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**(1991) 03 AHC CK 0145**

**Allahabad High Court**

**Case No:** Criminal Appeal No's. 4, 38 and 754 of 1979

Munshi

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** March 6, 1991

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 34, 394, 399, 402

**Citation:** (1991) 15 ACR 311

**Hon'ble Judges:** Palok Basu, J; P.P. Gupta, J

**Bench:** Division Bench

**Advocate:** S.C. Maheshwari, for the Appellant;

**Final Decision:** Allowed

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### **Judgement**

Palok Basu, J.

The three connected appeals have been filed by the four Appellants Munshi, Waris, Ishaq and Shaukat against their conviction and sentence u/s 302/34 IPC to imprisonment for life and u/s 394 IPC to seven years R.I. as recorded by Sessions Judge Muzaffarnagar on 23-12-1978 in Sessions Trial No. 115 of 1978.

2. The charge against the Appellants was that they have committed the murder of one Hukam Singh in between the night of 7th and 8th of October, 1977 in the jungle of village-Makhiyali, near Bhopa Road, police station Nai Mandi, Muzaffarnagar, after depriving the deceased of wrist-watch and cycle.

3. The points relevant in the present appsals are as to whether the prosecution case sought to be proved against the Appellants on the basis of their identification by eye-witnesses and of the articles recovered from two of them, namely Shaukat (watch of the deceased) and Ishaq (cycle of the deceased), can connect them with the murder or with the alleged robbery. Learned Counsel for the Appellants have not challenged the prosecution case relating to the recovery of the dead-body of Hukam Singh near about 10

A.M. on 8-10-1977 lying in Rajbaha (water channel) near the culvert of Bhopa Road whose hands and legs were tied with a string and a loop of rope was also found round the neck, but he has very seriously challenged that none of the Appellants can be convicted on the basis of the evidence produced by the prosecution as it falls short of proving the requirements of law.

4. According to the prosecution case Hukam Singh was a teacher in the primary Pathshala in Village Jat Majhera and had left around 9 A.M. on 7-10-1977 but did not come back till 7 P.M. resulting in his search but he was not found. The next morning around 10 A.M. a dead-body was recovered from the water channel and a First Information Report was lodged by his brother Ghamman Singh at the police station at 10.30 A.M. on 8-10-1977. The Station Officer was present who recorded the statement of the informant and proceeded to investigate the matter. The inquest was done by Sub-Inspector S.C. Tyagi under his supervision. Necessary memoranda were prepared about the recovery of the dead-body and allied materials. It is said that the Investigating Officer obtained from the informant a cash memo of "Atlas" cycle having frame No. 313449 purported to have been issued to Hukam Singh deceased and a recovery memo about it was also prepared. Further case of the prosecution is that some witnesses including Daya Nand, PW 5 and Chatru, PW 6 had seen the deceased going on the foot-path near Rajbaha walking with the cycle in his hands. They had seen four persons sitting at the culvert The Investigating Officer further states that he had arrested five persons on 19-10-1977 relating to a case u/s 399/402 IPC. Two out of whom were the Appellants Saukat and Ishaq. From their interrogation the complicity of the other two Appellants Munshi and Waris also come to be known. Shaukat was allegedly wearing a watch, ext. 1 which he gave voluntarily to the Sub-Inspector then and there where as Ishaq took the police party to a Kotha of his house and handed over a cycle, Ext. 2, to the Investigating Officer. So far as the Appellants Waris and Munshi are concerned, they had already been allegedly arrested on 17-10-1977 on suspicion.

5. Report about holding of test identification parade for the accused persons as also for the watch was forwarded by the Investigation Officer. Consequently a parade was held on 9-11-1977 which was conducted by Behari Lal PW 16. The four Appellants were identified correctly by Daya Nand, PW 5 and Chatru, PW 6. Identification proceedings relating to the watch was held on 2-12-1977 which was correctly identified by PW 1, Ghamman Singh, PW 2, Ved Singh, both brothers, and PW 3, Som Pal, son of Ved Singh. As a result of identification proceedings a charge-sheet was submitted on 16-2-1977 after due committal proceedings the trial commenced and the learned Trial Judge has recorded conviction and sentence as noted above, hence this appeal.

6. The Appellants denied their participation and also denied the recovery. They alleged their false implication on account of enmity with the police. They, however, did not produce any evidence in defence.

7. The case of the Appellants Munshi and Waris depends only on the identification evidence furnished by PW 5, Daya Nand and PW 6, Chatru. Daya Nand, PW 5 states that he had planned to go to village Tissa and on the road they found Hukam Singh walking holding the cycle in his hand as it was reported to have developed a puncture. They asked Hukam Singh why he was walking and then the deceased had replied that suddenly his cycle tyre got punctured. The deceased asked them to wait at the crossing of the patri and the Bhopa Road but the deceased did not come. From a distance they saw four persons were sitting on the culvert and the deceased was going walking. All this has happened in the forenoon of 7-10-1977. When the said PW 5, Daya Nand and PW 6, Chatru returned to their village through the same path the next day they did not see any police force or persons or the dead-body at the place where from the dead-body of the deceased Hukam Singh was later on recovered.

8. It has been admitted that this patri is a common road and used frequently by the villagers and further that in the adjoining fields no cultivation had grown. The learned Counsel for the Appellants had laid great stress on the fact that even though the purpose of visit of both these witnesses is absolutely untenable and unacceptable but even if it is accepted, mere noticing of the four persons sitting at a place would not indicate that the Appellants were responsible for committing the murder of the deceased Hukam Singh. It is true that no exact time of death of Hukam Singh has been proved by the prosecution evidence. It is also true that till evening of the next day when Daya Nand and Chatru were returning they had not noticed any police force, village crowd or got any information about the deceased body having been recovered from Rajbaha. It is also true that but for admittedly having had only a glimpse of four persons sitting on 7-10-1977, no other role activity or action is attributed to those four persons. Learned Counsel for the Appellants severely criticised the theory of purchasing a she-buffalo as propounded by these two witnesses from a far of village and said that their presence at the site itself is doubtful. However, even if it is believed that they had noticed the four Appellants and their being no other evidence against two of them, cases of which we are considering presently, it does not connect them in any manner with the murder of deceased Hukam Singh. In any case it appears impossible to believe that the said witnesses will be retaining the impression of having had a glimpse for a few seconds of a few persons sitting together accidentally by chance after about one month of the said seeing. Identification parade was held on 9-11-1977 while the incident is said have been happened on 7th or 8th of October, 1977.

9. Coming to the case of other two accused namely Shaukat and Ishaq it may be stated to start with that identification as against them also will be unacceptable for the reasons which go along with the cases of Munshi and Waris discussed above. The alleged recovery of the cycle is sought to be connected with the alleged cash memo of the cycle produced by Ghamman Singh, Advocate, brother of the deceased Hukam Singh. This cash memo was handed over during investigation The Investigating Officer has not investigated the origin of the cash memo The shopkeeper who may have sold the cycle has not been examined. The source or origin and also the sale transaction, if any, of the

said cycle through the said memo by the shopkeeper in favour of the deceased Hukam Singh has not been proved at all. Production of a cash memo by a third person inscribing by a ball-pen the name of Hukam Singn on it cannot be the legal evidence of proving the sale by the shop-keeper of the said cycle to the deceased Hukam Singh. The primary evidence having not been produced, the evidence sought to be furnished through a cash-memo trying to link the cycle with the deceased is un-acceptable as it shall not even come within the purview of secondary evidence. In the absence of the said proof of ownership, sale and purchase of the cycle, its recovery from the Appellant Ishaq cannot be made the basis of an incriminating circumstance. Firstly, this item of evidence does not prove that the cycle recovered was of the deceased and secondly the recovery by itself does not connect the Appellant Ishaq with either having relieved the deceased of his cycle or having murdered him.

10. Coming to the case of Shaukat, it is said that he voluntarily offered the watch which he was wearing at the time of his arrest relating to the case u/s 399/402 IPC. There was no occasion for the Appellant Shaukat to become so charitable voluntarily. There was no occasion for either the prosecution, or to the Appellant at that stage to believe that the watch was necessarily to be handed over by the Appellant to the Investigating Officer just because he has been arrested. No documentary evidence has been produced relating to the ownership of the watch and the three witnesses have identified it in the test identification parade for this property held on 2-12-1977, as belonging to the deceased. The evidence in the case is silent as to what has happened in the case u/s 399/402 IPC. relating to which those two Appellants were arrested. Under these circumstances the recovery of the watch itself becomes doubtful In any case such watches are of common use and there was no special marking on the basis of which the identification evidence can be safely relied upon. Admittedly the recovery was about 14 days after the alleged murder of Hukam Singh. Consequently, the recovery of the watch alone will not fasten the guilt on Appellant Shaukat of either having robbed the deceased or having murdered him.

11. In view of the aforesaid discussions the prosecution case against all the appeallants has not been proved beyond reasonable doubt and all of them are entitled to acquittal.

12. The appeals are consequently allowed. The conviction and sentences of the Appellants are set aside. They are on bail. They need not surrender and their bail bonds are discharged.