

Sk. Md. Omar Vs. the State

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Court : Kolkata

Decided On : Jan-30-1964

Reported in : 1965CriLJ443

Judge : Amaresh Roy, J.

Appellant : Sk. Md. Omar

Respondent : The State

Judgement :

Amaresh Roy, J.

1. This Rule was issued at the instance of one of the several accused persons in a case which is pending in a Special Court at Alipore constituted under Act XXI of 1949, and prayer in the Rule is for quashing the charge for an alleged offence under Section 120-B/409, I. P. C. that has been framed against this petitioner Sk. Md. Omar by the learned Judge presiding in that Special Court by his order dated the 14th October, 1963. That charge of conspiracy under Section 120.B, I. P. C. is the common charge against all the accused in the case and charges for specific offences including offences under Sections 409, 409/ 109, 466/109, 474 and 477A, I. P. C. have been framed against some of the other accused persons by the same order, but petitioner Sk. Md. Omar has been charged only for the alleged conspiracy and no other offence.

2. Of the several persons who had been produced before the Special Court for trial, one accused, Claude Carl Baker, during the pendency of the proceedings at a stage before witnesses were examined] absconded and failed to appear in court by jumping bail to which the learned Judge had admitted and enlarged him. In that circumstance the learned Judge has proceeded to take evidence against that absconding accused in his absence by following the procedure laid down in Section 512. Cr. P. C.

3. That accused C. C. Baker having absconded, no charge has been framed against him; another accused Sanat Kumar Bose has been discharged by the learned Judge as there was no evidence against him for framing any charge; and another accused Haripada Bhattacharya was granted pardon and as approver he has deposed as P. W. 3.

4. The general charge of conspiracy has been framed by the learned Judge against all the other accused persons, including the present petitioner Sk. Md. Omar. Broad outlines or the prosecution allegations which are the basis of that charge of conspiracy are that accused (1) P. K. Das (2) Yar Mahammad (3) Pramatha Sen (4) Ajit Palit (5) Naren Biswas (6) Pramatha Bhattacharya (7) Sk. Omar and also the absconding accused C. G. Baker along with other persons had entered into a criminal conspiracy between 1st April, 1953 and end of April 1956 by agreeing to commit an illegal act being the offence of criminal breach of trust in respect of a large quantity of petrolium, approximately 14,495 gallons, belonging to Corporation of Calcutta The modus operandi alleged to have been employed for carrying out the purpose of that conspiracy was that quantities of petrol brought in motor tankers driven by several drivers, one of whom was C. C. Biker, for being stored in the underground tank at the North Garage of the said Corporation situate at 72/1 Grey Street, Calcutta of which the accused P. K. Das was the store-keeper at the relevant time was directed to other places one of which was a petrol pump known as India Motor House at No. 7 Tarachand Dutt Street, Calcutta of which the present petitioner Sk. Md. Omar was the owner. Prosecution also alleged that for covering up that misappropriation of petrol, certain forgeries and falsification of accounts were employed by some of the members of the said conspiracy, giving rise to specific offences committed by those individual accused persons.

5. It appears from the evidence and materials on the record that the Enforcement Department of the Corporation of Calcutta commenced an investigation in the matter in March 1956; Enforcement Branch of the Calcutta Police took up investigation of the case in July 1957 and on 28th February, 1959 Sub-Inspector Paritosh Chatterjee (P. W. 1) drew up a formal F. I. R. naming therein ten persons including the accused P. K. Das, the petitioner Sk. Md. Omar and also C. C. Baker.

6. Before the learned Judge, Special Court, a large number of witnesses have been examined and a large volume of documents, Registers, statements and Books of Account have been proved by prosecution as materials showing the existence of the conspiracy between the accused persons and others, participation of individual accused in that conspiracy and also overt acts in pursuance thereof that are said to constitute the specific offences alleged against some of them. One of those documents proved and relied on by prosecution is Ex. 29 which is said to be a record of a signed statement made by C. C. Baker on 7th December, 1958 to Ram Chandra Banerjee, P. W. 120. That document contains statement of events that happened during the period of the charge of conspiracy.

7. By devoting careful consideration to the large volume of evidence, the learned Judge in his order has proceeded to apply correct standard for considering under Section 254, Criminal P. C. whether the charges proposed by prosecution against each of the accused persons should be framed and has found seriatim that for the purpose of framing charges-

(1) There is ample evidence that P. K. Das committed breach of trust regarding huge amount of petrol.

(2) Though there is no direct evidence of agreement to do criminal breach of trust by P. K. Das, there are important circumstantial and documentary evidence to make out prima facie case for framing, charges of conspiracy for criminal breach of trust between P. K. Das and Yar Mahammad.

(3) There is strong prima facie case of conspiracy between P. K. Das and Pramatha Sen.

(4) There is strong prima facie case of conspiracy between Ajit Palit and P. K. Das.

(5) There is strong prima facie case of conspiracy between Naren Biswas and P, K. Das.

(6) There is strong prima facie case of conspiracy against Prafulla Bhattacharya.

For arriving at the last of the findings mentioned before the learned Judge relied on the testimony of P. W. 120 Ram Banerjee that at times he had seen Baker, P. K. Das and Prafulla Bhattacharyya going out of north garage with petrol tank soon after it was brought for supplying petrol there.

8. Against each of the accused persons named in the findings summarised above the learned Judge has framed the charge of conspiracy. None of those accused persons has at this stage moved for quashing that charge and on behalf of the petitioner Sk. Md. Omar also none of those findings has been challenged as incorrect or improper.

9. In considering the case against Sk. Md. Omar the learned Judge has observed in the order that there is no direct evidence to prove the allegation of conspiracy between him and P. K. Das, though the learned Judge was fully conscious of the testimony of P. W. 120 Ram Banerjee and P. W. 11 Sunil Dey that those witnesses had seen accused Sk. Omar at times coming to north garage. The learned Judge then observed that the evidence provided by C Form (Ex. 993, 993/5, 994) that on many days petrol was found in excess of 2000 gallons in Sk. Omar's pump, taken with the evidence provided by Burmah Shell books showing that on many such days when petrol is found in excess in his store, the supplies were made by Barmah Shell Company noted in their books by themselves 'may not be sufficient evidence of association or other circumstance to show that Omar was involved in the conspiracy.'

10. In this part of his order the learned Judge has left out of his consideration what would be the position by prima facie standard, if excess of quantity in Sk. Omar's store even on one or more days seen from C Forms (Exs. 993, 993/5 and 994) has remained unexplained by Burmah Shell Books, and when such evidence is

taken into consideration, not by themselves, but in conjunction of the evidence provided by P. W. H Sunil Dey and P. W. 120 Ram Banerjee even not taking into consideration Ex. 29. True effect if such consideration had been devoted by the learned Judge, and the magnitude of that omission of his, will appear when I proceed to examine the contentions raised by the contending parties in this Rule, but it is necessary to notice here that as a result of that omission the learned Judge has observed in the order

So, if the statement of Baker, marked Ex. 29, be legal evidence, then the same corroborated by the independent evidence of P. W. 120 Ram Banerjee and P. W. 11, Sunil Dey is likely if unrebutted to result in the conviction of Sk. Omar; whereas if Ex. 29 is not legal evidence at all and can't be considered as such then, of course, it must be held that no charge should be framed against Omar.

11. The learned Judge has then held that Ex. 29 is not admissible in evidence either under Section 8 or Section 30 of the Evidence Act but it is admissible in evidence under Section 10 of that Act. He has relied on evidence provided by P. W. 120 and P. W. 11 for holding 'prima facie there is reasonable ground to believe that Sk. Omar, P. K. Das, Prafulla Bhattacharya and Baker conspired to commit an offence and that being so any statement of Baker in reference to such common intention is relevant against Omar also.'

12. For using Ex. 9 against Sk. Omar the learned Judge overruled the contention raised before him, based on the authority of Privy Council decision in the case of *Mirza Akbar v. King-Emperor* 45 Cal W N 269 : 67 Ind App 336 : AIR 1940 PC 176, that the said statement made in 1958 after the period of conspiracy was over, was not admissible under Section 10, Evidence Act. In doing so the learned Judge relied on the decision of the Supreme Court in the case of *Sardul Singh v. State of Bombay* (S) : 1957 CriLJ1325 and framed charge of conspiracy against Sk. Md. Omar along with other six accused persons who were present before him. Against that order framing the charge, only Sk. Md Omar has moved this Court and obtained this Rule.

13. Appearing in support of the Rule for quashing Mr. Ajit Kumar Dutt has emphasised the learned Judge's observation that if Ex. 29 is not admissible in

evidence then there is no sufficient evidence for framing charge against Sk. Md. Omar and has contended that Ex. 29 is not admissible under Section 10 or any other section of Evidence Act because

(a) It is a statement of a person who was named as an accused but has gone out of trial and is neither an accused nor a witness in the present trial.

(b) It is a statement made in 1958 i. e. long after the period of alleged conspiracy was over and the purpose of conspiracy had terminated.

14. Besides attacking the learned Judge's view that Ex. 29 is admissible as evidence against Sk. Md. Omar, the learned Advocate for the petitioner has also contended that other evidence in the case are not sufficient even to lay basis of a criminal conspiracy involving Sk. Md. Omar which would enable prosecution to adduce any evidence under Section 10 of the Evidence Act, far less to justify framing a charge against him. Mr. Dutt has therefore put emphasis on the learned Judge's view that if Ex. 29 is left out, there is not sufficient evidence for framing charge of conspiracy against Sk. Md. Omar. He goes a step further and says that even if Ex. 29 is taken into consideration, then also that evidence taken along with other evidence would not justify framing of charge of conspiracy against him.

15. On behalf of the State Mr. J. M. Banerjee has argued that the learned Judge of the special court was not right in thinking that if Ex. 29 is left out there is no evidence against Sk. Md. Omar. He points to certain circumstances and documents and also to the oral testimony of P. Ws. 11, 20 and 120 for contending that without calling in aid Ex. 29, other evidence under Section 10 being adduced, but also they are sufficient for framing the charge of conspiracy against Sk. Md. Omar.

16. Mr. Banerjee further contends that Ex. 29 is admissible in evidence against Sk. Md. Omar under Section 10, Evidence Act, and it is also admissible under Section 8 as substantive evidence of his participation in the conspiracy and under S 11 for corroborating other evidence about Sk. Omar's association with the conspirators and participation in carrying out the purpose of conspiracy, i. e. as overt acts showing his participation in conspiracy.

17. For examining the correctness of the view that Ex. 29 is admissible under Section 10, Evidence Act against Sk. Md. Omar, two characteristics of that document need be remembered -

(1) It is a statement of C. C. Baker who is a co-accused which is sought to be used against Sk. Md. Omar, though it is not a confession.

(2) It was made in 1958, that is long after the period of conspiracy alleged by prosecution was over and narrates what happened within that relevant period.

18. It follows from first of these characteristics that being a statement of a co-accused which is not a confession, against Sk. Md. Omar it is not evidence that could be brought under S. 8, 11 or 14 of Evidence Act and is not admissible unless it comes within Section 10 of Evidence Act which embodies the theory of agency as explained by the Supreme Court in the case of (S) : 1957 CriLJ1325 . It is true that the maker of that statement C. C. Baker is not present before the court having absconded by jumping bail, and evidence against him is being taken under Section 512, Criminal P. C. Whether or not that statement (Ex. 29) is receivable as evidence against C. C. Baker being relevant and admissible under any of the other sections of Evidence Act, either as his conduct showing his intention or as substantive evidence to show Baker's participation in the alleged conspiracy is not a question with which we are concerned in this Rule. What is relevant in this Rule is the question whether that documents admissible under Section 10 as evidence against 'the person believed to be so conspiring (Sk. Md. Omar) as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that such person (Sk. Md. Omar) was a party to it.'

19. It is settled law that for receiving evidence under Section 10, basis has to be laid that "there is reasonable ground to believe that two or more persons have conspired together to commit an offence' and for believing that "the persons (against whom such evidence is offered) to be so conspiring.' Therefore there must be other evidence providing reasonable ground to believe (1) existence of the conspiracy, and for believing that (2) Sk. Md. Omar was a person so conspiring, before evidence under Section 10 can be received against him.

20. In the present case before considering Ex. 29 as evidence and even before taking up the case against Sk. Md. Omar the learned Judge has not only held that there were reasonable grounds for believing the existence of the conspiracy alleged by prosecution, but also that there were other evidence to enable him to frame charge of conspiracy against other persons including P. K. Das, Prafulla Bhattacharya, against whom he has framed the charge under Section 120-B I. P. C. and also C. C. Baker, against whom he has not framed such charge as that accused is absconding and is not before the Court. Then the learned Magistrate has relied on the testimony of P. W. 11 Sailen Dey and P. W. 120 Ram Banerjee for believing that Sk. Md. Omar was a person so conspiring. That evidence by themselves and without more appear to me sufficient to pass the prima facie standard to enable the learned Judge to frame the charge of conspiracy he has framed against Sk. Md. Omar. When that evidence is taken into consideration in conjunction with the evidence provided by C Forms (Exs. 993, 993/5 and 994) then that bundle of evidence in its cumulative effect pre-eminently provided, in my view, enough justification for framing, the charge of conspiracy against sk. Md. Omar, as has been framed by the learned Judge, though he has done so only by taking the aid of Ex. 29, which he did by omitting to consider the cumulative effect of the evidence other than Ex. 29, as I have pointed out in the earlier part of this judgment. I hold that the learned Judge committed an error by devoting consideration to items of that evidence taking by themselves and not in conjunction with each other. If he had done so, in view of his own findings to which I have already referred, it would be only reasonable for him to frame charge of conspiracy against Sk. Md. Omar without taking Ex. 29 as evidence against this accused. His observation that without the aid of Ex. 29, no charge should have been framed against Sk. Md. Omar is erroneous and I hold so disagreeing with the contentions of Mr. Dutta for the Petitioner and agreeing with the contentions of Mr. Banerjee for the State in that aspect of the case. Broad reason for taking that view I would state without going into details because this is only the stage of framing charges and it would not be proper for me at this stage to express any view on evidence that may influence the court below at the trial that will be held,

21. The circumstances relied on by the Judge for holding prima facie that there was a conspiracy for which he has framed charges against other six accused

persons including P. K. Das and Prafulla Bhattacharya taken in conjunction with the particular evidence provided by

(1) C. Forms (Exs. 993, 993/5 and 994) that there was excess petrol in Omar's store on some dates during the period of the charge, though Burmah Shell Books showed that on many such days (not all) Burmah Shell Company had supplied petrol to Omar's store.

(2) P. W. 11 Sunil De that on some days during the period of the charge Omar was seen visiting north and talking with P. K. Das in his office.

(3) P. W. 120 Ram Banerjee that during the period of the charge.

(a) Baker was a driver of Burmah Shell Company who used to come to north garage with petrol lorry for supply of petrol,

(b) P. K. Das and Prafulla Bhattacharya used to have talks with Baker and many of the outsiders who used to come to the North Garage, one of whom was Omar,

(c) One day he saw that Baker came in the North Garage with the petrol lorry, within a few minutes of his arrival. Baker along with accused P. K. Das and Prafulla Bhattacharya took away the petrol lorry from the North Garage

in their cumulative effect provide, in my view, ample justification for framing the charge of conspiracy against the accused Omar without taking Ex. 29 as evidence against him.

22. In arriving at that conclusion I have devoted consideration to the criticisms that Mr, Dutta on behalf of the petitioner advanced on the veracity of the witnesses who have provided that evidence and their value. One particular criticism was that evidence regarding Omar was not obtained from these witnesses until they were recalled after cross-examination before charge of many witnesses had been made. It appears from the records that P. W. 11 was examined on 4th and 5th April 1963; P. W. 20 was examined on 13th and 15th May, 1963; P. W. 120 was examined from 30th July to 6th August 1963 continuously with one day's suspension on the ground of illness of that witness, and then on 7th August 1963

examination of P. W. 120 was continued and on that day he proved Ex. 29 and spoke about accused Omar on matters within his knowledge. Examination-in. chief of this witness was resumed on 21st August, 1963 and he was cross-examined before charge on that day (21st August 1963) for another accused and next day (22nd August 1963) he was cross-examined before charge on behalf of accused Omar. Before that cross-examination of this witness on 21st August 1963 and 22nd August 1963, P. W. 11 Sunil dey was recalled and further examined in chief on 21st August 1963 and on the same day he was cross-examined on behalf of accused Omar. P. W. 20 was recalled for further examination on 22nd August 1963 and he spoke of the limits of quantity of storage at 7 Tara Chand Dutt Street according to the license in Form K of the Petroleum Rules. He was cross-examined on behalf of accused Omar on the same day. From that sequence of dates and examination of witnesses, no particular reflection on the veracity of these three witnesses could reasonably be made out. It appears that prosecution nursing a notion that Ex. 29 would be evidence under Section 10 of Evidence Act, adduced evidence through other witnesses to lay basis for offering such evidence, before they thought of proving Ex. 29 through P. W. 120; then only P. W. Hand P, W. 20 were recalled. In my view that does not affect the value of their testimony, for prima facie use for framing charge as the learned Judge has done.

23. In view of the conclusion I have reached above, the question whether the document Ex. 29 is receivable in evidence loses its importance for the disposal of this Rule. But that question remains a live question for the stage of trial upon the charges framed, and it need be answered because the learned Judge of the Special Court has held that document to be admissible under Section 10 of the Evidence Act as evidence against Sk. Md. Omar, and by parity of reason he may use it against other accused persons also in the trial that he is proceeding to hold,

24. It has to be borne in mind that by acting under Section 512, Criminal P. C. the learned Judge is taking evidence against the absconding accused C. C. Baker in this proceeding. In that sense C. C. Baker has not gone out of the trial altogether. Ex. 29 being a statement of Baker, may be received as evidence against him outside Section 10, but within any or all of Sections 8, 11 and 14 of Evidence Act. That is not a question which is arising in the present Rule and it will be relevant

only when C. C. Baker is brought to trial, In this Rule the question is if Ex. 29 is receivable as evidence under Section 10 of Evidence Act for being used against Sk. Md. Omar, and for the matter of that, against any of the accused persons other than C. C. Baker whose statement it is.

25. For bringing any evidence under Section 10, one requirement is what I have already mentioned as laying the basis before such evidence can be offered and I have held that the learned Judge in the court below has rightly held that the basis has been laid in this case. The other important requirement is that the evidence offered shall be, in the language of Section 10 'anything said, done or written by any one of such persons in reference to their common intention.'

For examining the second characteristic of Ex. 29 that it is a statement made after the period of con. spiracy was over and the effect regarding its admissibility under Section 10. Evidence Act as laid down by the Supreme Court of India, it is necessary to remember and recount that English Law on the subject is the Common Law rule that was explained in that country in the case of R. v. Blake reported in (1844) 6 QB 126. In that case question arose regarding admissibility of a document not created in the course of carrying out the purpose of the conspiracy but made by one of the conspirators after the fraud was completed. In the English case,

Lord Denman C. J. said that the evidence must be rejected 'on the principle that a mere statement, made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator'. Patteson J. described it as 'a statement made after the conspiracy was effected'. Ibid 139. Williams J. said that it merely related 'to a conspiracy at that time completed.' Coleridge, J. said that it 'did not relate to the furtherance of the common object.

This summary is quoted from the judgment of Privy Council reported in .

26. English law therefore has been understood as laying down that unless the matter offered as evidence was anything said, done or written within the period of conspiracy it would not be evidence against any of the conspirators other than the

author of the thing said, done or written.

27. That view was adopted as law in India by this Court in 1910 in the case of Emperor v. Abani Bhushan Chukerbutty ILR 38 Cal 169 and in 1931 by Bombay High Court in the case of Emperor v. Ganesh Raghuath ILR 55 Bom 839 : AIR 1932 Bom 56.

28. In 1940 the question was considered by the Judicial Committee of the Privy Council in an appeal from N. W. Province in the case reported in to which attention of the learned Judge of Special Court was directed. It is the same case reported in . Lord Wright delivering the opinion of the Board in that case said-

The English rule on this matter is, in general, well settled. It is a common law rule not based on, or limited by, express statutory word. The leading case (1844) 6 Q B 126, illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud, But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt, what was contained in it amounted to a statement evidencing what had been done, and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect.

'The words relied upon in Section 10 of the Evidence Act are 'in reference to their common intention.' These words may have been chosen as having the same significance as the word 'related' used by Williams and Coleridge J J. Where the evidence is admissible it is, in their Lordships' judgment, on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy, and was receivable as a step in the proof of the conspiracy. Ibid. 139. The words written or spoken may be a declaration accompanying an act, and indicating the quality of the act as being an act in the course of the conspiracy : or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle their Lordships think the words of Section 10 must be

construed in accordance with it, and are not capable of being widely construed so as to include a statement made by one conspirator, in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words 'common intention' signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative, or statement or confession made to a third party after the common intention or conspiracy was no longer operating, and had ceased to exist, is admissible against the other party. There is, then, no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment, Section 10 embodies this principle. That is the construction which has been rightly applied to Section 10 in decisions in India, for instance, in ILR 55 Bom 839 : AIR 1932 Bom 56 and ILK 38 Cal 169. In these cases the distinction was rightly drawn between communications while the conspiracy was going on, with reference to the carrying out of the conspiracy, and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.

29. In effect therefore it was held that law in India by Section 10, Evidence Act containing the phrase 'in reference to common intention' bore the same meaning as 'relate to furtherance to common intention' a phrase used by Coleridge, J. in the Queen's Bench decision in the case of (1844) 6 Q B 126.

30. In 1957 this question was discussed in the Supreme Court before a Bench of three learned Judges (Jagannadhadas, B. P. Sinha and Gajendragadkar JJ.) in the case of (S) : 1957 CriLJ1325 . That was a case of conspiracy to commit an offence of criminal breach of trust and the charge of that conspiracy related to the period from December 1, 1948 to January 31, 1949. Evidence was offered which included entries in certain Books of Account relating to three periods:

(1) First period : 1st December, 1948 to December, 1949.

(2) Second period : February 1, 1949 to the end of December, 1949.

(3) Third period : During the year 1950.

31. Obviously the second and third of these periods were outside the period to which the conspiracy charge related. But entries during these two later periods were thought relevant to show that entries in the first period were fraudulent regarding which each one of the accused in that case had put forward a defence that he was an unconscious tool in the hands of one of the accused about whose criminal intentions none of the other accused persons was aware.

32. Jagannadhadas, J. who delivered the judgment of the Supreme Court in that case held that -apart from Section 10, the evidence provided by the entries , of period outside the period of charge would be admissible under Section 14 of Evidence Act as conduct in general of each individual co-conspirator including his act, writings and statements is evidence against himself. Para (38) at p. 761 of the report make that clear.

33. I may here point out that is the exceptional characteristic of that case involving charge of criminal breach of trust that the Supreme Court was . referring to in para (48) at p, 765 of the report and not that such exception operates on Section 10 of the Evidence Act in all cases involving such charge, as the learned Judge of the Special Court appears to have thought in this case.

34. Then his Lordship discussed the Privy Council, decision in and pointed out that in the case before the Privy Council and also in the other two cases reported in ILR 38 Cal 169 and ILR 55 Bom 839 : AIR 1932 Bom 56 the statements which were, ruled out as inadmissible under Section 10 of the Evidence Act were not sought to be made admissible under some other section of the Evidence Act, Para (44) at p. 764 of the report. Then his Lordship considered the English decision (1844) 6 Q B 126 and Privy Council decision in on the question whether the phrase 'in reference to their common intention' occurring in S. .10 of Evidence Act bears the same meaning as 'refer to furtherance of common intention' in the English Common Law rule as explained by Coleridge. J. in the case of (1844) 6 Q B 126 and adopted by Privy Council in the case of . On that question Jagannadhadas, J. expressed his Lordship's view accepting the interpretation of Section 10, Evidence Act put on it by the Privy Council in the above case and said

at the end of Para (45) at p. 765 of the report-

It is thus reasonably clear that evidence of acts, statements or writings of a co-conspirator either under trial or not on trial but outside the period of conspiracy, would not be admissible in proof of the specific issue of the existence of the conspiracy. It is necessary to add that my learned brothers prefer to reserve their opinion on this legal question on the ground that it does not call for decision in this case.

35. The reservation expressly made by the two learned Judges (Sinha and Gajendragadkar. JJ.) who constituted that Bench of the Supreme Court with Jagannadhadas, J. has to be noticed for its importance and effect that although one learned Judge presiding on that Bench accepted the Privy Council view, the other two learned Judges composing that Bench did not pronounce acceptance of that Privy Council view of law in India on the interpretation of Section 10, Evidence Act and made express reservation of opinion. A point may arise therefrom that the Bench of the Supreme Court has not given its approval to the view of law that Privy Council laid down; but at the same time contrary pronouncement also has not been made by the Supreme Court in that latest case on the point,

36. In that state of law it is not possible to think as the learned Judge of the Special. Court appears to think that the Supreme Court has stated a view of law on the point contrary to what Privy Council had laid down in 67 Ind App 338 : AIR 1940 P C 178.

37. Tested by that view of law the statement (Ex. 29) made by C. C. Baker in 1958, although made by way of description of past events that happened during the period of conspiracy, is a narrative or statement made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist. Such statement was held inadmissible by the Judicial Committee of the Privy Council against any party other than the maker of the statement. Against the maker of the statement it may be admissible under either Section 8 or 11 or 14 of the Evidence Act; if it were a confession it might be admissible against a co-accused under Section 30 of that Act, but it is not admissible under Section 10 of the Act.

38. Ex. 29 therefore should properly be limited in its use only as evidence against its maker C. C. Baker taken under Section 512, Criminal P. C. It should not be used in the trial against the petitioner Sk. Md. Omar or any of the other accused in the case, as evidence under Section 10 of the Evidence Act.

39. For the reasons stated above I uphold the charge that has been framed against Sk. Md. Omar. The Rule is therefore discharged.

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