

ADMISSIBILITY OF CONFESSIONS UNDER THE LAW OF EVIDENCE AND COUNTER-TERRORISM LAWS

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ABSTRACT

This paper addresses the inconsistency between the general rule of law of evidence law and counterterrorism laws pertaining to the admissibility of confessional statements made to the Police. This paper discusses the evolution of counter-terrorism regime in India and lays out the legal framework pertaining to the counterterrorism regime in India. Further, it has examined how the court deals with cases under the counterterrorism laws, which are no longer in force. It has been observed that even though the two major antiterrorism acts; TADA and POTA have been repealed, the cases booked under the acts and state laws like MCOCA, keep the spirit of the underlying principles of the act, alive. It can be seen that the court has repeatedly delved into the interpretation of the concerned sections of the repealed statutes. Lastly, this paper offers recommendations to bridge the gap between the Indian counter-terrorism regime and the general rule of law of evidence. It has been concluded that the major fall out of the anti-terrorism laws was due to its contradictions with the general law of the land, which led to confusion, misuse and eventually, revocation of the statutes.

Keywords- Confession, counter-terrorism, Law of Evidence, TADA, POTA, MCOCA.

INTRODUCTION

There has been a lot of discrepancies regarding a universally accepted definition of ‘terrorism’. A research done in 1980s claimed that there are 109 definitions of ‘terrorism’ in literature.ⁱ Simply put, ‘Terrorism’, as generally accepted, alludes to acts of violence that target civilians in the pursuit of political or ideological aims.ⁱⁱ Over the past decade, 21,000 people, worldwide, were killed each year, in terrorist attacks.ⁱⁱⁱ Since, 2000, India has recorded the deaths of 50,436 people pertaining to terrorist attacks.^{iv} In the initial years of Indian Independence, terrorism was dealt with as a Law and Order issue.^v However, as acts of terrorism rose and became more intense and geographically widespread, it called for a special counter- terrorism regime. Indian Parliament has constantly enacted several special statutes to deal with terrorism. However, these attempts have largely been ineffective and unsuccessful. Some of the relevant statutes are, The Unlawful Activities (Prevention) Act of 1967 (UAPA), Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1985, Prevention of Terrorist Act (POTA) in 2002, and state laws like, Maharashtra Control of Organised Crime Act, 1999 (MCOCA).

One of the distinguishing features of these acts is that they diverted from the general rule of Law of Evidence pertaining to admissibility of custodial confessions. This diversion has caused a constant judicial battle, leading to the amendment and revocation of some of these acts. This paper will compare and analyse the admissibility of confessions to the police under the Law of Evidence and the above-mentioned Counter-Terrorism Laws. This paper will briefly discuss the evolution of counter- terrorism regime in India. Subsequently, it will lay out the legal framework pertaining to the counter terrorism regime in India. Further, it will examine how the court deals with cases under the counter terrorism laws, which are no longer in force. Furthermore, the paper will analyze the influence and implications of these laws on present Anti- terrorism jurisprudential regime and offer recommendations for the same. In order to gain a better insight into the matter, I have primarily referred to the legislations and case laws. I have also consulted books and journal articles related to Indian Counter-terrorism regime.

EVOLUTION OF COUNTER- TERRORISM REGIME

The Unlawful Activities (Prevention) Act (UAPA) was enacted in 1967. It was enacted to “provide for the more effective prevention of certain unlawful activities of individuals and associations [, and for dealing with terrorist activities,]” and related matters.^{vi} Later, as a consequence of Indira Gandhi’s assassination, the Parliament enacted the Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1985.^{vii} Due to the extensive misuse of the act for political reasons, the act lapsed in 1995.^{viii} Meanwhile, due to the absence of any federal law governing terrorist activities, states which were constantly targeted in such acts of violence, like Maharashtra, enacted their own state law. In 1999, Legislative assembly of Maharashtra enacted the Maharashtra Control of Organised Crime Act (MCOCA). Such initiative was later taken by Karnataka and Chhattisgarh. Karnataka enacted, Karnataka Control of Organised Crime Act, 2000 (‘KCOCA’), and Chhattisgarh enacted the Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005 [Chhattisgarh Special Public Safety Act] (‘CVJSA’).^{ix} The Indian Parliament attack on 13 December, 2001, resulted in the parliament enacting Prevention of Terrorist Act (POTA) in 2002.^x Nevertheless, it’s effect was momentary. It was repealed in 2004 for resembling reasons for the fallout of TADA.^{xi} Therefore, the current laws in force are the UAPA and the state laws, in addition to the central criminal laws like the Indian Penal Code, 1860, Code of Criminal Procedure, 1974 and Indian Evidence Act, 1872.

LAWS CONCERNING CONFESSIONS

The court stated, “confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession....”^{xii} The general law of land states that a confession made before the police officer cannot be proved against the accused in the Courts of law.^{xiii} Under criminal law, ‘confessions’ are a species of ‘admissions’.^{xiv} Section 17 of Indian Evidence Act, 1872 defines admissions.^{xv} Under, the Act, sections 24 to 32 relate to confessions.^{xvi} Section 24 lays down the conspicuous rule of invalidating confessions made under any inducement, threat or promise.^{xvii} Section 25 of the Evidence Act, makes a confession before a police officer inadmissible in the court.^{xviii} This is the general rule regarding

admissibility of confessions. This section acknowledges the unfortunate reality of police brutality for extortion of confessions and the mental state of heightened panic and fear experienced in police custody.^{xix} Section 26 of the Evidence Act, takes another step forward and bars the proof of a confession made by any accused person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate.^{xx} Thus, even if a confession is recorded in the presence of the magistrate but is made under any inducement, threat or promise, the court will invalidate it. Nonetheless, Section 27 of Evidence Act is an exception to this rule. If a discovery of admissible evidence is made as a consequence of a part of confession or other statement given to the police, that part of the statement may be admitted as corroborative evidence.^{xxi} Thus, the general rule is that a confession made to a police officer is inadmissible in the courts of law.

However, when the Parliament enacted the Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1985 and Prevention of Terrorist Act (POTA) in 2002, they diverted from this general rule. Section 15 of TADA and section 32 (1) of POTA make confessions by an accused, before the police officer, admissible in the court, under the respective acts. Section 32 (1) of POTA mirroring section 15 of TADA states,

“32. 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 a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.”^{xxii}

This section starts with a non obstante clause and the provision lifts the ban against the reception of confessional statements made to the police officers.^{xxiii} Constitutional validity of section 15 of TADA was challenged in 1994, in the case of *Kartar Singh vs. State of Punjab*.^{xxiv}

The Court upheld the constitutionality of the act by reason of constitutionally established principle of legislative classification under Article 14.^{xxv} Although, in a five judge bench, 2 judges dissented and struck down section 15 of TADA.^{xxvi} Interestingly, Justice Sahai, commented, “Article 20(3) of the Constitution of India declares that, "No person accused of any offence shall be compelled to be a witness against himself." In our context, this would

mean that the constitutional embargo is only against "compelled" confessions. It has nothing against custodial confessions if made voluntarily.^{xxvii} However, the court also listed certain guidelines pertaining to section 15 of TADA, which were further solidified as sub-sections (2) to (5) of section 32 of POTA, which was eventually struck down. However, the underlying principles of the above mentioned two sections can be found in section 18 of Maharashtra enacted the Maharashtra Control of Organized Crime Act, 1999 (MCOCA).^{xxviii} This section also extends the admissibility of a confession to the co-accused, abettor, or conspirator.^{xxix}

INFLUENCE ON THE CURRENT JUDICIAL LANDSCAPE

Mumbai and Delhi are two of the most populated cities in India and are often the most targeted in terrorist attacks. Maharashtra Control of Organised Crime Act (MCOCA), 1999 which also applies to Delhi, makes it a prominent anti- terrorism law. As mentioned earlier, section 18 of MCOCA allows for custodial confessions to be admissible evidence. In 2006 Mumbai blast case, the Supreme court held that Section 18 of the MCOCA is an exception to the rule laid down in Sections 25 and 26 of the Evidence Act, and must be interpreted strictly.^{xxx} The court further stated that the admissibility of a confessional statement would unequivocally override Sections 25 and 26 of the Evidence Act for purposes of admissibility, but must compulsorily be restricted to the accused persons making the confession and to a co-accused (abettor or conspirator).^{xxxi} The Delhi High Court held regarding the reliability of the confession that it is 'trite law' that it cannot be adjudged at the initial stage of framing of charges but must be decided during the trial stage when the witnesses are examined.^{xxxii} However, relating to the cases booked under TADA or POTA adjudicated post the revocation, it was noted that even though Cr.P.C and the Evidence Act come in conflict with either recording of a confession of a person by a police officer of the rank mentioned therein, in any of the modes specified in the Section, or its admissibility at the trial, Section 15 of the TADA Act will have an overriding effect over the Cr.P.C. and the Evidence Act.^{xxxiii} Relating to the scope of section 15 of TADA, the court held that, the confessional statements recorded under section 15 of TADA and the rules framed pursuant to this Law, would still be admissible for the offences for the offences under any other law which were tried along with TADA offences under section 12 of the Act.

Although, it must be noted that the it is irrelevant that accused is acquitted of the offences under T.A.D.A. in the same trial.^{xxxiv}

In the case of *Gulam Mohd. Vs. State of Gujarat, 2008*, it was contended by the appellant that apart from the confessional statement recorded under section 32 of POTA, there was no further evidence against him.^{xxxv} The Supreme Court held that there was sufficient evidence against him apart from the confessional statement which was duly recorded under section 32.^{xxxvi} Further, the Court held that, if a confessional statement qualifies for proof in accordance with the provisions of the Evidence Act, then the said confessional statement could be considered against the co-accused facing trial under POTA.^{xxxvii} Therefore, in this case, even the court gave primacy to sections 25, 26 and 27 of the Evidence Act. With respect to confessional statement, the court held that there is no statutorily time fixed during which the confessional statement can be retracted but the same had to be done within a reasonable time.^{xxxviii} Relating to the guilt associated with the confessional statement, the court in a case held that, an accused person's guilt is reflected in the confession statement from which he has not retracted.^{xxxix} Contemporarily, in another case, the court held that a retracted confessional statement of a co-accused by itself cannot be the ground for finding of guilt against an accused.^{xl} Further, expounding on the scope of section 32 of POTA the court held that the statement recorded thereunder is undoubtedly a statement made by a person and it can be used for any purpose to the extent a statement under , section 161- 164 of Cr.P.C. can be used.^{xli} Further in the case of *Harbans Singh Vs. State (Govt. of N.C.T. of Delhi), 2007*, wherein, the conviction was based on a confessional statement coupled with recovery was held valid.^{xlii} There was evidence missing for one transaction in the case, wherein the confessional statement was used as sufficient evidence.^{xliii}

Therefore, it can be seen that even though the two major acts; TADA and POTA have been repealed, the cases booked under the acts and state laws like MCOCA, keep the spirit of the underlying principles of the act, alive. It can be seen that the court has repeatedly delved into the interpretation of the concerned sections of the repealed statutes. In the initial years after the Acts were repealed i.e. after 2004, even though, the court attempted at giving primacy to the general rule of Law of Evidence, it can be seen that, the court was more inclined towards appreciating and employing the 'special nature' of these anti- terrorism statutes, allowing them to override the principles of Evidence Act. However, in the recent years, the court has engaged

in rigorous application of the general rule of exclusion of custodial confessions as admissible evidence. For example, in 2008 Mumbai terror attack case, though Kasab was charged with several sections of UAPA, he confessed before a Magistrate and section 164 of CrPC was applicable to this confession.^{xliv} Consequentially, prosecution could not utilize Kasab's own confession as evidence and relied mainly on testimonies and depositions of witness along with material evidences including forensics.^{xlv}

RECOMMENDATIONS

Given the inclination towards misuse of Anti- terrorism laws for political gains, as evidenced by the regimes of TADA and POTA, the central government must enact a central law to govern terrorist activities in India. The law must be in compliance with the current Law of Evidence. In the Kartar Singh case, Justice Sahai correctly stated that, "The defect lies not in the personnel but in the culture.... The cultural climate was not conducive for such drastic change."^{xlvi} Even though countries like the United States of America and England have made such confessional statements admissible as a regular criminal law practice, criminal law jurisprudential landscape in India is not yet ready for such a provision. Lack of awareness remains an issue with smooth and fair procedural practices.^{xlvii} With the rise in terrorist attacks and its potential to grow in the coming years, calls for a review by the Indian law enforcement committee. There is a need to study the jurisprudence of anti- terror statutes separate from the general criminal jurisprudence.^{xlviii} Such study must be done with the perspective of national security to avoid previous failures of such legislations.^{xlix} The current legal framework dealing with Anti- terror laws is insufficient. Additionally, the contradicting provisions of Anti-terrorism laws and general criminal laws and the law of evidence causes major delays in the proceedings.¹ There must be an anti- terrorism legal regime that is coherent with the existing law of the land.

CONCLUSION

This paper has analysed the admissibility of confessions to the police under the Law of Evidence and the above-mentioned Counter-Terrorism Laws. It can be seen through case laws that the court has begun to give primacy to sections 25 and 26 of Evidence Act over the

underlying principles of sections 15 and 32 of TADA and POTA respectively, which can now be found in the state laws like, MCOCA. It can be seen that the major fall out of the anti-terrorism laws was due to its contradictions with the general law of the land, which led to confusion, misuse and eventually, revocation of the statutes. With the current political atmosphere, there is an exigent need for a special Anti- terrorism law for the federation, which is consistent with the laws in force.

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