Privy Council Appeal No. 15 *of* 1940

Mirza Akbar - - - - - - - - - - *Appellant*

v.

The King-Emperor - - - - - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH MAY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM

LORD WRIGHT

SIR GEORGE RANKIN

Delivered by LORD WRIGHT

This is an appeal *in forma pauperis* by special leave from a judgment and order of the Court of the Judicial Commissioner, North-West Frontier Province dated the 10th July, 1939. The learned Judicial Commissioner dismissed the appellant's appeal from his conviction of an offence punishable under s. 302/120-B Indian Penal Code, i.e., conspiracy to murder in consequence of which conspiracy murder was committed, and confirmed the sentence of death passed on him by the Additional Sessions Judge, Peshawar Division, on the 8th May, 1939.

The appeal raises two main points, which are the only points calling in their Lordships' judgment for consideration here. They are independent of each other. The first is a question as to the jurisdiction of the Court by which the sentence was confirmed. It was contended on behalf of the appellant that the Court was not legally constituted, because the appeal to the Court was dismissed and the sentence confirmed by a single Judge of the Court of the Judicial Commissioner sitting alone. The second was whether if the objection as to jurisdiction failed, the decision of the Court was vitiated by misreception of evidence. As their Lordships announced at the conclusion of the arguments before them, they were of opinion that both points failed the appellant and that the appeal should be dismissed. They will now state their reasons for coming to that conclusion.

The appellant was charged with conspiracy to murder, in consequence of which conspiracy murder was committed under the joint effect of section 302/120B of the Indian Penal Code. He was convicted and sentenced to death by the Trial Judge, Mr. Mohammad Ibrahim, Additional

Sessions Judge Peshawar Division, assisted by four assessors who were unanimously of opinion that all three accused including the appellant were guilty. The facts of the case and the circumstances under which they were convicted will be dealt with so far as relevant in this appeal, in connection with the second question, that of evidence. When, after some preliminary proceedings, the appeal came on for hearing before the Court of the Judicial Commissioner on the 10th July, 1939, it was heard by Almond, the Judicial Commissioner, sitting alone. Kazi Mir Ahmad A.J.C., the Additional Judicial Commissioner, was absent on leave. The period of his leave was for two months with effect from the 30th May, 1939. The Honourable Mr. M. A. Soofi had been appointed under section 222 (2) of the Government of India Act, 1935, to act as a Judge of the Court during the absence of Kazi Mir Admad A.J.C. But it happened that in this particular case Mr. M. A. Soofi was disqualified from sitting on the appeal because, as the Judicial Commissioner at the outset of his judgment on the appeal explained, Mr. M. A. Soofi had exercised judicial functions in the proceedings. The question whether in those circumstances the Court was properly constituted by Almond J.C. sitting alone falls to be determined on the basis of Rules 1 and 3, of the Rules made on the 19th May, 1939, by the Governor of the North-West Frontier Province in the exercise of the powers conferred on him by Section 7 of the North-West Frontier Province Courts Regulation, 1931 (as amended), for the purpose of specifying the classes of civil and criminal proceedings which were to be heard by a Bench of the Court of the Judicial Commissioner, North-West Frontier Province. The Rules provide respectively as follows:—

> " Rule 1 of the said rules provides that the following classes of criminal cases are to be disposed of by a Bench, viz., any appeal from a sentence of death or of transportation for life and any cases of confirmation or revision of any such sentence.
>
> " Rule 3 provides that notwithstanding anything contained in these rules where a Judge of the Court has in a subordinate capacity exercised judicial functions at any stage of a criminal proceeding or is personally interested therein, he shall not hear any appeal or reference arising out of such proceeding, and if it is not practicable to constitute a Bench without such Judge, such appeal or reference shall be heard by another Judge sitting alone."

That Mr. M. A. Soofi was disqualified under Rule 3 was not disputed, but it was contended on behalf of the appellant that in the circumstances of the case compliance with Rule 1 was not excused and that the appeal could only be legally disposed of by a Bench. It was not established, so it was contended, that it was not practicable to constitute a Bench without such Judge (that is Mr. M. A. Soofi) and accordingly the appeal could not legally be heard by another Judge (in this case the Judicial Commissioner), sitting alone.

Their Lordships are of opinion that the objection is not well founded. On the 10th July, 1939, when the appeal came

on for hearing, it was not practicable to constitute a Bench without Mr. M. A. Soofi, because there was no other Judge of the Court available to sit with Almond J.C. In the event the precise language of Rule 3 was thus satisfied. It was however contended that the appeal might have been adjourned until the return of Kazi Mir Ahmad A.J.C. from his leave, say, until the 30th July, 1939, an adjournment of 20 days. But their Lordships find in the Rule nothing to justify this qualification of the words of the Rule. If however there is some reservation implied, so that the Rule is to be construed as meaning " not reasonably practicable " there must be some authority to decide what is reasonable in the circumstances. Their Lordships think that this authority could be no other than the Judge. To decide whether or not an appeal should be adjourned is particularly a matter for the discretion of the Judge. It is not here necessary to decide whether in any case the decision of the Judge under Rule 3 can be overruled, but their Lordships think that if the exercise of this discretion, which is a judicial discretion, is to be in any case overruled, strong grounds for doing so must be shown. It is enough to say that no such grounds are shown here.

No authority has been cited directly in point. Reference was made to various decisions under section 274 of the Code of Criminal Procedure, which provides that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and if practicable of nine persons. The language of this provision is different from that of the Rule and the conditions are different, particularly in view of section 276, which enables a deficiency to be made good by leave of the Court by choosing other jurors from persons who may be present. There has been some difference of judicial opinion as to the true effect of the section 274, but the more recent and, in their Lordships' opinion, better, view is that adopted in *Emperor* v. *Benat Pramanik* I.L.R. 62 Cal. 900, which is that if the Judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that section 274 had been complied with. These decisions so far as they go may tend to support the opinion just expressed in regard to Rule 3, but as already stated, they do not give direct help in the construction of Rule 3.

In their Lordships' judgment the objection of want of jurisdiction fails.

The second objection requires some statement of the facts and the evidence. The appellant was tried along with the actual murderer Umar Sher, and with Mst Mehr Taja who had been the wife of the murdered man, Ali Askar. The murder was committed on the 23rd August, 1938, in the village of Taus Banda about four miles from Hoti. The guilt of Umar Sher was not really open to doubt. He was practically caught red-handed. He was caught running away with a single barrel shot gun in his hand, the barrel of which smelt as if freshly discharged. There was an empty

cartridge jammed in the barrel. When the appellant came up from the field in which he had been working about half a mile away from the scene of the murder he asserted that Umar Sher was innocent and should be released, but the others present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact however was relied upon by the prosecution as showing that he was a hired assassin, bribed to commit the murder by the appellant and Mst Mehr Taja who were co-conspirators in that regard. This was found by the Court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant, and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be, and the handwriting have not and could not have been contested before their Lordships.

It will be convenient to set out the relevant portions of the three letters. They are (1) Exhibit PA, in the handwriting of Mst Mehr Taja:

> " Greetings to thee O my sweet-heart. Mind not in the least if I have been hard on thee at times—pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy ears to these. They are arch devils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry my darling for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftab often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings."

Exhibit P.B. (also in Mst. Mehr Taja's handwriting).

> " Letter to the sweet-heart. Peace be on you. The fact, my darling is that I am in great distress: otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord. . . . I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings."

Exhibit P.D. (in handwriting of the appellant).

> " My sweet-heart and the bearer of my burden. If thou tauntest me in regard to my mother what do I care for her. I look to my God and to thee only for reliance. I cannot wait any more. For the sake of God and his Prophet do try or I will die. You must find out the money or I would die. Is it of my choice to be roaming about and thou be enjoying with him, but what shall I do. If I had my own way I would not have left you to remain with him. I am burning and have pity on me for God's sake. To me the passing of each day is like months and years. Once place thy self in my charge and satiate me with the honey of thy red lips. Even if thou cuttest my head off my neck I would still yearn for thy white breast. This is my last word if only thou wouldst attend to it. I have vowed for thy sake at many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's limbs have grown sapless after thee."

The judges in the Court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The Judicial Commissioner in dismissing these prisoners' appeals, thus summed up the position, with special reference to the letters. He said:

> " There is a reference to Mirza Akbar by name in Ex. P.D. and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other and there was a question of finding money for hired assassin to get rid of him. Subsequently we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in the earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach any importance to it at the time because they had no conception as to what was the motive for the commission of the offence.
>
> In my opinion there is no doubt whatsoever that these two Appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did."

But the appellant's contention was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the Examining Magistrate after she had been arrested on the charge of conspiracy. That statement which was made in the appellant's absence was admitted in evidence both by the trial judge and by the Judicial Commissioner on appeal as relevant against the appellant under section 10 of the Evidence Act. The Judicial Commissioner said that it had been argued that section 10 did not apply to any statement made by conspirators if the offence to commit which they conspired, has actually been committed. He rejected that argument and refused to hold that section 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant, since he had not had any opportunity of cross examining Mst. Mehr Taja upon it.

In their Lordships' judgment, the Judicial Commissioner misconstrued the effect of section 10.

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 words. The leading case of *R.* v. *Blake* 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. Lord Denman said at p. 138 that the evidence must be rejected " on the principle that a mere statement made by one conspirator to a third party or any act 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". 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 ". 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 JJ. 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 (per Patteson J. at p. 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 *Emperor* v. *Ganesh Raghunath* I.L.R. 55 Bomb. 839, *Emperor* v. *Abani* I.L.R. 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 the conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past.

In their Lordships' judgment the statement of Mst. Mehr Taja falls under the latter category, and was wrongly admitted.

But in truth the question of law is not really material in this case. The statement so far from admitting a conspiracy with the appellant, categorically denied it. While the woman stated that the appellant had threatened to kill her and her husband if she refused to marry him, she had, she said, refused his advances and stopped him coming to the house. Mr. Roberts, Counsel for the respondent, frankly admitted that apart from the legal question, he could not rely on the statement as evidence of the conspiracy, or indeed on any other ground.

In their Lordships' judgment, however, the admission of the statement (to which it should be repeated that the Judicial Commissioner did not attach very great weight) did not vitiate the proceedings. On the material before the Court, after the statement is excluded, there was evidence sufficient to justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar. The vague suggestion that they related merely to a scheme to obtain a divorce and to raise money for that purpose is clearly untenable. The handwriting of the letters is clearly established. Under those circumstances their Lordships will follow the precedent established in *Pakala Narayana Swami* v. *King Emperor* 66 I.A. 66, and hold that in this case as in that it is impossible to say that the proceedings which ended with the conviction resulted in a failure of justice.

They accordingly humbly advised His Majesty that the appeal should be dismissed.

(24892) Wt. 8017—49 [illegible] 7/49 P. St. G. 338

In the Privy Council

MIRZA AKBAR

v.

THE KING-EMPEROR

DELIVERED BY LORD WRIGHT

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