

Criminal Appeal (DB) No. 225 of 1995 (P)

Against the judgment and order of conviction and sentence dated 28.07.1995 passed by Shri Rakeshwar Dayal, learned Additional Sessions Judge, Sahibganj in Sessions Trial No. 256 of 88/ 755 of 1993/ 1993

1. Dukhu Thakur, son of Musu Thakur (since deceased)
2. Fuleshwar Thakur, son of Dukhu Thakur
3. Khemanand Thakur, son of Dukhu Thakur
4. Kauleshwar @ Kaleswar Thakur, son of Dukhu Thakur

All are residents of Village Rakso, P.S. Borio, District Sahibganj
... Appellants

Versus

The State of Bihar (now Jharkhand) ... Respondent

PRESENT

HON'BLE MR. JUSTICE RONGON MUKHOPADHYAY
HON'BLE MR. JUSTICE NAVNEET KUMAR

For the Appellants : Mr. Rajeeva Sharma, Sr. Advocate
Ms. Rita Kumari, Advocate
For the Respondent : Mr. Saket Kumar, A.P.P.

CAV on 18.07.2024

Delivered on 13.08.2024

Rongon Mukhopadhyay, J. : 1. Heard Mr. Rajeeva Sharma, learned senior counsel for the appellants and Mr. Saket Kumar, learned A.P.P.

2. This appeal is directed against the judgment and order of conviction and sentence dated 28.07.1995 passed by Shri Rakeshwar Dayal, learned Additional Sessions Judge, Sahibganj in Sessions Trial No. 256 of 88/ 755 of 1993/ 1993, whereby and whereunder, the appellants have been convicted for the offence punishable u/s 302/34 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for life.

3. The prosecution case arises out of the fardbeyan of Sikandar Thakur in which it has been alleged that on 10.11.1985 at around 7-8 a.m. Dukhu Thakur was cutting earth from the field of his brother Ganesh Thakur for the purpose of sowing of potato and putting it on the ridge, when Ganesh Thakur objected and a quarrel ensued. In the meantime, the sons of Dukhu Thakur, namely, Khemanand, Fuleshwar and Kaleshwar had come with Lathi and they along

with Dukhu Thakur had committed assault upon Ganesh Thakur. It has been alleged that Ganesh Thakur on account of the assault fell down and became unconscious. When the informant tried to save his father, he was chased away by the accused persons. The villagers had assembled on hearing the commotion at which the accused persons fled away.

Based on the aforesaid allegations, Borio P.S. Case No. 123/1986 was instituted for the offences punishable u/s 323/307/34 of the I.P.C. On conclusion of investigation charge-sheet was submitted and after cognizance was taken, the case was committed to the Court of Sessions where it was registered as Sessions Trial No. 256 of 88/ 755 of 1993 / 1993. Charge was framed against the accused persons for the offence punishable u/s 302/ 34 of the I.P.C. which was read over and explained to them in Hindi to which they pleaded not guilty and claimed to be tried.

4. The prosecution has examined as many as eight (08) witnesses in support of its case.

P.W. 1 Sikandar Thakur is the informant who has stated that the incident is of the year 1986. Dukhu Thakur was cutting the earth from his field and filling up his own field. His father came out and asked Dukhu Thakur as to why he is doing such act which was responded with abuses from Dukhu Thakur. When his father objected, he attempted an assault with a Kudal. Thereafter the sons of Dukhu Thakur had come and they had started committing assault upon his father with Lathi. Naresh was instigating them to commit assault. When he tried to save his father, he was chased by the accused persons and in order to save his life, he entered into the house of Lunmpai Ansari, who saved him. His father due to the assault had become unconscious. He has proved his signature in the fardbeyan which has been marked as Ext. 1. When he was returning form the Police Station, he saw the villagers taking his father to the hospital in a truck. His father was taken to Borio and thereafter to Bhagalpur where he died.

In cross examination he has deposed that Dukhu Thakur is his own uncle. There is a ridge between the fields belonging to his father and Dukhu Thakur. The earth was being cut only by Dukhu and due to his cutting the

earth a ditch was created in his field which was objected to by his father. When his father had objected he had also gone, but he had no inkling as to what such objection may lead to and therefore he had gone home. When a cry of alarm was raised, he saw the assault which floored his father. The assault on his father was committed by the accused in his presence. When his father was felled down, Suchi Devi, Lunmpai and Jauhar Ansari were present. Kaleshwar had initiated the assault upon his father with a Lathi followed by Dukhu. The other accused persons had chased him when he tried to save his father. Kaleshwar Thakur had assaulted near the ear of his father. He had gone to see his father after half an hour. Khemanand had also assaulted his father with a Lathi.

P.W. 2 Bhagia Devi is the wife of the deceased who has stated that the incident is of 3/4 years back. Her brother-in-law was cutting earth from her field and when her husband objected, he was abused. This led to a quarrel and Dukhu made an attempt to assault her husband with a Kudal, but the Kudal was caught by her and her husband. At this Dukhu called his sons and Fuleshwar and Kaleshwar came and started assaulting her husband with Lathi. Dukhu started pressing his neck. She was also assaulted on her ear by Dukhu and she became unconscious. When her husband became unconscious, the accused persons started chasing her son to commit assault upon him. Her son fled away and took shelter in the house of Lunmpai where the other witnesses saved him from assault.

In cross examination she has deposed that all of a sudden a quarrel started and her husband was killed. At the time of the incident, she was in the door of her house which is adjacent to the field. At the time of assault, the other persons had also assembled. All the four accused persons had indiscriminately assaulted her husband with Lathi and had also kicked him.

P.W. 3 Lunmpai Mian has stated that the incident is of 3-4 years back. He was sitting on his door steps, when he heard some commotion coming from the field of Dukhu and Ganesh Thakur. Dukhu had called his sons Kaleshwar and Fuleshwar as well as Khemanand who had come with a Lathi and there was a cry of alarm of someone being killed. He rushed towards the

place of occurrence and halted besides a palm tree. Ganesh was seen lying on the ground and his sister had covered the head of Ganesh with a cloth. The son of Ganesh, namely, Sikandar was chased and he came to his house and he asked Sikandar to flee away otherwise he would also be killed. Sikandar went inside his house and hid there. When all the four accused came to his house, he had already locked the door and somehow managed to persuade them to go away. After one and half hour, when normalcy returned he had personally taken Sikandar to his house and left him there. He had seen Ganesh lying on a cot who was thereafter taken to Borio and to Bhagalpur where he died.

In cross examination he has deposed that the field of Ganesh is near to his field, but since he has planted pigeon peas in his field, the field of Ganesh is not visible. Ganesh was lying about 10 yards from the palm tree. Sikandar had entered into his house on being chased and after 30 minutes, he had gone away. He had seen blood oozing out from the ear of Ganesh. He did not find any other injury on his body.

P.W. 4 Madhu Madaiya has stated that he was not present when the incident had taken place and he had come to know that there was an altercations between the Thakurs with respect to a land.

P.W. 5 Surya Devi is the sister of the deceased and the accused Dukhu Thakur. It was around 8 in the morning and it was the time for sowing potatoes and while she was cooking rice in her house, she heard some commotion at which she rushed out and saw her brother Ganesh having fallen on the ground. She had seen at the place of occurrence Dukhu, Fuleshwar, Kaleshwar, Khemanand, her sister-in-law and Sikandar. Sikandar was chased by the accused persons in her presence, but Sikandar managed to flee away. Her sister-in-law disclosed that it was the accused persons who had committed the assault. Her brother was taken to the house and then to Borio. From Borio he was taken to Bhagalpur where he died.

In cross examination she has deposed that she had not seen the assault. Dukhu was standing near the place where Ganesh had fallen down. Sikandar had reached home after 1-1 ½ hours.

P.W. 6 Dr. Kailash Jha was posted as a Tutor in Forensic Department, Jawaharlal Nehru Medical College, Bhagalpur and on 15.01.1986, he had conducted autopsy on the dead body of Ganesh Thakur and had found the following injuries:

1. *Bruise with swelling on left side head behind ear vertically size 2 ½" x 1 ½".*
2. *Bruise 1" x ½".*

On dissection of head blood under scalp, depressed fracture on left temporal bone 2 ½ "x ½ ", supradural hinatoma, 4"x 3 ½ " at left hemispheres of brain. Sub dural hematoma 2"x 1" x ¼ "on left hemisphere.

All the injuries were antemortem for which weapon used was hard and blunt substance like Lathi. The cause of death was opined to be due to intra cranial haemorrhage. He has proved the postmortem report which has been marked as Ext. 2.

P.W. 7 Srimant Yadav had registered the First Information Report. He had issued the necessary requisition for sending the injured to the local hospital at Boria. Seeing the critical condition of the injured the Doctor had referred him to Bhagalpur. He had prepared the inquest report. Since the deceased remained unconscious prior to his death, he could not record his statement. After recording the restatement of the informant, he had inspected the place of occurrence, which is at Village Rakso in the field situated on the western side adjoining the house of the deceased. In the northern side from the place of occurrence, the field of Dukhu Thakur is located where mustard was planted. On completion of investigation, he had submitted charge sheet. A fardbeyan had also come from Bhagalpur. He has proved the First Information Report which is in his handwriting and bears his signature which has been marked as Ext. 3.

In cross examination he has deposed that Sikandar had never stated before him that Dukhu had made an attempt to assault his father with Kudal which was stopped by his father. He had not mentioned in the diary that Dukhu had asked his sons to come. He had also not mentioned about the presence of Naresh who was instigating the assailants. He had also not stated

that he was chased by the accused persons. Bhagia had not stated that when her husband fell down on the ground Dukhu had pressed his neck and had also kicked him. She had also not stated about being assaulted near her ear and she had fallen down. Bhagia had not disclosed that her son Sikandar fled while he was being chased by the accused persons. P.W. 3 has stated before him that he had rushed to the place of occurrence to pacify the situation.

P.W. 8 Mithilesh Sharma has proved the inquest report which has been marked as Ext. 4. He has also proved the fardbeyan which has been marked as Ext. 5.

5. The statements of the appellants were recorded under Section 313 Cr.P.C. in which they have denied their complicity in the incident.

6. It has been submitted by Mr. Rajeeva Sharma, learned senior counsel for the appellants that there are no eye witnesses to the occurrence of assault and the appellants have been implicated on the basis of previous enmity. It has been submitted that the witnesses have developed their case during trial as according to the Investigating Officer (PW-7) no such statements were made to him during investigation.

7. Mr. Saket Kumar, learned APP has submitted that PW-1, PW-2 and PW-3 are the eye witnesses to the occurrence and they have vividly described the manner of assault committed by the appellant upon the deceased.

8. We have heard the submissions of the learned counsel for the respective sides and have also perused the trial court records.

9. A trivial incident of cutting earth from the field of Ganesh Thakur by Dukhu Thakur led to a cascading effect of commission of assault upon Ganesh Thakur who ultimately succumbed to his injuries in a hospital at Bhagalpur. The evidence of PW-1, PW-2 and PW-3 being the eye witnesses to the incident have cemented the case of the prosecution against the appellants. On a quarrel having ensued between the brothers whose agricultural fields are situated adjacent to each other escalated to use of abusive language by Dukhu Thakur and on his calling, his sons Fuleshwar, Kaleshwar and Khemanand had arrived with Lathis and committed assaulted upon Ganesh Thakur, resulting in his death. The defence has failed to elicit any notable

contradictions in the evidence of PW-1, PW-2 and PW-3. Though these witnesses have not disclosed certain aspects of the case before the Investigating Officer, but on an overall conspectus of the evidence it can be concluded that all the appellants in furtherance of a common intention had committed the assault. However, at the same time, the other notable features which can be culled out from the evidence of PW-1, PW-2 and PW-3 is that there was no premeditated design to commit the murder of Ganesh Thakur and therefore exception 3 to Section 300 I.P.C. will come into play. Why we say so is because of the sudden quarrel taking place between the brothers and in the heat of passion the consequent assault committed upon him with Lathis, a common instrument kept by the villagers. This finding of ours gains credence from the postmortem report which reveals that a fatal blow was given on the head of Ganesh Thakur which led to his death. Though no witnesses have stated otherwise, but it would be apparent from the postmortem report that there was no repeated blows from the appellants. As per the evidence of PW-1, the fatal blow upon his father was given by the appellant Kaleshwar Thakur. Although the other appellants were present, but it appears that they had not rained Lathi blows upon Ganesh Thakur though an intention to commit bodily harm cannot be ruled out. Having, a common intention can be premeditated or it can develop at the spur of the moment. In the present case consequent to the quarrel having ensued between Dukhu Thakur and Ganesh Thakur, Dukhu Thakur being enraged called out his sons who were nearby and who came and Kaleshwar Thakur gave a fatal blow upon Ganesh Thakur. Even PW-2 who is the wife of the deceased has in her own cross examination accepted the fact that the incident had occurred at the spur of the moment.

10. In the backdrop of such fact situation the learned trial court committed an error in convicting the appellant for the offence punishable u/s 302 I.P.C. We, therefore, modify the conviction of the appellants to one u/s 304 Part II I.P.C. The incident is of almost four decades back. All the appellants have remained in custody for some time. In view of the aforesaid, we hereby modify the sentence to the period undergone by each of the appellants. We,

therefore, dismiss this appeal modifying the conviction and the consequent sentence imposed upon the appellants.

This appeal is disposed of.

(RONGON MUKHOPADHYAY,J.)

(NAVNEET KUMAR, J.)

Jharkhand High Court, Ranchi
Dated the 13th August, 2024
MK/N.A.F.R.