PETITIONER:
STATE OF GUJARAT

Vs.

RESPONDENT:
MOHAMMED ATIK AND OTHERS

DATE OF JUDGMENT: 03/04/1998

BENCH:
M.K. MUKHERJEE, K.T. THOMAS

ACT:

HEADNOTE:

JUDGMENT:

J U D G E M E N T

Thomas J.

A Public Prosecutor moved in the trial court for permission to use a confessional statement recorded from an accused during investigation of another crime, but the trial judge investigation of another crime, but the trial judge disallowed the motion on the premise that unless the confession was recorded during the investigation of the very offence under trial it cannot be used in evidence of that case. The order thus passed by the trial court (A Designated Court under Terrorist and Disruptive Activities (Prevention) Act 1987, (TADAA as acronym) is now being challenged by the State of Gujarat by special leave.

It is not necessary to set out facts of the case which is now pending before the Designated Court. Nonetheless, some skeletal facts necessary for disposal of these appeals have to be stated: The three respondents in these appeals were accused in some cases registered by different police stations of Gujarat State following certain instances of bomb blasts at different places. Investigation revealed that those instances were the aftermath of conspiracies hatched by different conspirators who operated in different areas. Hence, offences came to be registered at different police stations and different investigating agencies commenced investigation in separate areas. Fourth respondent (Abdul Latif Abdul Wahab Sheikh) was arrested in connection with Crime No.1/34 of 1993 of the Maninagar Police station. During investigation of that case a Superintendent of Police (Shri ashish Bhati) has recorded a confessional statement from the said Abdul Latif under Section 15 of the TADAA. Second respondent (Musakhan @ Babakhan) was arrested in connection with Crime 1/284 of 1993 of Shahibag Police Station. His confessional statement was also recorded in the same manner.

In the meanwhile, police charge-sheeted the cases which were registered at two other police stations (Kalupur and Karanj Police Stations) as against fourth respondent Abdul Latif and some others. The Designated Court at Ahmedabad began proceedings to try those cases. While the trial was in progress, the Public Prosecutor in that Court felt that the

confessional statements recorded by the police during investigation of the case registered at Maninagar Police Station under Section 15 of the TADAA have to be used as prosecution evidence as those statements related to events which are subject-matter of the cases registered in Kalupur and Karanj Police Stations. It was then that the Public Prosecutor filed application for permission to use such confessional statements. The application was opposed on the main ground that the confession made in another case cannot be used in the crime registered by Kalupur and Karanj Police Stations. Learned Judge of the Designated Court, thereupon, considered the following question:

> "The question therefore is whether the prosecution be permitted to introduce and prove the confessional statement of an accused alleged to have been made during the investigation of another offence committed on a different date, during the trial of that accused in another crime."

Learned Judge answered the question in the negative by upholding the objection raised by the respondent, as per the impugned order.

As these special leave petitions were pending an important development happened - fourth respondent (Abdul Latif) died and the case against him got abated. Nevertheless the question remains alive as the confessional statement attributed to the second respondent Musakhan @ Babakhan is also sought to be used in the cases registered by Kalupur and Karanj Police Stations. For considering the said question we look at Section 15(1) of the TADAA which reads thus:-

> "15. Certain confessions made to police officers to be taken into consideration- (1) Notwithstanding anything in the Code or in the Indian Evidence act 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person [or co-accused, abettor or conspirator] for an offence under this act or rules made thereunder."

It is clear from the above section that a confessional statement recorded in accordance with the requirements contained in the Section becomes admissible in spite of the ban contained in Section 25 of the Evidence Act or Section 162 of the Code of Criminal Procedure. The requirements stipulated in Section 15(1) of the TADAA for admissibility of a confession made to a police officer are (1) The confession should have made to a police officer not lower in ran k than a Superintendent of Police (2) it should have been recorded by said police officer (3) the trial should be against the maker of confession (4) such trial must be for an offence under TADAA or the Rules thereunder. If the

above requirements are satisfied the confession becomes admissible in evidence and it is immaterial whether the confession was recorded in one particular case or in a different case.

When there is no statutory inhibition for using such confession on the premise that it was not recorded during the investigation of the particular offence which is under trial there is no need or reason for the Court to introduce a further fetter against the admissibility of the confessional statement. It often happens that a confessor would disclose very many acts and events including different facets of his involvement in the preparation attempt and commission of crimes including the acts of his co-participators therein. But to expel every other incriminating disclosures than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law.

We have, therefore, absolutely no doubt that a confession, if usable under Section 15 of the TADAA, would not become unusable merely because the case us different or the crime is different. If the confession covers that different crime in which that crime is under trial and it would then become admissible in the case.

In State of Rajasthan vs. Bhup Singh - 1993 (10) SCC 675 a similar objection raised by the defence was considered in the context of admissibility of a confessional statement under Section 27 of the Evidence Act. In that case, information was elicited by the police from the accused during investigation in connection with a particular offence and weapon of offence was recovered in consequence thereto. That information became relevant in a subsequent case, but the accused contended that the said information is not admissible in evidence in the subsequent case. This High Court over-ruled the objection on the ground that there is no such prohibition in Section 27 of the Evidence Act. It was observed that "it is immaterial whether the information was supplied in connection with the same crime or a different crime." The same principle applies to a confession recorded under Section 15 of the TADAA.

However, Shri S.K.Dholakia, learned Senior Counsel who argued for the appellant State contended that the confession made by the 4th respondent-Abdul Latif (who died during pendency of these Special leave petitions) is useful and relevant in evidence to prove the criminal conspiracy involving the remaining accused as the said confessional statement relates to the role played by such remaining accused in the crime. Learned counsel said that since the maker of the confession died, the relevancy of the confessional statement would fall within the ambit of Section 32(3) of the Evidence Act. The sub-section renders the following statement relevant if it was made by a person who is dead:

> "(3) When the statement is against the pecuniary or propriety interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages."

Even if the fourth respondent - Abdul Latif were alive his confession could have been used as against another person only under the strict parameters fixed in the proviso to Section 15(1) of the TADAA. The proviso reads thus:- "Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused." But

the moment the maker of the confession dies before conclusion of the trial, the above proviso sinks into disuse because than it would be impossible to try the two persons together.

However, learned counsel submitted that what becomes relevant under Section 32(3) of the Evidence Act would become relevant under Section 10 of the Act as well: That Section pertains to "Things or done by conspirator in reference to common design.

It provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence "anything said, done or written by anyone of such persons in reference to their common intention" is a relevant fact. So unless what the deceased accused (Abdul Latif) disclosed in his confessional to their common intention," that statement cannot be brought within the scope of Section 10 of the Evidence Act.

We have to see the amplitude of the expression "in reference to their common intention" as used in Section 10 of the Evidence Act. It was once considered that expression is as good as saying "in furtherance of the common intention." Almost seven decades ago a Full Bench of the Patna High Court had held it like that in Indra Chandra Narang and others vs. Emperor- AIR 1929 Patna 145:

> "The object of this section is merely to assure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the act, words, or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained."

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.

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)

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)

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.

In the result we allow these appeals and set aside the impugned order and permit the prosecution to make use of the confessional statement, recorded under Section 15 of TADAA of the accused who are now facing trial.