

# ALLAHABAD HIGH COURT

Daryao Singh

Vs.

State (Allahabad)

Criminal Appeals Nos. 448 of 1950 and 233 of 1951

(Malik, C.J. and Bind Basni Prasad, J.)

31.07.1951

## JUDGMENT

### **Bind Basni Prasad, J.**

1. This judgment will govern Criminal Appeals Nos. 448 of 1950 and 233 of 1951. They arise out of the same occurrence. The judgments are two, because one of the accused was absconding and he was tried subsequently when he was arrested.

2. This is a case of a highway robbery and murder. On 16-3-1949, at about 5 P. M. one Karan Singh was returning on his mare from a fair held in the village of Charthawal in the district of Muzaffarnagar. Behind him were two persons riding on a horse, one of whom is alleged to be a Sikh and the other a person of this Province. One Karnal Uddin who is an employee in a grove of Ghaudhri Misri Lal in the jungle of Charthawal was also returning from the fair. The mare and the horse passed by him and after going a short distance he noticed that one of the two persons riding on the horse, namely the person belonging to this Province, got down and when Karan Singh passed by him he caught hold of the reins and dragged him down. The Sikh who was on the horse fired two shots from a pistol at Karan Singh. Karan Singh died instantaneously. The person who had caught hold of the reins of the mare then rode upon the mare and drove it away. A report of this occurrence was made by Kamal Uddin at Chauki Gharthawal the same evening at 7.30 P. M. In this report the names of the accused were not mentioned, but it was stated that one of the miscreants was a Sikh and the other a person of this Province. The description of the mare was given and its value was said to be Rs. 1,200.

3. S. I. Giri Lal started the investigation at once. He recovered blood soaked earth from the scene of the occurrence. He was able to arrest Daryao Singh, who is the appellant in Criminal Appeal No. 448 of 1950, on 30.3.1949. The mare was also recovered from him. The other accused Mahendra Singh, who is the appellant in the other appeal, was not arrested until 20.6.1950. It is

said that Mahendra Singh was absconding. The police, therefore, sent up the case first against Daryao Singh and another person, Allah Rakha, under Sections 302 and 394 read with Section 34, Penal Code. The charge against Allah Rakha was that of abetment only. By the judgment dated 25.2.1950 Sri N. L. Gupta, the learned Sessions Judge of Muzaffarnagar, convicted Daryao Singh of offences under Sections 302 and 394, Penal Code. He was sentenced to transportation for life under Section 302 and to 10 years rigorous imprisonment under Section 394, Penal Code, Allah Rakha was acquitted.

4. After the arrest of Mahendra Singh on 20.6.1960, he was also placed on trial and by the judgment dated 20.2.1951, the same learned Sessions Judge convicted him also of the two offences and sentenced him to death under Section 302, Penal Code. He was further sentenced to ten years' rigorous imprisonment under Section 394, Penal Code.

5. It is desirable to deal with the cases of the two appellants separately as different considerations arise in respect of each. We take up first the case of Daryao Singh, the appellant in Criminal Appeal No. 448 of 1950. It is true that in the First Information Report his name is not mentioned. The reason for this is that Kamal Uddin who made the report did not know his name. The report is a straightforward document and has a ring of truth about it. The facts stated in it are borne out by the recovery of the blood-stained earth from the scene of the occurrence and the post-mortem examination report of Karan Singh. It will be seen that the deceased Karan Singh had two circular gunshot wounds, a circular penetrating wound in the abdomen, a circular wound on the outer side of the upper right arm; and a corresponding circular wound on the inner side of the right arm. In the opinion of the doctor the cause of death was shock and haemorrhage as a result of the bullet wound. Kamal Uddin had no animus to implicate Daryao Singh falsely, [After further discussing the evidence his Lordship concluded.] To sum up, in view of the evidence of the eye-witnesses, absence of any motive on their part to give false testimony against Daryao Singh, the recovery of the mare from his possession and his identification by the three eye-witnesses in the jail, we agree with the conclusion reached by the learned Sessions Judge that Daryao Singh was a party to the murder of Karan Singh. His appeal should be dismissed.

6. Before parting with the case of Daryao Singh, we desire to note an error committed by the learned Sessions Judge. It appears that after the arrest of Daryao Singh, an identification proceeding of the mare was held by a police officer. The learned Sessions Judge has admitted those proceedings in evidence. Statements made by witnesses to a police officer are inadmissible in evidence under Section 162, Criminal Procedure Code. In *Surendra Dinda v. Emperor*<sup>1</sup>, a distinction was made between the actual fact of identification which is a mental act on the part of the person identifying and the communication to a third person of this mental act. The communication is, of course, a statement; but the identification by the identifier cannot possibly be a statement. The communication of the mental act of recognition and identification to the police is hit by Section 162, but the evidence in Court subsequently by the actual identifier himself is not inadmissible under Section 162. Reliance has also been placed by the learned

Sessions Judge on the judgment of the Sind Judicial Commissioner's Court in *Nur Mohomud v. Emperor*<sup>2</sup>, The same distinction was made there and it was held that Section 162, Criminal Procedure Code, shuts out statements, written or oral, express or implied, made by witnesses to the police during the course of the investigation; but care must be taken not to shut out evidence of what a witness saw or did. Conduct must be distinguished from speech. A tracker can say in Court that during police investigation he recognized on a certain day, at a certain place certain tracks, and that the tracks were of a particular

<sup>1</sup>48 Cr LJ 804 (Cal)

<sup>2</sup>41 Cri LJ 924 (sind)

person if he knew him already, or of a person at the scene of the crime, if he did not know him already. The learned Sessions Judge should not have allowed the evidence as to what the witnesses stated to the police officer at the time of the identification of the mare to be brought on the record.

7. We come now to consider the case of Mahendra Singh, who is the appellant in Criminal Appeal No. 233 of 1951. The first point we noted about him is that he was arrested about 15 months after the occurrence, and was put up for identification about 15? months after the occurrence. Kamal Uddin, the maker of the report could not identify him. Only two of the eyewitnesses, namely Kantu and Atar Singh, identified him. The evidence of Kantu shows that at the time of the occurrence the Sikh accused had a beard and long hair. He had tied a piece of cloth on his beard. At the time of identification in jail he had no beard and the hair on his head was cropped. There was thus a difference between the appearance of Mahendra Singh and the Sikh accused as described by the witnesses. The value of identification evidence is very much minimised if the identification proceedings are held long after the occurrence. Human memory is fallible. It is sometimes difficult to identify a person not very well-known whom one sees with a rather different appearance about fifteen months later. It is possible that Kantu and Atar Singh identified Mahendra Singh by pointing out at random. There are other circumstances also which go in favour of this appellant. Kantu and Atar Singh said that at the time of the occurrence the Sikh accused was wearing khaki shirt, khaki knicker and khaki turban. On the other hand, Kamal Uddin states that the Sikh was wearing a pyjama. There is a great difference between a knicker and a pyjama.

8. Further, it appears from the two wireless messages, which passed between certain police officers and which were summoned by the defence, that Mahendra Singh was alleged to be a notorious leader of dacoits and was wanted in several cases. We are informed by counsel for the defence that three other cases are also going on against him. The suggestion on behalf of the defence is that as Mahendra Singh was considered by the police to be a notorious dacoit, so in order to arrest him this case was also foisted upon him. Be that what it may, we have to consider in the present case the evidence on the record as against him. If it is sufficient, his conviction and sentence should be upheld, but if it is insufficient, then for the mere reason that he is alleged to

be a notorious dacoit he cannot be sentenced. (After discussing the evidence the judgment proceeded.)

9. The case of Mahendra Singh is distinguishable from that of Daryao Singh. In the case of the former, the only evidence against him is that of Atar Singh and Kantu who identified him in jail after 15? months. As against this there are various other factors going in his favour which have been mentioned above. On the other hand, Daryao Singh was arrested about 13 days after the occurrence with the stolen mare in his possession, and his identification proceedings were held about five weeks only after the occurrence and he was correctly identified by all the three eye-witnesses, who committed no mistakes. There is also the fact that Mahendra Singh was wanted by the police in several other cases and the suggestion that he was wrongly taken to be the murderer in this case also is not without force. We are not satisfied that the case against Mahendra Singh is established beyond doubt. We would, therefore, allow his appeal.

10. The appeal of Daryao Singh is dismissed. The appeal of Mahendra Singh alias Kartara is allowed, his conviction and sentences are set aside and he will be set at liberty unless required in connection with some other case.

Order accordingly.