

CASE NO.:
Appeal (crl.) 525 of 2004

PETITIONER:
Abdulahab Abdul Majid Shaikh & Ors

RESPONDENT:
State of Gujarat

DATE OF JUDGMENT: 24/04/2007

BENCH:
K.G. BALAKRISHNAN & G.P. MATHUR

JUDGMENT:
J U D G M E N T

WITH
CRIMINAL APPEAL NOS. 1316-17 OF 2004
State of Gujarat

\005Appellant

Versus

Abdulahab Abdulmajid Shaikh & Ors.

\005Respondents

CRIMINAL APPEAL NO. 1318 OF 2004

State of Gujarat

\005Appellant

Versus

Salim Noormahammad Haveliwala & Anr. \005Respondents

K.G. BALAKRISHNAN, CJI

All these appeals arise out of a Common Judgment in TADA Crime Case No. 4/1995 and TADA Crime Case No. 27/1996 delivered by the Additional Designated Judge at Ahmedabad.

There were 11 accused persons before the Designated Court charged for various offences under the Indian Penal Code (IPC), TADA Act, Indian Passport Act, Motor Vehicles Act and Bombay Police Act. By the impugned judgment, A-1 to A-4 and A-9 were convicted for the offences punishable under Section 120 B IPC and under Sections 342, 365 and 384 IPC read with Section 120 B IPC, but all the accused were acquitted of various other charges framed against them. Out of the 5 accused convicted by the designated court, 3 of them have filed Criminal Appeal No. 525/2004 and the two other appeals before us have been preferred by the State of Gujarat challenging the acquittal of the other accused.

The case of the prosecution was that PW 3 Jayendra Mahendra Tripathi was a builder having a construction company of his own. He was also working as a teacher during the relevant period and staying in Kundan Apartment in Vasna area in Ahmedabad. The office of the construction company was in Deep Apartment at Vasna. He used to go to his office in the evening. On 19.1.1994, he left his house at 4.00 p.m. on way to the office. Walking towards office, when he reached the place near Vasna Bus Stand, a Maruti van came and stopped near him. He was shown a visiting card by the occupants of the van to enquire about the address mentioned thereon. While PW 3 Jayendra Mahendra Tripathi was reading the visiting card, somebody pushed him from behind and he was forced into the Maruti van. Inside the van, his head and face were covered with a woolen cap. 5-6 persons were sitting in the Maruti van and after the victim was forced into the van, the van moved and travelled for 30-45

minutes and eventually he was taken to the cellar of a building. There, the victim gave the telephone number of his construction company, but as there was no response from that telephone number, he gave the telephone number of his friend K.K. Vaidh. PW 3 Jayendra Mahendra Tripathi was kept in a room in that building and according to the prosecution, the accused persons made a demand of Rs. 5 lakhs from the partners of the construction company.

The partners of the construction company withdrew Rs. 10 lakhs from the Union Bank of India and a relative of the victim, namely, PW 4 Kirtikumar Tapishanker Tripathi, was asked to come with Rs. 3 lakhs near Anjali Cinema on 19.1.1994 at an evening time by the victim himself who spoke to him on telephone. He was asked to come by a rickshaw and to handover Rs. 3 lakhs to a person who would identify himself by a code (No. 500). He came with Rs. 3 lakhs near Anjali Cinema Square Road. A person came on a motorcycle, identified himself with the aforesaid code and the bag containing Rs. 3 lakhs was given to that person.

PW 2 Harshad Premjibhi Gajjar gave a complaint to the police on the same day, i.e. 19.1.1994. A case was registered by PW 14 Police Inspector and investigation started. During investigation, the house of A-6 Salim Haveliwala was searched on 23.3.1994 and a sum of Rs. 50,000/- was recovered. Thereafter, the house of his father-in-law A-7 Yakub Ganibhai was also searched and Rs. 1,75,000/- was recovered. Bundles of notes recovered from his house were showing the slips of Union Bank of India, C.G. Road, Relief Road and Rajpur branches, Ahmedabad. During investigation, A-1 Abdulvahab Abdulmajid Shaikh, A-5 Mohammadrafik Abdulrahim Shaikh, A-3, Abdulsattar @ Sattar Ghanti, A-4 Mahamadsalim @ Salim Tolo and A-2 Najirmahammad Alimahammad Vora were arrested. Pursuant to the information furnished by A-4 Mahamadsalim @ Salim Tolo, six cartridges were recovered from a heap of bricks. On 8.9.1994, the investigation was taken over by ACP Shri B.R. Patil. He arrested A-9 Musakhan @ Babakhan Ismailkhan Pathan. This accused expressed his desire to give a confession and A-9 Musakhan @ Babakhan was produced before PW 1 DCP, Shri Suroliya. Shri Suroliya recorded the confession statement of A-9 Musakhan @ Babakhan and the investigating officer finally filed the charge-sheet.

On the side of the prosecution, 18 witnesses were examined and series of documents were produced by the prosecution as exhibits. The appellants, when questioned under Section 313 Cr. PC, completely denied their involvement in the case. A-6 Salim Haveliwala and A-7 Yakub Ganibhai admitted the recovery of Rs. 50,000/- and Rs. 1,75,000/- respectively from their houses, but contended that the money belonged to them. A-9 Musakhan @ Babakhan stated that he was never produced before PW-1 DCP, Shri Suroliya and denied having given any statement before him.

The Designated Judge, though accepted the evidence of recovery of the money from the two accused, held that the prosecution could not prove their identity and hence no importance was attached to the recovery effected by the police. In the appeals filed by the State, the main thrust has been given to the acquittal of these accused persons and it has been urged that the Designated Judge failed to appreciate the evidence in proper perspective. The Designated Judge relied on the confession statement given by A-9 Musakhan @

Babakhan and it was held that the confession given by A-9 Musakhan @ Babakhan has been supported by other items of evidence and on that basis A-1 to A-4 and A-9 were convicted for some of the offences charged against them.

The short question that arises for consideration is whether the confession given by A-9 Musakhan @ Babakhan could be relied upon. The learned Counsel for the appellants strenuously urged before us that the confession made by A-9 Musakhan @ Babakhan was not at all truthful and voluntary and it was prepared at the instance of the two police officers and therefore, it is not admissible under Section 15 of the TADA Act. The learned Counsel for the appellants also contended that the confession of a co-accused is not a substantive piece of evidence and if at all, it could be relied on only as a corroborative piece of evidence and in the absence of any other evidence the confession of a co-accused by itself shall not be used as primary evidence to prove the complicity of the co-accused and convict him. Reliance was placed on the decision of the Privy Council in *Bhuboni Sahu Vs. R* [AIR 1949 Privy Council 257] and it was urged that the confession of a co-accused is obviously a fragile and feeble type of evidence and it could only be used to lend credence to other items of evidence. Our attention in this behalf was drawn to Section 30 of the Indian Evidence Act, the application of which was explained in detail in *Haricharan Kurmi Vs. State of Bihar* [1964 (6) SCR 623].

It is true that the confession of the co-accused by itself is not sufficient to find a co-accused guilty unless there is other supporting evidence to prove that the accused was guilty. In *State through Superintendent of Police, CBI/SIT Vs. Nalini and Others* (1999) 5 SCC 253, this court held that the confession is a substantive piece of evidence, but as a 'Rule of Prudence' the Court should seek other corroborative evidence to test its veracity. Having regard to the above principle, we find that the evidence in this case indicates that there is sufficient corroboration of the confession given by A-9 Musakhan @ Babakhan. It is to be remembered that all procedural formalities were complied with in recording the confession of A-9 Musakhan @ Babakhan. The learned Counsel for the appellant in Criminal Appeal No. 525/2004 vehemently contended that the confession given by A-9 Musakhan @ Babakhan was retracted the moment he was produced before the Magistrate and, therefore, it is to be treated as "not voluntary". The learned Counsel also pointed out that when PW-1 DCP, Shri Suroliya was recording the confession of A-9 Musakhan @ Babakhan, the Magistrate was very much available and the Police Officer should have produced the accused before the Magistrate in order to record the confession of the accused. It was argued that failure to produce the accused before the Magistrate indicated that the confession was not voluntary and the same was not given by the accused. We do not find much force in this contention. The Police Officer was empowered to record the confession and in law such a confession is made admissible under the provisions of the TADA Act. The mere fact that A-9 Musakhan @ Babakhan retracted subsequently is not a valid ground to reject the confession. The crucial question is whether at the time when the accused was giving the statement he was subjected to coercion, threat or any undue influence or was offered any inducement to give any confession. There is nothing in the evidence to show that there was any coercion, threat or any undue influence to the accused to make the confession. A-9 Musakhan @ Babakhan who was questioned

under Section 313 Cr. PC had no case that he was subjected to any third degree treatment or threatened with dire consequences. He only stated that he had not given any statement before PW-1 DCP, Shri Suroliya.

The narration of evidence given by A-9 Musakhan @ Babakhan would show that the confession was voluntary. A-9 Musakhan @ Babakhan had given various details of the conspiracy of kidnapping and subjecting the victims to wrongful confinement.

The relevant portion of the confession relating to the kidnapping of PW-3 Jayendra Mahendra Tripathi are given by A-9 Musakhan @ Babakhan in his confession as follows :

"\005. After four or five days of last Uttarayan, Sherjada called Nazir Vora, Salim Tola, Sattar Battery and me at the house of Wahab situated at Devi Park Society in Dani-Limda. When we went there, Sherjada and Wahab were present. Sherjada and Wahab made a plan to kidnap one Jayendra Tripathi, a builder at Vasna and deciding this, at about 3 pm., we took the Maruti Van of Sherjada affixing bogus number plate on it and went to Vasna. Wahab and Sherjada had revolvers. Sherjada was knowing Jayendra Tripathi and he had also seen his house. Hence, while going near Kundan Apartment, situated near Mehta Hospital in Vasna, there is house of Tripathi and we sat there in Maruti Van for keeping watch. At 4 PM, Jayendra Tripathi used to go out from his home, which was told by Sherjada. Therefore, we waited for some time. At about 4:00 hrs., when Jayendra Tripathi came out, Sherjada identified him and from there he kidnapped him and threw him in Maruti Van applying old cap and took him to Devi Park. Taking the telephone number of victim's friends and relatives, Wahab and Sherjada threatened them on phone and extorted money. On the next day, Tripathi was released. I was taking lunch and Tiffin from outside for Tripathi. But for this work, no money was paid to me.
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From the confession statement, it is evident that some persons came to Vasna area and while PW-3 Jayendra Mahendra Tripathi was walking near the Kundan Apartment, he was kidnapped and forced into the Maruti van and his face and head were covered by an old cap and he was taken to Devi Park. A-9 Musakhan @ Babakhan speaks about the involvement of other accused persons. In the confession, it is also stated that PW-3 Jayendra Mahendra Tripathi was released on the next day after the ransom amount was paid. A-9 Musakhan @ Babakhan also says that he was not paid anything in this transaction. The fact that a Maruti van came and PW-3 Jayendra Mahendra Tripathi was kidnapped in that vehicle is spoken to by the victim himself who was examined as a witness for the prosecution.

These appeals before us are disposed of as follows.
Criminal Appeal No. 525/2004

The main evidence in this case is the confessional

statement of accused Musakhan @ Babakhan. Of course, the confession statement is generally not treated as the primary evidence, but this Court in Nalini's case (supra) has held that the confession recorded under Section 15 of the TADA Act is a substantive piece of evidence and it could be accepted provided there is corroboration by other material particulars. In the instant case, there is substantial corroboration of the confession of A-9 Musakhan @ Babakhan by other items of evidence. The counsel for the appellants strongly urged before us that the confession itself is highly suspicious and it cannot be relied upon to convict the appellants, but we find no force in that contention. The confession was recorded strictly in accordance with Section 15 of the TADA Act. The accused was apprised of the fact that in case any such confession is made, it would be used against him. The police officer who recorded the confession also stated that it was voluntary in nature. The counsel for the appellants contended that the Chief Judicial Magistrate was readily available to record the confession and when such a facility was available, the police officer should not have recorded the confession. It was also pointed out that when A-9 Musakhan @ Babakhan was produced before the C.J.M., he retracted the confession and that itself is sufficient to hold that the confession was not voluntary in nature. Under Section 15 of the TADA Act, a police officer is permitted to record the confessional statement of accused and certain strict procedure is prescribed. The appellants have no case that this procedure has in any way been violated. Merely because the confession was retracted, it may not be presumed that the same was not voluntary. It is important to note that when A-9 Musakhan @ Babakhan was produced before the Magistrate, he had no case that he was subjected to any third degree method. He only stated that he had not made any confession before the police.

In the confessional statement, A-9 Musakhan @ Babakhan has given detailed narration of the incident relating to the abduction of victim Jayendra Mahendra Tripathi. He stated that accused Vahab & Sherzada were armed with revolvers. In the course of investigation, the revolver was recovered from one of the accused. The accused was seen at the apartment near the Mehta hospital in Vasna where the victim Jayendra Mahendra Tripathi was staying. The accused stated in his confession statement that Jayendra Mahendra Tripathi was abducted at about 4 p.m. when he came out of the house. The victim Jayendra Mahendra Tripathi was examined as PW-3. He deposed that he had been staying at Kundan apartments in Vasna. He further deposed that on 19.1.1994 at about 4 o' clock he started from his house for his office and on the way 5-6 persons came in a Maruti van and he was forcibly dragged into that Maruti van and taken to some distant place. He also deposed that he was asked to give the telephone number of his company and that he gave the telephone number of his friend also. All these facts are spoken of by A-9 Musakhan @ Babakhan in his confession statement.

To prove the abduction and extortion of money from Jayendra Mahendra Tripathi, the prosecution examined several other witnesses. PW-7 deposed that Mahendrabhai, the partner of Tripathi had withdrawn Rs. 10 lakhs from the Union Bank of India by giving four cheques. PW-4 Kirtikumar Tapsishanker Tripathi deposed that he had paid Rs. 3 lacs to one motorcyclist on 21.1.1994. It is also pertinent to note that in the confession statement, A-9 Musakhan @ Babakhan referred to the presence of A-1, A-2, A-3 and A-4 in the conspiracy and later in the abduction of Jayendra Mahendra Tripathi.

On consideration of confession statement, which is amply

corroborated by other items of evidence, we have no hesitation in accepting the same as truthful and voluntary. The complicity of A-1 to A-4 in the abduction is proved beyond reasonable doubt.

In the result, the conviction of these three appellants for the offences punishable under Sections 120-B, 342, 365, 384 read with Section 120-B of the IPC is only to be confirmed. Criminal Appeal No. 525 of 2004 would accordingly stand dismissed and the appellants would surrender to their bail bonds.

Criminal Appeal No. 1318/2004

It is an appeal preferred by the State against the acquittal of A-6 and A-7. Counsel for the appellant-State submitted that the acquittal of A-6 and A-7 was palpably wrong as there is evidence to show that they were party to the abduction and extortion of money from the victim. This submission is based on the evidence of recovery of Rs. 50,000/- from the house of A-6 Salim Noor Mohammed and Rs.1,75,000/- from the house of A-7 Yakub Ganibhai. The recovery of these amounts, though stands proved, the prosecution could not prove that these amounts were actually the amounts paid by the agents of Tripathi as ransom to these accused. These accused gave some explanation as to how these amounts happened to be in their house. A-6 claimed that it was an amount belonging to him and he was keeping it for his business purposes. There was no bank slip or any other item of evidence to show that the amount was withdrawn from the bank on 21.1.1994. Though the bank officials were examined as prosecution witnesses, they also could not give any satisfactory evidence to prove that the currency notes recovered from these two accused were relatable to the amounts withdrawn from the Bank. Moreover, in the confession statement, A-9 did not involve these accused. In the above circumstances, the acquittal of A-6 and A-7 was correct. The appeal is without any merit and is dismissed accordingly.

Criminal Appeal Nos. 1316-17/2004

These appeals are filed against acquittal of all the accused charged for offences punishable under the TADA Act. These accused were charged under Sections 3 and 5 of the TADA Act read with Section 120-B IPC. The ground urged by the appellant-State is that Jayendra Mahendra Tripathi was abducted at gun point from a notified public place and that the accused are hardcore criminals. Therefore, they ought to have been convicted under Sections 3 and 5 of the TADA Act.

The contention of the State is that these accused should not have been acquitted of the charges under Sections 3 and 5 of TADA Act as the crime committed by them was of grave nature and came within the purview of the said provisions of the TADA Act. It is further contended that the Special Judge has not given any specific reasons as to why these accused were acquitted of the charges. But the prosecution could not adduce any evidence to prove that these accused had committed the offences charged against them. The act of kidnapping for extorting ransom from the victim cannot be termed as an act committed "with intent to overawe the Government as by law established". There is also no evidence to show that the accused intended to strike terror in the locality. Their primary objective was to extort money from the victim. There is also no evidence to show that these accused were supporting any communal elements or intended to create disharmony among different sections of the people. These are all main ingredients to constitute offence punishable under Section 3 of the TADA Act. So also, there is no evidence to show that these accused were in possession of any arms or

ammunition during the commission of the crime, for which they have been charged. The accused have been rightly acquitted. Criminal Appeal Nos. 1316-17/2004 are without any merits and dismissed accordingly.

JUDIS