

1. Criminal Appeal No. 1747 of 2007
Shafiq ... Appellant
Versus
State of UP ... Respondent

2. Reference No. 9 of 2007

Hon'ble Yatindra Singh, J

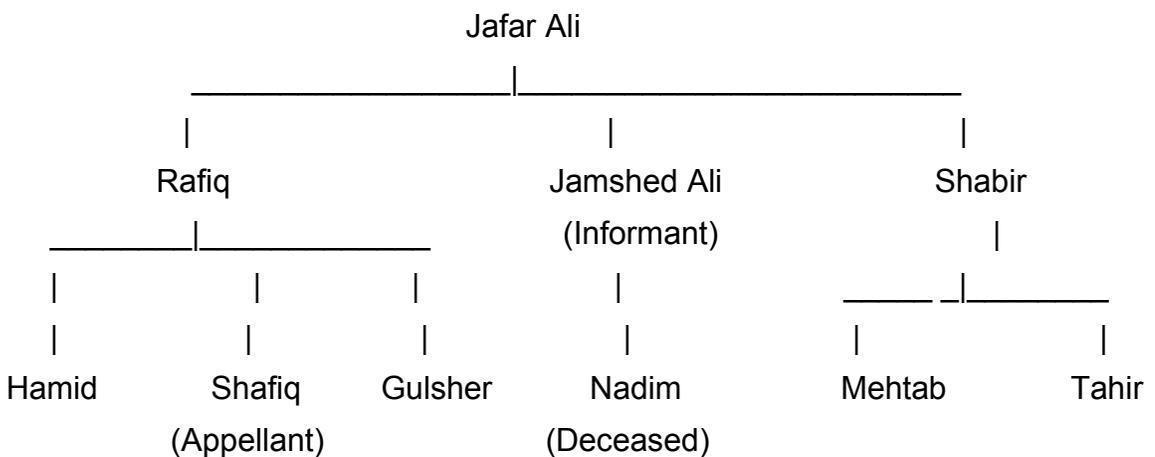
Hon'ble Surendra Singh, J

(Delivered by Hon'ble Yatindra Singh, J)

1. In today's World, Sigmund Freud's theories may be questioned but his redefinition of sexual desire as the primary motivational energy of human life is not totally off the point. Yet, sex education is a debatable issue. Nevertheless, this appeal reminds a need of minimal sex education/ awareness alongwith right moral values (संस्कार): may be at school/ college level; or by the family at home.

THE FACTS

2. The parties involved in the case are related to each other. The relevant pedigree is mentioned below:



3. Nadim (the Deceased) was son of Jamshed Ali (the Informant). He was aged about 11 years at the time of the incident. In the evening of 16th July 2004, at about 16:00 hours, he went on a cycle to the tubewell at his father's fields but never came back.

4. The father of the Deceased, the Informant, had gone out in the evening and when he came back in the night, he alongwith family members (some were already

out searching) searched for the Deceased. His cycle was found next to the pole, near the transformer of the tubewell but his dead body was not found. His dead body was found the next day at 8:00 hours in the fields of his uncle Rafiq. It was lying in pool of blood along with three blood stained guavas, and leaves of mango as well as of sugercane.

5. The Informant lodged an FIR at 9:25am on 17.7.2004. It was registered as case crime no. 69 of 2004, under section 302, 201 IPC, Police Station Titaro, District-Saharanpur. No one was named as an accused in the FIR.

6. It is said that a Panchayat was held on 18th July 2004 at about 8:00am. In this Panchayat, Shafiq (the Appellant), a cousin of the Deceased, allegedly confessed to sodomy on the Deceased and then murdering him when he (the Deceased) insisted on complaining about the sodomy to the family members.

7. The police arrested the Appellant at about 13:10 hours on 20th July 2004. At 14:40 hours on the same day, the *daranti* with which the crime was supposed to have been committed and the clothes of the Appellant, alleged to be worn by him at the time of the incident, were recovered at his pointing.

8. The police submitted the charge-sheet and the case was committed to the Session's court. It was registered as ST No. 443 of 2004.

9. The Additional Session Judge, Court No.-5, Saharanpur (the ASJ) framed charge on 17.11.2004. The Appellant was charged under sections 377, 302, and 201 IPC.

10. Among others, the prosecution has filed the following documents:

Copy of report dated 17.7.2004 (Ex Ka-1);

Post mortem report of Nadim dated 17.7.2004 (Ex Ka-2);

Recovery memo of *daranti*, shirt, pant, and *baniyan* dated 20.7.2004 (Ex Ka-3);

FIR dated 17.7.2004 (Ex Ka-4);
Copy of GD (Ex Ka-5);
Copy of GD (Ex Ka-6);
Photocopy of GD (Ex Ka-7);
The Carbon Copy of GD (Ex Ka-8);
The Carbon copy of Report no.17 (Ex Ka-9);
Inquest of dead body of Deceased (Ex Ka-10);
Chalan lash (Ex Ka-11);
Photo lash (Ex Ka-12);
Letter to RI (Ex Ka-13);
Letter to CMO (Ex Ka-14);
Site plan with the index of the spot where dead body was found (Ex Ka-15);
Recovery memo of blood stained and plain earth dated 17.7.2004 (Ex Ka-16);
Photo copy of the report (Ex Ka-17);
Copy of GD (Ex Ka-18);
Copy of GD No. 18 (arrest of accused) (Ex Ka-19);
Site plan with the index of the place from where *daranti*, and clothes of the Appellant were recovered (Ex Ka-20).
Charge- Sheet (Ex Ka-21);
Report of Forensic Science Laboratory (Vidhi Vigyan Prayogshala), Lucknow dated 26.4.2005 (Ex Ka-22);
Injury report of Shafiq dated 21.7.2004 (Ex Ka-23). This exhibit was marked by us by order dated 21.5.2010 in the order sheet at the time of reserving the judgement.

11. The prosecution examined the following witnesses:

Jamshed Ali (PW-1): Informant, deposed about extra judicial confession at the Panchayat;

Mazahir (PW-2): Independent witness, deposed about extra judicial

confession at the Panchayat;

Dr. CM Taneja (PW-3): Doctor, conducted the post mortem;

Adesh Kumar (PW-4): Independent witness, deposed that the Deceased as well as Appellant went in the same direction before the incident;

Ravindra Kumar (PW-5): Constable, carried the dead body for post mortem;

Zahid (PW-6): Witness of recovery;

Bhoop Singh (PW-7): Constable clerk, prepared the chik;

Rajendra (PW-8): Investigating Officer (the IO).

12. The statement of the Appellant under section 313 CrPC was recorded on 13.10.2006. He denied his involvement in the incident.

13. The ASJ by his judgement dated 14.2.2007 convicted the Appellant and awarded the following sentence to him on 19.2.2007:

Death penalty and a fine of Rs.20,000/- under section 302 IPC;

Seven years rigorous imprisonment and a fine of Rs.5000/- under section 377 IPC;

Five years rigorous imprisonment and a fine of Rs.5000/- under section 201 IPC.

The sentences were to run concurrently. The court also directed that in absence of not depositing the fine, the Appellant was to undergo six months rigorous imprisonment (RI).

14. The ASJ sent reference no. 9 of 2007 under section 366 CrPC for confirmation of the death penalty. The Appellant has also filed an appeal numbered as Criminal Appeal No. 1747 of 2007.

POINTS FOR DETERMINATION

15. We have heard Sri VP Srivastava, Sri Asfaq Ahmad Ansari, counsel for the Appellant; Sri DR Chaudhari GA, Sri Arunendra Kumar Singh and Sri Anand Tiwari, AGA for the State; and Sri Bagish Pandey holding brief of Vikrant Pandey,

counsel for the complainant.¹

16. The following points arise for determination in the case:

- (i) What is the law relating to circumstantial evidence? What are the circumstances against the Appellant?
- (ii) Whether the extra judicial confession is voluntary;
- (iii) Whether the recovery of *daranti* and the clothes of the appellant was under compulsion and due to the police torture.
- (iv) Whether the circumstances against the Appellant are proved?
- (v) Whether the Appellant is guilty;
- (vi) In case the Appellant is guilty, then what punishment should be awarded.

1st POINT: THE CIRCUMSTANCES AGAINST THE APPELLANT

17. No one saw the incident. The case is based on circumstantial evidence and the extra judicial confession. The law—when a case can be said to be proved against an accused on circumstantial evidence—has been established in different decisions (see below for citations)². It is as follows:

- (i) The circumstances from which the conclusion of guilt is to be drawn should or must be established.
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) They should exclude every possible hypothesis except the one to be proved, and

There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been perpetrated by the

1 We are thankful to the counsel appearing in the case for looking into a part of the judgement under the heading (THE FACTS and POINTS FOR DETERMINATION), Appendix, and the injuries mentioned in the judgement. Yet, if there are any mistakes, they are ours.

2 The cases are: KT Palanisamy v. State of Tamil Nadu: AIR 2008 SC 1095, Arun Bhanudas Pawar Vs State of UP: 2008 (61) ACC 32, Sharad Birdhichad Sarada v. State of Maharashtra (SC): AIR 1984 SC 1662, Shivaji Sahabrao Bobade Vs State of Maharashtra: AIR 1973 SC 2622, Hanumant Vs State of MP: AIR 1953 SC 129.

accused.

18. The counsel for the State pointed out the following circumstances against the Appellant. According to him, they prove the guilt of the Appellant beyond reasonable doubt:

- (i) The Appellant and the Deceased were well known to each other;
- (ii) The Appellant was seen going in the same direction as the Deceased and then came back alone. The deceased was never seen thereafter;
- (iii) The recovery of the *daranti* (the weapon) and the blood stained clothes of the Appellant at his instance;
- (iv) Human blood found in the *daranti*, clothes, and semen found on the part of the Appellant;
- (v) The Extra Judicial Confession of the Appellant;
- (vi) Corroboration of Extra Judicial Confession by the circumstances.

19. Among the circumstances mentioned in the preceding paragraph, the counsel for the Appellant laid special emphasis on the extra judicial confession being involuntary (vth circumstance) and recovery being under compulsion (iiird circumstance). These circumstances are being dealt separately under the second and third point. The rest of the circumstances will be dealt while dealing the fourth point.

2nd POINT: EXTRA JUDICIAL CONFESSION—RELIABLE

20. The Informant (PW-1) and Mazahir (PW-2) deposed that:

- (i) A Panchayat was held on 18.7.2004 at about 8:00am. In this Panchayat, the father of the Appellant was also present. (PW-1 deposed that in the Panchayat, the father of the Appellant was also present. PW-2 deposed that Appellant was brought by his father);
- (ii) In the Panchayat, there were number of persons (according to PW-1 200 to 250 and according to PW-2 400 to 500 people).
- (iii) In the Panchayat the Appellant confessed that:

He committed the bad act (sodomy) (कुकर्म) on the Deceased. Thereafter the Deceased started weeping and said that he would complain to his father as well as to the father of the Appellant;

The Appellant asked the Deceased not to complain and when the Deceased insisted, he (the Appellant) cut his neck with *daranti* and killed him.

21. In a crowd, where many people are present, it is difficult to assess the number of people. This also happened in this case. In these circumstances, it is not such a contradiction so as to disbelieve their testimony.

22. The counsel for the Appellant cited the following rulings:

- (i) State of Rajshtan vs. RajaRam: (2003) 8 SCC 180 (the RajaRam Case);
- (ii) State of Haryana vs. Jagbir Singh: (2003) 11 SCC 261 (The Jagbir case);
- (iii) Jaswant Giri vs. State of Punjab: (2005) 12 SCC 438 (the Jaswant Case),

And submitted that:

The confession was obtained after torturing the Appellant;

It was not voluntary; and

It is irrelevant and cannot be relied upon.

23. If confession is secured by coercion or after torture then it is not voluntary and is irrelevant. No reliance can be placed upon the same. Before, we discuss whether the extra judicial confession was voluntary or not, it would be proper to refer to the rulings cited by the counsel for the Appellant.

Cases Cited by Appellant—Distinguishable

24. In all the cases cited by the counsel for the Appellant, it was held that the extra judicial confession should be voluntary and on the facts of those cases, it was not relied upon.

25. In the RajaRam case, the court held,

'The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence.'

26. In the RajaRam case, the extra-judicial confession was deposed by PW-3 and PW-4. On the facts of that case, the court held,

'It is improbable, as rightly held by the High Court that the accused would repose confidence in a person who is inimically disposed towards him, and confess his guilt. Similarly, PW-3 is a close relative of PW-4 and as records reveal, a person of doubtful antecedents being a history-sheeter. Though that alone cannot be a ground to discard his evidence, the totality of circumstances cast an indelible shadow of doubt on his evidence.'

27. In the Jagbir case, the extra judicial confession was ignored on the following ground,

'The second circumstance is the alleged extra-judicial confession before PW-10. The High Court has analysed the evidence in great detail. It is on record that the accused Jagbir was being taken to various places and at different points of time he was being pressurised to make a statement. Though the accused was claimed to have made the statement in the presence of a large number of persons, a combined reading of the evidence shows that nobody else speaks about the so-called extra-judicial confession, not even those who have been examined as PWs. Though PW-10 said that there were many persons who had heard it, no other person has stated about it. The statements of PWs 7 to 10 go to show that the accused was being interrogated by PWs and other villagers as well as his father and other relatives. Interrogation continued for about 3 days when allegedly Jagbir confessed his guilt. Though the first information report was lodged by PW-7 after knowing about the extra-judicial confession, there is no mention about this vital fact. In a given circumstances, omission to mention about the particular aspect may not render the prosecution version suspicious. But when circumstances in the present case are taken in their entirety the

alleged extra-judicial confession is not believable.'

28. In the Jaswant case, the extra-judicial confession was made before PW-9. The court disbelieved it for the following reasons,

'The first and foremost aspect which needs to be taken note of is that PW-9 is not a person who had intimate relations or friendship with the appellant. PW-9 says that he knew the appellant "to some extent" meaning thereby that he had only acquaintance with him ... There is no earthly reason why he should go to PW-9 and confide to him as to what he had done. According to PW-9, the appellant wanted to surrender himself to the police. But there is no explanation from PW-9 as to why he did not take him to the police station ... The alleged confession made by the appellant, as narrated by PW-9, is not in conformity with the prosecution case ... One more point to be noted is that the alleged statement of the appellant that the deceased was in a drunken condition cannot be correct as the doctor found no evidence of consumption of alcohol by the deceased.

Having regard to these features, we do not find assurance from all angles that the alleged confession attributed to the appellant by PW-9 is correct. It is not safe to base the conviction on the doubtful testimony of PW-9 who gave different versions before the police and the Court.'

29. These cases were decided on their facts. They have no application to this case except that the extra-judicial confession can be relied only if it is proved that it was voluntary.

Extra Judicial Confession—Voluntary

30. The counsel for the Appellant submitted:

The father forced the Appellant to admit his guilt;

The Appellant was beaten; and

The extra-judicial confession was not voluntary.

31. Mazahir (PW-2) deposed that the father of the Appellant had brought him in the

Panchayat. This does not mean that the Appellant was forced to admit his guilt by his father. There is neither any suggestion to any witness nor anything in cross-examination on these lines. There is no evidence for the same. In the circumstances, it is inconceivable that the father would force his son to make the extra judicial confession.

32. There is neither any evidence nor any suggestion that the Appellant was beaten or tortured before he confessed to the crime. The oral evidence of the Informant (PW-1) and Mazahir (PW-2) is that after the Appellant confessed to the crime, he was beaten by his brother and family members. This is natural.

33. The Appellant was elder cousin of the Deceased. He was aged about 19 years³ at the time of the incident and the Deceased was 11 years old, unaware about sex. The elder, instead of protecting his younger cousin, took undue advantage of the situation. Anyone would be incensed by the act. The fact that the Appellant was beaten in the Panchayat after his confession does not make the extra judicial confession involuntary.

34. The Informant, is the uncle of the Appellant. Mazahir (PW-2) is an independent witness. They are not on inimical terms with the Appellant or his family member. There is no reason why they would depose falsely. In our opinion,

Panchayat was held in which the Appellant confessed to his crime;

Extra judicial confession is proved;

It was made before persons, who have no reason to state falsely; and

It was truthful and voluntary.

But can a conviction be made on extra judicial confession?

35. There seems to be some debate;

Whether an extra judicial confession is a weak kind of evidence or not; and

Whether a conviction can be made on the basis of the same.

³ This age of the Appellant is estimated from the age given in the statement under section 313 CrPC.

Nonetheless, it is settled⁴ that a conviction can be made on the basis of an extra judicial confession, if,

It is voluntary; and

It is made to person who has no reason to depose falsely against the accused; and

It is corroborated by the other circumstance.

Whether the other circumstances corroborate the extra judicial confession or not will be seen while discussing the fourth point.

3rd POINT: RECOVERY VALID

36. The Appellant was arrested at 13:10 hours on 20.7.2004. Thereafter the *daranti*, and the clothes, which the Appellant was wearing at the time of the incident, were recovered at his instance (recovery memo Ex Ka-3).

37. The counsel for the Appellant submitted that the recovery was inadmissible as it was under compulsion and after police torture.

38. The site plan of the place of recovery is Ex Ka-20. This indicates that towards north of the *gher* of the father of the Appellant is the Informant's house and towards south of this *gher* is *gher* of Shabir uncle of Informant. The recovery was from the Almirah of the *baithak*, in the *gher* of the Appellant's father.

39. The counsel for the parties disagree on the proposition whether a recovery tainted by police torture is admissible or not. The counsel for the Appellant has cited the following decisions in support of his submission:

(i) NCT of Delhi vs. Navjot Sandhu alias Agsan Guru: 2005 (II) SCC 600 (paragraph 121 to 144);

(ii) Pulkuri Kottaya vs. King Emperor: 1947, CrLJ 533 (PC).

Whereas the counsel for the State relied upon State vs. NMT Joy Immaculate: 2004 (5) SCC 729 (paragraph 14 to 15.2). However, it is not necessary for us to

⁴ This discussion may be seen in Sivakumar vs State: (2006) 1 SCC 714 and Gagan Kanojia vs. State of Punjab: (2006) 12 SCC 516

decide this point, as in our opinion, there was neither torture by the police nor compulsion.

40. The Appellant had some injuries on his body. He was examined by the doctor on 21.7.2004 at 12:35 hours. His injuries are mentioned in the injury report (Ex Ka-23). They are as follows:

- (i) Contusion 10.00cm x 2.00 cm present on the back both side from the mid line in lower part 30.00 cm below from the inferior angle of left scapula. Colour is reddish.
- (ii) Multiple contusion present in an area 12.00 cm x 10.00 cm on the left hip region. Colour is reddish;
- (iii) Contusion 9.00cm x 2.00 cm present on the right hip region. Colour is reddish;
- (iv) Abrasion 1.5 cm x 0.5 cm present on the dorsal surface of index finger of left hand, 7.00 cm proximal from the tip of that finger. Scabbed. Colour is reddish;
- (v) Traumatic swelling 7.00 cm x 8.00 cm on the dorsal surface of left had, 9.00 cm proximal from the tip of middle finger of that hand. Margin of swelling are ill defined;
- (vi) Traumatic swelling 7.0 cm x 12.0 cm present in the dorsal surface of right hand, just distal from the right wrist joint, margin of swelling are ill defined.

The opinion of the doctor is also mentioned in the injury report. It records that the injuries number 1 to 6 were caused by hard and blunt object; they were simple in nature; and their duration was about 12 to 24 hours.

41. The prosecution has explained the injuries. The IO deposed that:

These injuries were on the body of the Appellant at the time of the arrest;

At that time, the Appellant informed that the injury no. (iv) was caused when he was using *daranti* and other injuries were caused when he was beaten in the Panchayat on 18.7.2004.

42. The counsel for the Appellant pointed out the opinion of the doctor mentioned

in the injury report and submitted:

That these injuries were said to be 12-24 hours old,

They could neither be caused on the date of the incident i.e. 16.7.2004 nor on 18.7.2004 when the Panchayat was held.

43. The Appellant was arrested on 20.7.2004 at 13:10 hours. The injuries were examined on 21.7.2004 at 12:35 hours. According to doctor, these injuries were 12-24 hours old. Twenty-four hours would give some time before the time of arrest. There is always some variation in the time given by the doctor. In any case it is merely an opinion of the doctor.

44. There is oral evidence on record to show that the Appellant was beaten in the Panchayat after he confessed to the crime. The incident is such that the Appellant could be beaten by his family members even after the Panchayat. There is nothing on the record to show that the Appellant was beaten by the police. In our opinion the injuries were not caused due to the police torture but because of beating at the Panchayat or by the family members.

45. The recovery was at the pointing of the Appellant; it was at his instance. It is not only mentioned in the recovery memo (Ex Ka-3) but is also deposed by the IO (PW-8) as well as Zahid (PW-6), a witness of the recovery.

46. The counsel for the Appellant submitted:

Zahid (PW-6) stated that *daranti* and clothes were in the almirah whereas the IO (PW-8) stated that *daranti* was on top of the almirah and clothes were on *algani*;

There is contradiction in their statements;

The recovery should be disbelieved.

47. *Algani* is something on which clothes can be hanged. In every almirah for keeping clothes there is provision to hang the clothes. The clothes may be hanging there. It cannot be said that there is any contradiction in their statements.

48. A thing that is on top of an almirah does not mean that it was in the open: it could be on the top shelf.

49. In our opinion, there is no contradiction. In any case it is immaterial and merely for this, the recovery cannot be ignored. The statement leading to recovery is admissible under section 27 of the Evidence Act.

**4th POINT: CIRCUMSTANCES PROVED—CORROBORATE
EXTRA JUDICIAL CONFESSION**

50. The circumstances against the Appellant have already been pointed out while discussing the first point. Let's consider whether they are proved and if they corroborate the extra-judicial confession.

(i) Appellant knew the Deceased

51. The Deceased had gone at 4:00pm on 16.7.2004 on a cycle to the tubewell which is situate in his father's agriculture field. His cycle was also found next to the pole close to the transformer. This transformer was close to the tubewell.

52. The Deceased and Appellant are first cousins. There is nothing on record that the relationship among the family members was strained. On the contrary, evidence suggests that the relationship was good. The Deceased would have no fear from the Appellant in the agricultural field. The first circumstance is proved.

(ii) Seen Going in the Same Direction

53. Adesh Kumar (PW-4) is an independent witness. He deposed that:

A year ago, he (PW-4) was having loose motions and had to go for latrine repeatedly. He took medicine but loose motions did not stop;

He had gone to the tubewell of the Informant. At that time, the Deceased had come on a cycle and had kept his cycle next to the pole close to the transformer and thereafter proceeded towards north;

After some time the Appellant also came and asked him whose cycle was

that and he informed him that this cycle was of the Deceased. The Appellant went in the same direction towards which the Deceased had gone;

He (PW-4) remained there for about half an hour. The Appellant came back alone and cleaned his hands. The Appellant's another brother Gulsher also came on the motor cycle. They cleaned their motor cycle;

The Deceased neither came back nor he (PW-4) ever saw the Deceased alive again.

54. The site plan, where the dead body was found is Ex Ka-15. Points no. 7 and 9 of its index indicate that the tubewell of the Informant and the guava trees were 150 yards and 50 paces respectively towards south of the place where dead body was found i.e. the dead body was found towards north of the tube well and in between two places, were the guava trees from where the guavas could be plucked.

55. The site plan (Ex Ka-15) supports the evidence of Adesh Kumar (PW-4) that the Deceased had gone towards north after keeping the cycle. Three blood stained guavas were also found on the spot (recovery memo Ex Ka-11). The site plan indicates that the guava trees were between the tubewell and the place where the dead body of the Deceased was found. The Deceased might have plucked guavas from the trees while passing by the guava trees.

56. There is neither any cross-examination nor any suggestion to Adesh Kumar (PW-4) that he was on inimical terms with the Appellant. There is no reason for him to depose falsely. In our opinion the second circumstance is also proved.

(iii) & (iv) Blood on *Daranti* and Clothes, Semen on the pant

57. The circumstance number (iii) is proved while discussing the third point. We need not discuss it further.

58. The counsel for the Appellant submitted:

(a) The injury no. 4 is scabbed. This is only possible if the blood comes out.

This injury was caused by police torture when the Appellant was arrested. The clothes of the Appellant got blood stained because of this;

- (b) The clothes that were sent alongwith were not the clothes that were recovered but the clothes that the Appellant was wearing at the time when the recovery was made;
- (c) The goods material were packed in a different packets yet they were sent in one packet and the blood from the clothes of the Deceased could have intermingled with the other clothes and *daranti*;
- (d) The clothes of the Appellant at the time of the incident were not blood stained. Had it been so then Adesh Kumar (PW-4) would have deposed about it;
- (e) In the bundle alongwith blood stained soil, mango and sugarcane leaves were also recovered. Yet, there is no mention of the same in the forensic science laboratory report (Ex Ka-22);
- (f) The forensic science laboratory report (Ex Ka-22) indicates that human blood was found on all items but there cannot be human blood in the plain soil. The report is incorrect;

(a) to (d) No Merit

59. While discussing the third point, we have held that injuries were not caused on 20.7.2004 at the time of the arrest or thereafter by the police. They were already there at the time of the arrest. There is no question of blood coming out and staining the clothes that the Appellant was wearing at that time.

60. In any case, the clothes that the Appellant was wearing at the time of arrest were not sent but the clothes that were recovered were sent for examination. This will be clear from the discussion in the succeeding paragraphs.

61. The prosecution case is that there were six bundles. These six bundles were sent to Forensic Science Laboratory; this is clear from its report (Ex Ka-22). It indicates⁵ that six sealed clothes' bundle in which CJM seal was affixed alongwith

⁵ Report in Hindi in this respect is as follows:

छः वस्त्रवृत समुदित बंठल जिस पर (सी.जे.एम.एस. आर. ई. मुद्रा नमुनानुसार) की छाप अक्षत थी।

its samples were received and sent back. These six bundles were opened in court and have been exhibited. A detail of these bundles and things contained therein is mentioned in Appendix-1 to this judgement.

62. Adesh Kumar (PW-4) deposed that the Appellant cleaned his hands but did not state either way whether, the blood stains were there on his clothes or not. It is just possible that he was at a distance or such an angle so as to not see it. In any case, it should have been clarified by the defence.

63. In our opinion,

The clothes recovered on 20.7.2004 were sent for chemical examination and not the clothes that the Appellant was wearing at the time of arrest;

The six bundles were sent to the forensic science laboratory Lucknow as claimed by the prosecution. They were separate. There could not be any intermingling of the blood from the clothes of the Deceased on the *daranti* or on the clothes of the Appellant.

(e) & (f) Report cannot be ignored

64. Blood stained guavas, mango and sugar cane leaves, were also recovered from the place of the incident. Mango and sugercane leaves were packed in the fourth bundle (Ex-10). However, they are not mentioned in the forensic science laboratory report (Ex Ka-22). Does it nullify it?

65. It is correct that the aforesaid things are not mentioned in the report but they were in the bundle. The bundles were opened in the court. The mango and sugar cane leaves were found in the bundle and were exhibited (Ex 16 and 17). These details are in the deposition of the IO (PW-8).

66. The forensic science laboratory did not conduct the test for human blood on the leaves. It is because of this reason that those items were not mentioned in the report. Nothing turns upon the same.

67. In forensic science laboratory report (Ex Ka-22), serial number 5 has been mentioned twice: the first serial number 5 is of blood stained soil; while the second serial number 5 is of plain soil. This is obviously a typing mistake.

68. In blood stained soil human blood was found; the serial number of plain earth is the same: it is because of this that the report says that in all items (1 to 9) human blood was found. Merely on this ground the forensic science laboratory report (Ex -22) cannot be ignored.

69. The forensic science laboratory report (Ex Ka-22) also indicates that semen was found in the pant.

70. In our opinion,

Recovery is reliable;

The blood stained were found on *daranti* and clothes worn by the Appellant at the time of the incident; and

Semen was also found on the pant worn by the Appellant at that time.

(v) & (vi) Extra Judicial Confession—Corroborated

71. While discussing the second point, we have already held that extra judicial confession was voluntary and is admissible: it was not made under coercion. The other circumstances discussed above have also been proved. They corroborate the extra judicial confession. Conviction can be recorded on the basis of the same.

4th POINT: APPELLANT GUILTY U/S 377 AND 302 IPC

72. According to the prosecution case, the murder was committed as the Deceased insisted complaining to the elders, about the sodomy committed on him. Let's consider if sodomy was committed or not.

The Rahim Case—Distinguishable

73. The counsel for the Appellant brought to our notice the following observations

of the Supreme Court in *Rahim Beg vs. State of UP*: AIR 1973 SC 343 (the *Rahim case*),

'As regards the stain of semen on the *Langot* of *Rahim Beg* we find that *Rahim Beg* is a young man of 22. The *Langot* in question was dirty at the time it was taken into possession. It cannot be said as to how old was the semen stain on the *Langot*. The semen stain on the *Langot* of a young man can exist because of a variety of reasons and would not necessarily connect him with the offence of rape.

...

According to the doctor ... If a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused ... No cogent explanation has been furnished as to why they were not soon thereafter not medically examined by the police.'

And submitted that:

- (i) The Appellant was young man and finding of semen on the pant would not connect him to the offence of sodomy;
- (ii) Semen on the pant could be for variety of reasons;
- (iii) There is neither any medical examination of the private part of the Appellant nor any explanation why it was not done;
- (iv) There is nothing to show that there was any injury on the private part of the Appellant;
- (v) He cannot be convicted for sodomy.

74. The Appellant was aged about 19 years at the time of the incident. At this stage, semen could be there for variety of reasons and it would not be unusual to find it on the underwear as was found on the *langot* in the *Rahim case*. However, here the semen was not found on the underwear but on the pant. This is unusual and shows that there was an abnormal situation.

75. In *Rahim case*, the charge was rape on the girl whose hymen was intact. In this case there is no hymen. There is neither any evidence nor anything has been

brought to our notice that even in this case there would be injuries to the private part.

76. There are other distinguishing features as well. In the Rahim case, the arrest was on the next day. In this case, the arrest is on the fourth day. It is not known whether the injuries on private part would still subsist; there were two accused. One of them was married. The court doubted that they will conspire together to commit the crime. In the opinion of the court, it was work of one person. In this case, there only one person is involved; the other circumstances were also not proved. Whereas, in this case the other circumstances have been proved.

In our opinion, the Rahim case is distinguishable, it is not applicable here.

Offence U/S 377 IPC—Proved

77. The Ante-mortem injuries of the Deceased are as follows:

- (i) Incised wound 11.00cm x 2.00 cm x trachea deep on front of neck 2.00 cm below angle of mandible on left side and 1.00 below on right side;
- (ii) Incised wound 5.00 cm x 3.00cm on left side face just below left ear and muscle deep;
- (iii) Abrasion 0.5 x 0.5 cm on right side forehead just above right eyebrow;
- (iv) Incised wound 1.00cm x 0.5 cm x muscle deep at the base of right thumb on palmer area;
- (v) Lacerated wound 2.5cm x 2.00 cm x bone deep on the frontal aspect of left wrist joint medial part bone exposed;
- (vi) Lacerated wound 0.5cm x 0.5cm x muscle deep on the dorsal aspect of left hand on index middle ring and little finger;
- (vii) Abrasion 3.00cm x 1.00 cm on lateral aspect of left elbow joint;
- (viii) Abrasions around the anal skin are present over an area of 3.00cm x 2.00cm around the anus.

The opinion of the doctor is also mentioned in the post mortem injuries. It indicates cause of death was due to shock and haemorrhage as a result of ante-mortem

injuries.

78. Injury no. (viii) shows that abrasions were present over an area 2.0 cm x 3.0 cm around the anus.

79. Dr. CM Taneja (PW-3) conducted the post-mortem. He deposed that:

He suspected some foul play; and had made the slide of inside the anus and around it;

He sent the slide to District Hospital to be examined by the pathologist.

80. There is nothing on record to show as to what was found in the report. May be, no semen was found around the area but this does not mean that sodomy was not committed.

81. Semen was found on the pant. This was unusual. Injury no. (viii) indicates some foul play. These circumstances corroborate the extra judicial confession that the Appellant committed sodomy.

Offence U/S 302 IPC—Proved

82. Motive for murder was that the Deceased insisted on complaining about sodomy to his father and Appellant's father. Sodomy has been proved. All other circumstances against the Appellant are proved. They corroborate the extra judicial confession that the Appellant murdered the Deceased.

Offence U/S 201 IPC—Not Proved

83. The dead body of the Deceased was found in the fields. It was apparently at the place where the crime was committed. The *daranti* and clothes were found in the *Almirah* of the *gher* of father of Appellant. There is no evidence regarding destroying or causing disappearance of evidence.

84. In our opinion, the prosecution has proved beyond reasonable doubt that the

Appellant is guilty under section 377 and 302 IPC. However, he is given benefit of doubt under section 201 IPC.

5th POINT: DEATH PENALTY OR FINE NOT PROPER

85. The Appellant was a young man aged about 19 years at the time of the incident. It is at this time the sexual urges are at their peak. Often young men neither understand them nor the society tries to explain them the same. They often get wrong notions and wrong ideas. Perhaps, this is, what happened in this case.

86. The Government of India has taken a decision to up-scale the National School AIDS Education Programme (SAEP) and implement the Adolescence Education Programme (AEP) in all secondary and higher secondary schools. The Central Board of Secondary Education is implementing the AEP in all private schools affiliated to it. But many States have refused to accept it: it is debatable. We do not wish to say anything more on this point, as it is policy issue in the realm of the State. But this case does indicate a minimal sex education alongwith inculcating right moral values (संस्कार): may be at the school/ college level; or by the family at home.

87. It is not clear, if there was any remorse on the part of Appellant but remorse was there by his family members. It has come in the evidence that Appellant was brought in Panchayat by his father and thereafter he was beaten by his brother. Remorse would be there in the Appellant too: we have no reason to doubt it.

88. The Appellant and the Deceased were first cousins. There is nothing on record to show that there was any enmity or differences in the family prior to the incident. There was no pre-planning to commit murder.

89. It seems that the Deceased in the heat of the sexual urge, committed sodomy. Thereafter, the fear struck him, when the Deceased insisted that he would complain about it to the family members. He might have thought he would be beaten by his family members that he got panicky and killed his younger cousin.

Had the family brought the topic of sex education; inculcated right values (संस्कार) among the young ones then, this incident might not have happened.

90. Considering the circumstances of the case, we do not think that it is a fit case to accept the reference and to award the death penalty or to impose any fine.

91. We do hope that the family of the Deceased would condone the act of the Appellant, forgive him, and this would not impair or strain the good relations amongst them.

CONCLUSIONS

92. Our conclusions are as follows:

- (i) An extra judicial confession, given voluntarily and corroborated with the other circumstances can be relied upon;
- (ii) In this case, the extra judicial confession was voluntarily given. There was no coercion;
- (iii) The recovery of *daranti* and clothes of the Appellant is reliable;
- (iv) The clothes that were recovered were sent to Forensic Science Laboratory for examination and not the clothes that the Appellant was wearing at the time of the arrest;
- (v) All circumstances are proved against the Appellant. The extra judicial confession is corroborated by the other circumstances. It can form the basis for conviction;
- (vi) The appellant is guilty under section 377, and 302 IPC. However he is discharged under section 201 IPC. He is sentenced to,
 - Five years rigorous imprisonment under section 377 IPC;
 - Imprisonment for life under section 302 IPC.
 Both the sentences will run concurrently.

90. In view of our conclusion, the reference no. 9 of 2007 is not accepted. The appeal against the conviction dated 14.2.2007 and sentence dated 19.2.2007 passed by Additional Session Judge, court No.-5, Saharanpur in ST No. 443 of

2004, is partly allowed. The sentence is also accordingly modified. The Appellant is in jail. He will serve out his sentence.

Date: 28.5.2010

BBL

Appendix-1

Details of the six bundles and the material inside them

Number of bundle and the item contained therein	Exhibit of the bundle in which different items were sealed	Particulars and their exhibit in the bundle
1. Weapon	Clothe: Ex-2	<i>Daranti</i> : Ex -1
2. Clothes of Appellant	Clothe: Ex-6	(i) Pant Ex-3 (ii) Shirt Ex-4 (iii) <i>Baniyan</i> Ex-5
3. Plastic box	Plastic box: Ex-8	Plain soil Ex -7
4. Plastic box	Plastic box: Ex-10	(i) Blood stained soil Ex-9 (ii) Leaves of mango Ex-16 (iii) Leaves of sugar cane Ex-17
5. Slippers of Deceased	Clothe: Ex	Slippers Ex -11 & 12
6. Clothes of Deceased	Clothe: Ex	(i) Pant Ex-13 (ii) Shirt Ex-14 (ii) <i>Baniyan</i> Ex-15

Note: Bundle no.5 and 6 containing clothes and other articles were not exhibited but they were sent back by Forensic Science Laboratory. See deposition of the IO (PW-8).