

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.1805 of 2017**

- Mukesh Singh S/o Raju Singh, Aged About 41 Years R/o Gram Rahasa, P.S. Bhagwanpur, District Vaishali Bihar, Bihar

---- Appellant**Versus**

- State Of Chhattisgarh Through District Magistrate Raipur, Chhattisgarh, Chhattisgarh

---- Respondent/State**For Appellant :-**

Shri Surendra Singh, Sr. Advocate with Ashwani Dubey and Shri Y.C. Sharma, Sr. Advocate with Shri Sachin Nidhi and Shri Ajay Chandra, Advocate

For Respondent/State:-

Shri Lalit Jangde, Dy.GA

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board**Per Manindra Mohan Shrivastava, J.****19-08-2021**

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 17-11-2017 passed by the First Additional Sessions Judge to Court of Third Additional Judge, Raipur, District Raipur in Sessions Trial No.143/2011, whereby and whereunder the appellant has been held guilty for commission of offence under Section 395, 397, 342 read with Section 120-B of IPC and sentenced him, as described below-

Section-395 IPC	Life Imprisonment and fine of Rs.500/-, in default of payment of fine, additional rigorous imprisonment for one month.
Section-397 IPC	Rigorous Imprisonment for seven year and fine of Rs.500/-, in default of payment of fine,

additional rigorous imprisonment for one month.

Section-342 IPC	Rigorous Imprisonment for one year and fine of Rs.500/-, in default of payment of fine, additional rigorous imprisonment for one month.
Section-120-B IPC	Life Imprisonment and fine of Rs.500/-, in default of payment of fine, additional rigorous imprisonment for one month.

2. The prosecution story, as unfolded from the impugned judgment of conviction and order of sentence and records of the case is that on 14-09-2004, dacoity was committed in the State Bank of Indore, Main Branch, M. G. Road, Raipur between 09.45 hours to 10.40 hours in the morning and it is alleged that the dacoity was committed by the present appellant in conspiracy with other co-accused. It is further alleged that in furtherance of conspiracy, the accused persons entered into the building of the bank and they were carrying firearms and on the threat of firearms, the employees of the bank as well as some of the customers were wrongfully confined and they were also threatened and thereafter, 2.80 Crores was looted from the bank.

Upon information given to the police, spot FIR was recorded, followed by detailed investigation. Some of the accused, who were arrested, their memorandum were recorded and it is further said that on the basis of memorandum, recovery had taken place. The test identification parade was also conducted and in the test identification parade, it is said that some of the accused, though, not the present appellant, were identified. It is said that the accused were identified, though the present appellant-Mukesh Singh was not put up for identification. The police in further investigation also collected evidence from the hotel where accused had stayed before committing the offence and Register etc. were also seized. After completion of usual investigation, charge sheet was filed against the accused Sidhi Kumar, Bhushan Prasad, Sunil Kumar and Umesh Prasad. Thereafter, supplementary charge

sheet was also filed against other accused namely Sanjay Kumar Singh, Ram Babu and Shahi Ji. Against the present appellant-Mukesh Singh, no supplementary charge sheet was filed, but he was produced before the trial Court on the production warrant on 26-08-2014 before the trial Court. From the perusal of the impugned judgment, it is also revealed that during the pendency of the trial, accused Bablu @ Sanjay and Umesh Nishad absconded and one of the accused Ram Babu died.

3. Against the present appellant-accused Mukesh Singh, though, no charge sheet was filed, but, on the basis of material contained in the charge sheet filed against other accused, charges were also framed against the present appellant-Mukesh Singh, wherein he was also alleged of commission of offence of dacoity in conspiracy with other accused. The appellant having abjured guilt, he was put to trial along with other accused.

In order to prove its case, the prosecution examined as many as 30 witnesses. The trial Court also examined two witnesses as Court witnesses. The appellant was thereafter examined under Section 313 of Cr.P.C. in respect of incriminating evidence and circumstances led by the prosecution and the present appellant denied having committed the offence. No defence witness was examined by the present appellant-Mukesh Singh.

The learned trial Court, relying upon the evidence led by the prosecution, which included evidence of identification, recovery and tasdik panchnama, convicted the other accused including the present appellant-Mukesh Singh.

4. Learned Senior Counsel appearing for the appellant would argue that as against the present appellant, it is a case of no evidence. He would argue that in the entire prosecution case, the appellant has been involved only on the basis of certain inculpatory statement given by the other co-accused, who were arrested and that has been treated as reliable and admissible under Section-10 of the Indian Evidence Act and used against the present appellant-Mukesh

Singh as evidence of his involvement in the conspiracy, in furtherance of which, dacoity was committed. He would argue that the appellant was never put to identification in the test identification parade conducted by the competent authority. None of the prosecution witnesses, who have been examined by the prosecution as the identifying witnesses, have identified the appellant-Mukesh Singh during trial. It is further argued that no recovery of any incriminating article much less looted cash has been made from the present appellant. He would further argue that though, various documents relating to stay in a hotel, including register was also seized and various other documents were seized and sent for examination of the Handwriting Expert, but, as far as the present appellant is concerned, no incriminating evidence has been led by the prosecution. Learned Senior counsel for the appellant, drawing attention of this Court to the discussions and the findings recorded by the learned trial Court in para-33 to 35 of the impugned judgment, contended that the learned trial Court has convicted the present appellant only on the basis of certain inculpatory statement and memorandum of other accused. He would argue that the discovery of facts under various memoranda of other accused, did not involve the appellant in the alleged commission of offence, as nothing has been seized from the present appellant and there is no other evidence to prove as to how the appellant was involved in the alleged offence with the other accused. Taking his argument further, learned Senior Counsel would argue that the inculpatory statements have been prepared as "Tasdik Panchnama" in Ex.P-4 and P-6, which have been admitted in evidence against the present appellant applying the provision of Section 10 of the Evidence Act, which is wholly impermissible under the law. In support of his submission, learned Senior Counsel for the appellant has placed reliance on the decision of the Supreme Court in ***State of Gujarat vs. Mohammed Atik and others***¹ , ***Mohd. Khalid vs. State of W.B.***²,

1 (1998) 4 SCC 351

2 (2002) 7 SCC 334

State (N.C.T. of Delhi) vs. Navjot Sandhu³ and S. Arul Raja vs. State of Tamil Nadu⁴.

5. On the other hand, learned State counsel, supporting the impugned judgment of conviction and order of sentence would argue that as far as present appellant-Mukesh Singh is concerned, in all the memoranda statements of co-accused and “Tasdik Panchnama” namely Ex.P-2, P-3, P-4 and P-6, the appellant has been named. He would argue that the appellant remained arrested in connection with some other case, therefore, his identification parade was not conducted and even though, the witnesses of identification, who have been examined in the Court, have not identified him nor any recovery has been made from him, yet, the other accused in the case, have given clear statement regarding the manner, in which, the conspiracy was hatched in furtherance of which, the offence was committed, in which, the present appellant played an important role as one of the co-conspirator and his role in the entire conspiracy has been recorded during investigation in presence of independent witnesses. He would further argue that in the memorandum, Ex.P-2 of Bhushan Prasad Singh, Ex.P-3 of Sidhi Kumar, Tasdik Panchnama, Ex.P-4 at the instance of the accused-Siddhi Kumar and Bhushan Prasad, Memorandum, Ex.P-5 of accused-Umesh Prasad, Memorandum Ex.P-6 of accused-Sunil Singh, Tasdik Panchnama, Ex.P-7 of accused Sunil Kumar and Umesh Prasad, a common story of the manner, in which, the conspiracy was hatched and offence committed in furtherance of the conspiracy, has been clearly stated, which has been proved by the Investigating Officer. He would further argue that the role played by the different conspirator including the present appellant-Mukesh Singh has been coherently stated in all memoranda and Tasdik Panchnama of all the co-accused and each of them has clearly involved the appellant as one of the co-conspirator in the conspiracy leading to commission of offence.

³ AIR 2005 SC 3820

⁴ (2010) 8 SCC 233

According to him, the contents of Tasdik Panchnama, which reveal the manner, in which, conspiracy was hatched and the role played by the present appellant-Mukesh Singh, constitutes relevant and admissible evidence under Section 10 of the Indian Evidence Act, as far as the present appellant-Mukesh Singh is concerned.

6. We have heard learned counsel for the parties and perused the impugned judgment and records of the case.

7. In the present case, large number of accused were involved in the alleged offence of dacoity in the bank. Though, investigation was carried out and memorandum statement as also Tasdik Panchnama of other accused were recorded, but, there is nothing on record to show that any memorandum statement of the present appellant was recorded. Further, though identification parade was conducted, as many as four times and memo of test identification parade in Ex.P-12, P-13, P-14, P-15 & P-16 were prepared, but, it is clear that the appellant was never put up for identification by any of the identifying witnesses. Further more, after having gone through the evidence of the prosecution witnesses, particularly those, who have been examined as identifying witnesses of the accused, there is no evidence that any of the witnesses identified the present appellant-Mukesh Singh during trial.

8. No recovery of any incriminating article, much less cash, has been made from the appellant-Mukesh Singh on the basis of memorandum statement of co-accused. Thus, as far as the present appellant-Mukesh Singh is concerned, there is neither any evidence of identification nor recovery of any incriminating material from the appellant, much less, discovery of any other fact, which involves the appellant in the alleged commission of offence.

9. From the impugned judgment, this Court finds that the only basis for conviction of the present appellant in the alleged commission of offence is that his name has been mentioned in the memorandum statement of the co-accused

and the contents of Tasdik Panchnama prepared by the Investigating Officer, details prepared by the Investigating Officer on the basis of what has been stated by some of the accused, has been taken as relevant and admissible evidence of conspiracy and involving the present appellant-Mukesh Singh.

10. This Court has gone through the memorandum statement and Tasdik Panchnama, which have been referred to above, said to be recorded at the instance of the co-accused of the case.

11. In memorandum statement of accused-Bhushan Prasad Singh, Ex.P-2, accused Siddhi Kumar, Ex.P-3, accused Umesh Prasad, Ex.P-5, accused Sunil Singh, Ex.P-6, which have been recorded under Section 27 of the Evidence Act, certain facts are said to be discovered by the prosecution. In all these memorandum statements, co-accused have stated that the present appellant was also involved in the conspiracy, however, that statements of the co-accused recorded under Section 27 of the Evidence Act did not lead to discovery of any fact, which involved the present appellant-Mukesh Singh in the alleged commission of offence. Therefore, mere mention of the name of the present appellant in the aforesaid memorandum statement of co-accused by itself, without anything more, would not constitute any evidence on the basis of discovery of any fact.

12. In addition to memorandum statement, the documents in the name of "Tasdik Panchnama" have also been prepared. Ex.P-4 is said to have been prepared on the basis of the statement made by co-accused-Siddhi Kumar and Bhushan Prasad. In those statements, co-accused are said to have disclosed as to the manner, in which, the conspiracy was hatched and offence committed in furtherance of the said conspiracy. The role played by the present appellant in the said conspiracy and execution thereof is that after dacoity, co-accused escaped in two motorcycles, which are used by the present appellant.

13. In Tasdik Panchnama, Ex.P-7 recorded by extracting information from the

co-accused Sunil Kumar and Umesh Prasad also, similar role is alleged to have been played by the present appellant-Mukesh Singh.

14. Thus, all the memorandum statement and so-called Tasdik Panchnama are in the nature of disclosure statement recorded under Section 27 of the Evidence Act which are treated as confessional statement/inculpatory statement of co-accused of the case and on this basis, the appellant is involved in the alleged commission of offence.

15. None of the memorandum statement, Tasdik Panchnama, which have been recorded after conspiracy was actually committed and bank was looted, are relevant and legally admissible evidence by application of Section 10 of the Evidence Act, because, those statements of the co-accused as co-conspirator are not made while conspiracy was being carried out and they are nothing, but disclosure statement under Section 27 of the Evidence Act and inculpatory statement of the co-accused, much after the conspiracy was successful, offence was committed and accused were arrested.

16. The legal position in this regard was examined and principles evolved and settled in catena of decisions.

17. in the case of ***State of Gujarat vs. Mohammed Atik*** (supra), Their Lordships in the Supreme Court considered several previous judgment enunciating principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other.

18. The expression "in reference to their common intention" was also considered and it was also examined, as below:-

14. "But a three judge bench of this Court in Bhagwan Swarup Lal Bishan Las and others vs. State of Maharashtra (AIR 1965 SC 682 said that the expression ('in reference of their common intention' and is very comprehensive and it appears to have been designedly used to give it a wider scope than the words 'in furtherance of' in the English Law. Even if it is wider, would its width go beyond the period of conspiracy? It is well-

neigh settled that [Section 10](#) of the Evidence act is founded on the principle of law of agency by rendering the statement or act of one conspirator binding on the other if it was said during subsistence of the common intention as between the conspirators. If so, once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made "in reference to their common intention." In other words, a post-arrest statement made to a police officer, whether it is a confession or otherwise, touching his involvement in the conspiracy, would not fall within the ambit of [Section 10](#) of the Evidence act.

15. Privy Council has held so in *Mirza Akbar vs. King Emperor* - AIR 1940 PC 176. The relevant observations of Lord Wright are the following:

"This being the principle, their Lordships think the words of S.10 must be constructed in accordance with it and are not capable of being widely construed so as to include a statement 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' judgement, 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 statement or confession made to a third party after the common intention or conspiracy was no longer operation 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' judgement S.10 embodies this principle. That is the construction which has been rightly applied to S.10 in decisions in India, for instances, in [Emperor v. Ganesh Raghunath](#) (55 Bombay 839) and [Emperor v. Abani](#) (38 Cal 169). In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

(Emphasis supplied)

16. A three judge bench of this Court has also said in [Sardul Singh Caveeshar and others vs The State of Bombay](#) (AIR 1957 SC 747):

"The principle underlying the reception of evidence under S.10 of the Evidence Act of the statements, acts and writings of once co- conspirator as against the other is on the theory of agency. The rule in S.10 Evidence Act, confines that principle of agency in criminal matters to the acts of the co- conspirator within the period during which it can be said that the acts were "in reference to their common intention" that is to say, things said, done or written, while the conspiracy was on foot and in

carrying out the conspiracy. It would seem to follow that where, the charge specified the period is not receivable in evidence."

(Emphasis supplied)

19. Finally, the settled principles with regard to scope and ambit of Section 10 of the Indian Evidence Act was declared, as below:-

17. "Thus, the principle is no longer *res integra* that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of [Section 10](#) of the Evidence Act. The corollary of it is that the confessional statement of 4th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use."

20. In subsequent decision in the case of ***Mohd. Khalid*** (supra) also, the aforesaid principle was elaborately explained, relying upon the earlier judgment in the case of ***State of Gujarat vs. Mohammed Atik*** (supra), the principle that Section 10 of the Evidence Act, is exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator, restricted to the statement made during the period when the agency subsisted, was highlighted, as below:-

33. "In view of what we have said about the confessional statement it is not necessary to go into the question as to whether the statement recorded under [Section 164](#) of the Code as to be given greater credence even if the confessional statement has not been recorded under Section 15 of the TADA Act. However, we find substance in the stand of learned counsel for accused-appellants that [Section 10](#) of the Evidence Act which is an exception to the general rule while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. [In State of Gujarat v. Mohd. Atik and Ors.](#), [1998] 4 SCC 351, it was held that principle is no longer *res Integra* that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of [Section 10](#) of the Evidence Act. Once the common intention ceased to exist any statement made by a former conspirator thereafter cannot be regarded as one made in reference to their common intention. In other words, the post arrest statement made to a police officer, whether it is a confession or

otherwise touching his involvement in the conspiracy, would not fall within the ambit of [Section 10](#) of the Evidence Act.

34. The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention". Under the corresponding provision in the English law the expression used is "in furtherance of the common object." No doubt, the words "in reference to their common intention" we wider than the words used in English law (vide [Sardar Sardul Singh Caveeshar v. The State of Maharashtra](#), AIR (1965) SC 682.

35. But the contention that any statement of a conspirator, whatever be the extent of time, would gain admissibility under [Section 10](#) if it was made "in reference" to the common intention, is too broad a proposition for acceptance. We cannot overlook that the basic principle which underlies in [Section 10](#) of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. [Section 10](#), which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under [Section 10](#)."

21. In an another subsequent decision in the case of **S. Arul Raja** (supra), it was clearly held thus:-

58. "Furthermore, this Court in [Mohd. Khalid v. State of West Bengal](#) reported in (2002) 7 SCC 334 and [State of Gujarat v. Mohd. Atik & Others](#) reported in (1998) 4 SCC 351 has held that a post-arrest statement would not fall within the ambit of [Section 10](#) of the Evidence Act. Therefore, the statement made by A1 in police custody cannot be used to implicate the appellant in the conspiracy to murder Aladi Aruna."

22. In view of the settled legal position, it is apparently clear that none of the

documents containing statement of the co-accused who were arrested after the commission of offence of dacoity, in furtherance of conspiracy, would constitute relevant and admissible evidence under Section 10 of the Evidence Act, so as to involve the present-Mukesh Singh in the alleged commission of offence.

23. Therefore, we are inclined to accept the argument of learned Senior Counsel for the appellant that as far as the present appellant is concerned, there is no legally admissible evidence led by the prosecution to prove the involvement of the appellant in the conspiracy, in furtherance of which, the offence of dacoity was committed.

24. Resultantly, this appeal is allowed. Appellant-Mukesh Singh is acquitted of the charges levelled against him. His conviction is set aside. The appellant be released forthwith.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Vimla Singh Kapoor)
Judge