

(2006) 01 P&amp;H CK 0212

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Criminal Appeal No. 205-DB of 2000 (O and M)

Makhan Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision:** Jan. 30, 2006**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 120B, 302

**Citation:** (2006) 2 RCR(Criminal) 420**Hon'ble Judges:** Baldev Singh, J; Amar Dutt, J**Bench:** Division Bench**Advocate:** Kamalpreet, for the Appellant; Jayender S. Chandail, Assistant Advocate General, for the Respondent**Final Decision:** Allowed

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**Judgement**

Amar Dutt, J.

Makhan Singh and his brother Karnail Singh were tried u/s 302/120-B of the Indian Penal Code by the Additional Sessions Judge, Gurdaspur for having committed the murder of Amanprit on 11.8.1998. While Makhan Singh was convicted u/s 302 of the Indian Penal Code, Karnail Singh was convicted u/s 120-B of the Indian Penal Code and both of them were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- each. In default of payment of fine each of them was ordered to undergo further rigorous imprisonment for one year. Makhan Singh had filed Crl.A. No. 205-DB of 2000 and Karnail Singh had filed Crl.A. No. 206-DB of 2000 to challenge the conviction and sentence imposed upon them. Through the present judgment, we propose to dispose of both the appeals.

2. Briefly stated, the facts of the prosecution case as brought out in the testimony of its witnesses are that Fauja Singh son of Mit Singh resident of village Phulke has three sons, Makhan Singh (appellant) was the eldest, Karnail Singh (appellant) was younger to him and the third youngest was Ajaib Singh (the complainant). All the

three brothers reside in village Phulke and have a common tube well. While Karnail Singh was unmarried, Ajaib Singh had four daughters and one son, named, Amanprit, whose age on the date of occurrence was five years and six months.

3. On 11.8.1998, at about 7.30 a.m. Ajaib Singh accompanied by his wife Kashmir Kaur went to the tube well for bringing fodder for the cattle. The couple was followed by Amanprit and their daughter Rajbir. At that time, Makhan Singh was irrigating the paddy field from the tube well. Makhan Singh first unsuccessfully tried to kill Rajbir with a Kassi, who ran towards her parents to apprise them of this attempt and the fact that Makhan Singh had after failing in his attempt gone behind Amanprit to kill him. Ajaib Singh and Kashmir Kaur got up and saw Makhan Singh giving 3 to 4 Kassi blows on the head of Amanprit, who was standing near the Tahli tree on the ridge of the paddy field and as a consequence of those blows Amanprit fell down. Ajaib Singh and his wife started raising roush "MAR DITTA MAR DITTA" and on reaching the spot where Amanprit had been attacked they found him lying dead. In their presence Makhan Singh along with Kassi ran away from the spot towards village Rangeelpur. According to Ajaib Singh, at whose instance the first information report was lodged in Police Station Rangar Nangal, Batala at about 10.15 a.m. by SI Natha Singh PW4, the motive for the murder was that Makhan Singh wanted to grab the land belonging to Ajaib Singh and Karnail Singh.

4. After leaving Kashmir Kaur near the dead body to guard the same, Ajaib Singh had gone to the Police Station in the company of Tarsem Singh Sarpanch to lodge the first information report. The special report in relation whereunto reached the Ilaka Magistrate at Batala at 12.45 p.m.

5. On completion of the FIR, SI Natha Singh along with other police officials accompanied Ajaib Singh to village Phulke where he inspected the spot where the dead body of Amanprit was lying. He found Dalbir Singh and Kashmir Kaur present near the dead body; prepared inquest report Ex.PB in the presence of Ajaib Singh and Dalbir Singh as also the injury statement Ex.PC and thereafter forwarded the dead body along with request Ex.PD for getting the post mortem conducted thereon. He also lifted blood stained earth from the spot and made it into a sealed parcel and took the same into possession through recovery memo Ex.PE. He also prepared rough site plan Ex.PF of the place of occurrence. He searched unsuccessfully for the accused. On 12.8.1998, Makhan Singh was arrested. He was interrogated on 13.8.1998 and made a disclosure statement in pursuance whereunto he got recovered Kassi Ex.P1 from the field of Chari, which was taken into possession through recovery memo Ex.PH. He prepared rough site plan Ex.PJ showing the place from where the Kassi was recovered. On 5.9.1998, he recorded the supplementary statement of the complainant and on 6.9.1998, he arrested Karnail Singh. On completion of the investigation, a challan was put in Court against the two brothers.

6. On going through the papers sent up with the challan, the Ilaqa Magistrate committed the case to the Court of Sessions when he found that the offences disclosed were exclusively triable by the Court of Sessions.

7. On going through the papers, the learned trial Court framed charges under Sections 302 and 120-B of the Indian Penal Code against the accused and as both of them pleaded not guilty, the prosecution was called upon to lead evidence in support of its case.

8. In order to bring home the charge against the appellants, the prosecution examined Ajaib Singh PW1, Kashmir Kaur PW2, Sowinder Singh PW3, SI Natha Singh PW4, HC Surjan Singh PW5, Joginder Singh PW6, Dr. Sukhdip Singh PW7, LC Anand Singh PW8, Constable Ranjit Singh PW9 and Constable Gurdial Singh PW10.

9. When examined u/s 313 of the Code of Criminal Procedure both the appellants denied all the allegations and pleaded false implication. They, however, chose not to lead any evidence in defence.

After hearing arguments, the trial Court convicted and sentenced both the appellants as indicated hereinbefore.

10. We have heard Ms. Kamalpreet, Advocate, appearing on behalf of the appellants and Mr. Jayender S. Chandail, Assistant Advocate General, Punjab, appearing on behalf of the State.

11. On behalf of appellant Makhan Singh, it had been submitted by Ms. Kamalpreet that on 29.1.1999, the Superintendent, Central Jail, Gurdaspur had sent the following information to the Additional Sessions Judge, Gurdaspur, about the mental condition of the appellant :-

From

Superintendent,

Central Jail, Gurdaspur

To

The Inspector General Jail Department,

Punjab, Chandigarh.

No.\_\_\_\_\_ Dated\_\_\_\_\_

Subject : Regarding giving formal approval for transferring undertrial Makhan Singh son of Fauja Singh to Central Jail, Amritsar, for his treatment at Guru Nanak Dev Hospital, Amritsar.

12. You are hereby requested on the subject noted above that the under trial mentioned in the subject was admitted as an undertrial in this jail on 8.9.98 in case

F.I.R. No. 73 dated 11.8.98 under Sections 302/34/120-B I.P.C. Police Station Rangar Nangal. On 18.1.99 as he was ill, therefore, he was taken to Civil Hospital, Gurdaspur for treatment on the advise of the Jail Medical Officer. From there he was referred by the doctor to Psychiatric Department, Amritsar. Therefore, the undertrial has been transferred to Central Jail, Amritsar for treatment. By enclosing the refer slip of the Civil Hospital, Gurdaspur, you are requested that formal approval for transferring the undertrial to Central Jail, Amritsar on medical grounds be accorded.

Encl : (1) Sd/- Superintendent

Central Jail, Gurdaspur

Endst. No. 498 dated 29.1.1999

A copy of the above is sent to Shri Mehar Singh Rattu, Additional Sessions Judge, Gurdaspur for information with a request that the next date of hearing of this under trial in your court is 9.2.99.

Sd/- Superintendent

Central Jail, Gurdaspur

13. Similarly, an application for bail on behalf of Karnail Singh was submitted by the undertrial in Jail on 31.3.1999, which was forwarded by the Sessions Judge, Gurdaspur, on which the following order was passed by the Additional Sessions Judge on 3.4.1999 :-

This application has been received by way of entrustment. It be registered. The main case is fixed for 12.4.1999. As such this application be put up on the said date for consideration.

On 12.4.1999, evidently no proceedings had taken place and the case was taken up on 16.4.1999 on which date the following order was passed :-

Case has been taken up today as 12.4.99 was a holiday. No PW is present nor the summons received back. Now the prosecution evidence be summoned for 31.5.99.

14. The trial Court thereafter proceeded with the trial without determining whether Makhan Singh was fit to face his trial and as it is not disputed by the State that even today Makhan Singh is lodged in Mental Hospital, Amritsar, his trial stands vitiated on account of the failure of the Additional Sessions Judge to comply with the provisions of Section 329 of the Code of Criminal Procedure. In relation to the appeal filed by Karnail Singh, it has been urged that the case against Karnail Singh is evidently built up only around the extra judicial confession which is alleged to have been made by Karnail Singh before Sowinder Singh and Roula Singh. A perusal of the evidence shows that the confession does not in any way indicate as to how in fact Amanprit was killed and in this view of the matter the mere assertion that Karnail Singh had got killed his nephew from his brother Makhan Singh would not

be sufficient to base the conviction against him.

15. On behalf of the State, no explanation is forthcoming qua the discrepancy pointed out in the trial of Makhan Singh. In relation to the role played by Karnail Singh, it was urged that there was no reason why the statement of Sowinder Singh should not be relied upon and, therefore, the conviction should be upheld and the appeal dismissed.

We have carefully considered the rival contentions and have perused the record.

16. A salient feature which cannot be lost sight in the present case is the circumstance that the appellants and the complainant happened to be the sons of Fauja Singh. It is also evident from the record that Ajaib Singh is the youngest and while Karnail Singh was married but has no child, there is no evidence on the record to show whether Makhan Singh had any child or not. The two brothers, who have been convicted are 71 and 70 years old and Ajaib Singh is 20 years younger to both of them. There is no evidence on record of any previous enmity and, therefore, one has to infer that there was no apparent motive for the complainant to falsely implicate either of the appellants. The main questions, which in these circumstances will arise for consideration by us would be :-

a) the effect of the failure of the trial Court to give a finding in terms of Section 329 of the Code of Criminal Procedure about the mental condition of Makhan Singh and

b) whether in the absence of any role having been attributed by Ajaib Singh to Karnail Singh in the FIR and the statement made by him in Court would it be safe to rely upon an extra judicial confession that is alleged to have been made by Karnail Singh before Sowinder Singh as also whether from the language in which it is couched any conspiracy can be inferred between the two brothers to kill Amanprit. With regard to Makhan Singh, we have the statements of Ajaib Singh PW1 and Kashmir Kaur PW2 but whether the trial stands vitiated on account of the failure of the trial Court to follow the procedure prescribed u/s 329 of the Code of Criminal Procedure after it had received information from the Superintendent, Central Jail, Gurdaspur regarding the mental condition of Makhan Singh. The record shows that no order was passed by the trial Court on the application. The medical record of Makhan Singh, which has been made available before us for perusal during the appeal shows that Makhan Singh had been referred to Mental Hospital, Amritsar for treatment and even after his conviction he had been given psychiatric treatment. It is on account of this situation that Ms. Kamalpreet Kaur appearing on behalf of Makhan Singh states that the conviction and sentence of Makhan Singh will have to be set aside and direction issued to the trial Court to conduct the trial afresh in accordance with law.

17. The learned counsel appearing on behalf of the State was unable to give us any solution which would enable us to alleviate some of the sufferings which had already been suffered by Makhan Singh as according to him if the submission of the

appellants" counsel is to be accepted then the trial would stand vitiated and Makhan Singh would have to face a re-trial once his mental capacity to face the same is certified by the medical experts after examining him.

18. In view of the submissions made above, we have no option but to accept the stand of the counsel for the parties, according to whom, the failure of the Additional Sessions Judge, Gurdaspur (trial Court) to carry out an enquiry as envisaged u/s 329 of the Code of Criminal Procedure before proceeding with the trial of Makhan Singh vitiates the trial and would require a de novo trial qua Makhan Singh appellant as has been held in [I.V. Shivaswamy Vs. State of Mysore](#) .

19. This necessarily raises the question of the validity of the trial in relation to Karnail Singh, who suffers from no mental disability. While there is no doubt that the Additional Sessions Judge, Gurdaspur had, at the time of framing of the charge, proceeded to try both the brothers jointly by framing a joint charge u/s 120-B of the Indian Penal Code, which reads as under :-

I, M.S. Rattu, Additional Sessions Judge, Gurdaspur hereby charge you Makhan Singh and Karnail Singh as follows :-

That you both on 11.8.1998 at about 7.30 A.M. in the area of village Phulke agreed to do an illegal act to wit committed the murder of Amanprit Singh which is an illegal act and that you Makhan Singh did an act to wit committed the murder of Amanprit Singh in pursuance of the said agreement and thereby you committed an offence punishable u/s 120-B of the Indian Penal Code and within my cognizance.

20. Once information regarding mental status of Makhan Singh was available on the file, the trial Court was obliged to get conducted an enquiry in terms of Section 329 of the Code of Criminal Procedure. This evidently was not done in the case and we have already come to the conclusion that the trial qua Makhan Singh suffers from incurable defect which can be rectified only by directing a de novo trial. Even though it may in law have been possible for the trial Court to try the charge against Karnail Singh separately, since this has not been done, we do not deem it appropriate in appeal to de-link the case of Karnail Singh. The conviction and sentence of both the brothers have, consequently, to be set aside and the trial Court directed to proceed with the trial in accordance with law. In the event of an application being moved u/s 330 of the Code of Criminal Procedure, the trial Court will pass appropriate orders regarding custody of Makhan Singh. Taking into consideration the fact that Karnail Singh has already undergone more than seven years incarceration, we deem it appropriate to direct the trial Court to admit him on bail on his furnishing bail bonds to its satisfaction.

21. We further direct that the trial Court will take immediate steps to proceed with the trial of the case in accordance with law.

22. For the reasons recorded above, both the appeals are accepted, conviction and sentence recorded against the appellants are set aside and the case remanded back for de novo trial.