention to kill Janardan Thakur but had knowledge that the assault of spear may cause death. Hence in that circumstances we come to the conclusion that the prosecution has failed to prove the charge of Section 302 of the Indian Penal Code but the evidence on record suggests that this case comes within the purview of Section 304 Part II of the Indian Penal Code. In that circumstances, the conviction of the appellant is converted into Section 304 Part II of the Indian Penal Code and his sentence is altered to rigorous imprisonment for five years. The period undergone by the appellant during trial and appeal will be set off against the aforesaid period of sentence.

**24.** In result, this appeal is dismissed with modification of conviction and sentence, as



mentioned above. Since the appellant is on bail, his bail bond is cancelled and he is directed to surrender before the court below to serve out remaining part of sentence, if any. The court below is also directed to take all steps to take the appellant into custody.

**( Shyam Kishore Sharma, J. )**

**(Dinesh Kumar Singh, J.)**

Patna High Court, Patna  
The 31<sup>st</sup> August, 2010  
Tahir/- (NAFR)