

**(2007) 11 P&H CK 0166**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** 377-DB of 2003

Mani Ram and Another

APPELLANT

Vs

The State of Haryana

RESPONDENT

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**Date of Decision:** Nov. 21, 2007

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34, 377

**Hon'ble Judges:** Mehtab S. Gill, J; Harbans Lal, J

**Bench:** Division Bench

**Advocate:** H.S. Jaswal, for the Appellant; S.S. Randhawa, Additional Advocate General, Haryana, for the Respondent

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**Judgement**

Harbans Lal, J.

This appeal has been directed against the judgment dated 4th February, 2003 and order of sentence dated 6th February, 2003 passed by the Court of learned Sessions Judge, Bhiwani vide which he convicted and sentenced the accused/Appellants Mani Ram and Rajender, to undergo imprisonment for life and to pay a fine of Rs. 2000/- or in its default to further undergo rigorous imprisonment for a period of six months each u/s 302 read with Section 34 of the Indian Penal Code and further convicted and sentenced to undergo rigorous imprisonment for a period of eight years and to pay a fine of Rs. 1000/- or in default thereof to further undergo rigorous imprisonment for a period of six months u/s 377 read with Section 34 of IPC each with a further direction that both the substantive sentences shall run concurrently.

2. Succinctly put, facts of the prosecution case are that on 19th August, 2000, Raghbir Singh son of Shibu Ram complainant resident of Village Sanwar made a statement before the Sub Inspector Partap Singh, SHO, Police Station Baund Kalan stating therein that he and his elder brothers, namely, Sarjit and Diwan were living

separately. He had two sons out of whom, eldest was Anil Kumar aged 15-16 (since deceased) and younger is Amit. Anil was studying in 10+2 class in Village Sanwar. On 18th August, 2000, at about 4.30 P.M., Anil left the house by telling his mother Chanderpati that he was going to Devi Mandir to pay obeisance but he did not return till 9.00/10.00 P.M. He (complainant) and his brother Diwan accompanied by many residents of the village searched for Anil here and there throughout the night but he could not be traced. On the next morning (19th August, 2000) he alongwith Jagrup son of Shishpal and Surender son of Ram Karan was searching near Devi Mandir and Kandalwala Johar (pond). They noticed dragging marks near the Kem and Kendu trees. They found that the dead body of Anil Kumar bearing strangulation marks of a rope besides other injuries on the eyes and ears was lying in between the two trees. He suspected that some unknown person had killed his son Anil Kumar by strangulating. He set out for reporting the matter to the police by leaving Jagrup and Surender near the dead body. On the way, he came across the abovementioned Sub Inspector, who recorded his statement, made his endorsement and sent the same to the Police Station, where on its basis formal was registered. The Sub Inspector went to the scene of crime, prepared the rough site plan, conducted the inquest proceedings, recovered one Danda and two Nirodh (condoms) from the spot, which were taken into possession. A purse containing a diary, one currency note in the denomination of Rs. 50/- and one photograph were recovered from the well. The place of occurrence was also got photographed. After observing usual formalities, the dead body was despatched for postmortem examination.

3. On 20th August, 2000, both the accused were arrested. Pursuant to his disclosure statement, accused Rajender got recovered a plastic rope Ex.P13. The accused Mani Ram pointed out the place of occurrence and the well into which he had thrown the purse. The accused Rajender also pointed out the place of occurrence and memo of demarcation was prepared. The site plan showing the place of occurrence was also drawn. Both the accused were got medico-legally examined. The Medical Officer handed over the underwear of accused Rajender and pyjama of accused Mani Ram to the Investigator, who took the same into possession after converting the same into a sealed parcel.

4. After completion of investigation, the charge-sheet was laid in the committing Court.

5. On commitment, the accused were charged u/s 302 read with Section 34 of the IPC to which they did not plead guilty and claimed trial.

6. In order to substantiate its allegations, the prosecution examined PW1 Constable Karan Singh, PW2 Amar Singh Patwari, PW3 Head Constable Amir Singh, PW4 Manbir Singh Photographer, PW5 Dr. Hira Lal Beniwal, PW6 Ramu, PW7 Pawan Kumar, PW8 Raghbir Singh complainant and PW9 Sub Inspector Partap Singh, the Investigating Officer and closed its evidence. When examined u/s 313 Cr.P.C., the

accused denied all the incriminating circumstances appearing in the prosecution evidence against them. The accused Mani Ram stated that he has been falsely implicated in this case due to friction in the village and that no disclosure statement was made by him nor anything was got recovered by him. His co-accused Rajender adopted the same plea. They offered to produce defence evidence. Without leading any defence, they closed their evidence.

7. After hearing the learned Public Prosecutor for the State assisted by Shri Bajender Singh, Advocate for the complainant as well as Mrs. Poonam Sangwan, Advocate as Amicus Curiae assisted by Sh. Sumit Sharma, Advocate, the learned trial Court convicted and sentenced both the accused as noticed at the outset.

8. Feeling aggrieved with the impugned judgment/order of sentence, both the accused have preferred the instant appeal.

9. We have heard Mr. H.S. Jaswal, Advocate, representing the Appellants as well as Mr. S.S. Randhawa, Additional Advocate General, Haryana besides, going through the evidence on record with due care and circumspection.

10. Mr. Jaswal, Advocate appearing for the Appellants/accused strenuously urged before us that as alleged by the prosecution, Rajender accused had suffered extra judicial confession before Pawan Kumar PW, which is impossible as they are closely related to each other. Further more, the alleged statement was made at the back of Mani Ram co-accused. He maintained that in re: Ved Parkash alias Bhagwan Dia v. State of Haryana, Rajesh @ Raju v. State of Haryana, Gurdial Singh v. State of Haryana, 2006 (3) RCR (Cri.) 992; the witnesses examined by the prosecution were closely related to the deceased, they were not believed and the accused were acquitted. He further contended that the observations made in this authority have direct bearing on the merit of this case.

11. To controvert this submission, Mr. Randhawa submitted that in view of the observations made in re: Gura Singh v. State of Rajasthan, 2001(1) RCR (Cri.) 122, the conviction can be recorded on the basis of an extra-judicial confession made before a close relation.

12. The next argument having been raised by Mr. Jaswal is that the testimony of Ramu PW6, who claims to have last seen the deceased in the company of the accused being uncorroborated and a neighbour of the complainant has been erroneously relied upon by the learned trial Court.

13. To controvert this submission, Mr. Randhawa contended that the evidence of Ramu PW6 cannot be excluded from consideration merely because of its having not been corroborated on the record.

14. We have given a deep and thoughtful consideration to the rival contentions. This case is based on the circumstantial evidence, consisting of motive, last seen and extra-judicial confession.

15. First of all, we come to the motive. Pawan Kumar PW7 has testified that the accused Rajender came to him on 18th August, 2000 around 8.00 P.M. and disclosed that he alongwith Mani Ram committed unnatural offence i.e. sodomy with deceased Anil Kumar son of Raghbir Singh and thereafter, he was done to death. It is on the basis of this very evidence that the prosecution has sought to establish that sodomy was the motive for the accused to commit this crime. Is there evidence of sterling character to demonstrate this fact? Undeniably the statement of Pawan Kumar PW7 finds no corroboration from any source on the record. As per the prosecution evidence, the underwear of Rajender accused and pyjama of Mani Ram accused were seized and sent to the Forensic Science Laboratory. As would be apparent from the Forensic Science Laboratory report Ex.PCC, two used Nirodh (condoms) alongwith its wrapper, pyjama and Kachha (underwear) were examined, but semen could not be detected on these exhibits. The deceased was in the age group of 15-16 years and studying in 10+2 class. As follows from the evidence of Dr. Hira Lal Beniwal PW5, Mani Ram accused was 33 years of age whereas Rajender was 18 years of age. Rajender accused is the nephew of the complainant Raghbir Singh. It implies that the deceased and this accused were the first cousins. In all human probabilities, Rajender could not be expected to sodomise with his first cousin. For a little while, if it is assumed that Rajender as well as Mani Ram accused were bent upon to indulge into such activity, it is beyond comprehension that they would have felt the necessity to make use of Nirodh (condoms). It is a matter of common knowledge that such contraceptives are often used while committing sexual-intercourse with a woman to avoid conception. If the Nirodh (condoms) allegedly recovered from the scene of crime were made use of by the accused, the same by all probabilities would have been holding the semen therein, though, as per report Ex.PCC semen was not detected therein. The evidence of Dr. Hira Lal Beniwal PW5 read in the following terms:

On 19.8.2000, at 3.00 PM, I conducted the postmortem of deceased Anil Kumar son of Raghbir Singh, Chamar by caste, r/o village Sanwar, aged 15 to 16 years male, dead body was brought by HCRam Avtar of PS Baund Kalan and dead body was brought from Kandalwala Johar, in the area of village Sanwar. The dead body was identified by Jagroop son of Sispal Chamar and Sunder son of Ram Karan both rs/o Sanwar. As per police reports, death was due to GALE MEIN RASSI BANDHKAR (by tying rope around neck.). The length of dead body was 5' 5". A ligature marks of 3 cms wide at some place and 2 cms at other places, transversely placed at upper part of neck. On deeper dissection, underlying tissues were white and glistening margins were echymosed. Extra- vassation of blood was present in various planes of tissues. Ligature mark was present around whole of neck. Tongue was caught in between teeth. Face was cyanosed. Conjunctiva was congested. Discharge of faecal was present. Rigor mortis was present on whole of body. Dead body wearing yellow T-shirt, blue pant and light yellow underwear. Injuries:

Red bruise of 3x3 cms on right eye brow. Multiple marks of various sizes of ant-bite was present at many places of body, which were postmortem in nature. Walls, ribs and cartilages, abdominal wall and organs of generation were healthy. Membranes, brain, pleurae, larynx and trachea, right & left lungs, peritoneum, liver spleen and kidneys were congested. Right side of heart was full of blood and left side was empty. Stomach was congested and contained fluid. Small intestines were congested & contained semidigested food material. Large intestine congested and was containing faecal matter. Urinary bladder was empty. In my opinion, the cause of death in this case was asphyxia due to strangulation. Strangulation was ante-mortem in nature and was sufficient to cause death in ordinary course of life. Handed over to police:

1. Well sutured dead body alongwith its belongings.
2. Copy of PMR No. HL/16/2000 dt.19.8.2000 and
3. Police papers duly signed by me, page No. 1 to 12. Probable time that elapsed between injuries and death was within 5 minutes and between death and postmortem, was within 36 hours. The carbon copy of PMR is Ex.PF. Police request is Ex.PG and the inquest report is Ex.PH. The skiagram of injuries is Ex.PJ. On police request Ex.PK, I gave my opinion Ex.PL. Police produced to me a double fold rope of NIWAR of about 5 feet long and a sealed parcel having four seals of Marka AR. I opened the parcel, which was having a wooden DANDA of about 3 feet long and I opined that strangulation to deceased Anil Kumar may be caused by this rope with the help of DANDA. Danda was re-sealed by me and handed over to the police.

(At this stage, rope Ex.P-13 has been shown to the witness. It is the same, which was shown to me by the police)

(At this stage, a sealed parcel bearing two seals of the doctor witness has been opened and it found to contain DANDA).

The DANDA Ex.P14 is the same which was shown to me by the police with request Ex.PK and I opined vide Ex.PL.

On 20.8.2000, at 6.30 PM, I medico-legally examined Mani Ram son of Banarsi, 33 years male, Chamar by caste, r/o Sanwar, brought by Partap Singh SHO PS Baund Kalan and in my opinion, there was nothing to suggest that person examined was incapable to perform the sexual intercourse. Copy of M.L.R. of Mani Ram accused is Ex.PS and police request in this regard is Ex.PS/1.

On the same day, at 7.00 PM, I also medicolegally examined Rajender son of Sarjeet, 18 years male, Chamar by caste r/o Sanwar, brought by Partap Singh SHO PS Baund Kalan and in my opinion, there was nothing to suggest that person examined was incapable to perform the act of sexual intercourse. Copy of M.L.R. of Rajender is Ex.PT and police request in this regard is Ex.PT/1.

16. Obviously, this doctor has nowhere stated that signs/marks of sodomy were observed on the anus of the deceased. If it is assumed that such act was committed with the aid of alleged condoms nonetheless some marks of enetration might have appeared in the canal. Some redness might have also appeared here and there around the anus. The absence of such marks or effect improbabilises the theory of user of condoms. After removal of the condoms, some semen might have trickled from the penis, which might have come in touch with the corresponding front portion of the kachha of Rajender accused and pyjama of his co-accused Mani Ram and as its consequence stains of semen might have been detected on these clothes. The deceased might have also sustained some marks on the nose if he was sodomised by making him to lie forcibly on the ground with his face downward. There being no cogent evidence, it is very difficult to accept the theory of the prosecution that the deceased was sodomised. Paragraph 23 of the inquest report Ex.PH pertains to the articles found near the dead body. This column has been left blank. Paragraph 22 relates to the articles actually found on the dead body. Against this column, the words nothing near the dead body have been mentioned. In note No. 2 of marks in this report, it has been mentioned that Mark B indicates the place where Nirodh are found. The distance between this place and the place at which the dead body was lying has not been indicated. Sequelly, there can be no escape from the finding that the prosecution has utterly failed to establish the motive.

17. Coming to the last seen evidence, Ramu PW6 has deposed that last year in the Month of Bhadon, I was coming from my fields at around 7.00 PM and saw that three persons were going towards the side of temple; that they were Anil, Mani Ram son of Banarai and Rajender son of Sarjeet; that Anil was wearing blue coloured pant whereas Mani Ram and Rajender were wearing Kameez-pyjama. According to this witness, he had last seen the deceased in the company of the accused at 7.00 PM on 18th August, 2000. According to Dr. Hira Lal Beniwal PW5, he conducted the postmortem of the deceased Anil on 19th August, 2000 at 3.00 PM and that probable time that elapsed between the injuries was within five minutes and postmortem was within 36 hours. This witness has stated in his cross examination that I left for village from my fields at around 6.30 PM and that many persons met me on the way being a thoroughfare and that I cannot tell the name of those persons and what types of clothes they were putting on. Obviously, he regretted his inability to tell the names of the persons who had met him in the way or the types of clothes they were wearing. He has deposed that in the morning on 19th August, 2000, I came to know about the murder of Anil Kumar son of Raghbir Singh; that he came to know about the death of Anil Kumar at about 9 AM and by that time, police had arrived in the village; that on 19th August, 2000, at about 7 PM I was summoned by Raghbir Singh and thereafter my statement was recorded by the police. It implies that he divulged the fact of last seen after about 24 hours. He has not assigned any reason for non-disclosure of this fact to Raghbir Singh when they were searching for the deceased. He has stated that on the morning of 18th August, again said 19th I

disclosed to 4-5 persons that I saw the accused persons and they might be involved in the occurrence. In his next breath, he has deposed that, however, I cannot tell the names of those persons to whom I had disclosed the aforementioned fact. Curiously enough that he has faltered to disclose the names of those 4-5 persons whom he had allegedly disclosed the factum of last seen. If it is believed that he had last seen, the deceased in the company of the accused, his testimony is not corroborated by any other evidence. As per PW Ramus evidence, the deceased and the accused were last seen together at 7 PM on 18th August, 2000 whereas the dead body was recovered on 19th August, 2000 at about 11.30 AM as mentioned in the inquest report. Apparently, there is a very long gap between the two.

18. In re: State of Goa v. Sanjay Thakran and another, Subhash Chandra Nanda v. Sanjay Thakran and Anr. 2007 (2) RCR (Cri.) 458, the Hon"ble Supreme Court has observed that hence, there has been a considerable time gap of approximately 8-1/2 hours when D-2 was last seen alive with the accused couple. There being a considerable time gap between the persons seen together and the proximate time of crime, the circumstance of last seen together, even if proved, cannot clinchingly fasten the guilt on the accused. It has also been observed that the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out.

19. If the facts of the case in hand are looked in the background of the above-extracted observations, the theory of last seen collapses like a house of cards. The combined reading of medical evidence and the last seen evidence indicate a gap of considerable long duration which corrodes the deposition of Ramu PW.

20. We shall now weigh the extra-judicial confession allegedly made by the accused Rajender before Pawan Kumar PW7, in the absence of his co-accused Mani Ram. He is not holding any office. He is the nephew of the complainant. The cross-examination of this witness is very much relevant for determining the point under consideration. So, it is hereby reproduced in verbatim as under:

Raghbir complainant is my uncle. When Rajender accused came to me, I was alone in my house. Since I did not believe Rajender, therefore, I did not disclose the name to Raghbir nor enquired from him about Anil. When I returned from Dadri at around 8.00 P.M., my family members were searching for Anil. I got up in the morning at 6.30 or 7.00 AM. Thereafter, I also started searching for Anil. When I started search for Anil, at that time, Rajender accused was also searching alongwith my uncle Dewan. Vikram was with me at the time of search. In the morning, I had gone to the house of Anil, but none was found in the house. Since I did not believe the version of Rajender, therefore, I did not feel it necessary to disclose it to the family of Raghbir

or other family members. Moreover, accused Rajender was assisting in search of Anil. Before I got up in the morning, our family members had already gone to the place near the temple. All the villagers were running towards the temple side, therefore, I came to know that dead body of Anil was lying near the temple. I reached the place of occurrence around 9.00 a.m. My statement was recorded by the police around 1.30 PM on 19.8.2K. Before recording my statement by the police, I had not disclosed to anyone what Rajender accused had stated to me. I had stated to the police that Rajender accused came to me at 8.00 PM on 18.8.2K (confronted with his statement Ex.DA where the time is given as 9.00 or 10.00 P.M.). It is wrong to suggest that Rajender had not come to me on 18.8.2K and had not stated anything about this case to me or that I am deposing falsely at the instance of complainant Raghbir Singh, who is my uncle.

21. It is quite plain and patent from his above-extracted cross-examination that he as well as the members of his family continued searching for the deceased Anil Kumar. The explanation furnished by him for withholding the factum of extra-judicial confession from the complainant Raghbir Singh, is that he did not believe Raghbir Singh, which does not stand to the logic. If Rajender accused had verily suffered the alleged extra-judicial confession before this witness, he would have been the last person being the nephew of the complainant to keep it a guarded secret from his uncle. Obviously, he made a statement before the police at 1.30 PM on 19th August, 2000, though, he had reached the place of occurrence around 9.00 AM. He has not given any reason for not disclosing this fact to investigator with promptitude. As per the inquest report, the dead body was recovered on 11.30 AM by the police. He has not assigned any reason worthy of credence for withholding this fact for such a long time. In such a sorry state of affairs it would be undesirable to place reliance upon his uncorroborated statement.

22. In re: Gagan Kanojia and Anr. v. State of Punjab, 2007 (1) RCR (Cri.) 222; it has been held by the Apex court that by way of abundant caution, however, the Court may look for some corroboration of extra-judicial confession. In the instant case, extra-judicial confession is too far-fetched to believe. A fortiori, the same being uncorroborated, it would be too risky to rely upon it.

23. As ruled in re: Gagan Kanojia and Anr. (supra) when the case is based on circumstantial evidence, the court is to appreciate the circumstantial evidence in the following terms:

(1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

(2) Circumstantial evidence can be reasonably made the basis of an accused persons conviction if it is of such character that it is wholly inconsistent



with the innocence of the accused and is consistent only with his guilt.

(3) There should be no missing links but it is not that everyone of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

(4) On the availability of two inferences, the one in favour of the accused must be accepted.

(5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be-Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.

24. In the final analysis, it is discernible that all links in the chain are incomplete and circumstantial evidence led by the prosecution do not point out only to one conclusion, that is, the guilt of the Appellants herein. Sequelly, the instant appeal is hereby accepted and the impugned judgment is set aside, acquitting both the accused of all the charges framed and are directed to be set on liberty forthwith, if not required in any other case. Fine, if any, deposited by them be refunded. Bail bonds furnished by them stand discharged.