

CASE NO.:
Appeal (crl.) 889 of 2001

PETITIONER:
Central Bureau of Investigation

RESPONDENT:
Ashiq Hussain Faktoo & Ors.

DATE OF JUDGMENT: 30/01/2003

BENCH:
S. N. VARIAVA & B. N. AGRAWAL.

JUDGMENT:
J U D G M E N T

S. N. VARIAVA, J.

This Appeal is against the Judgment dated 14th July, 2001 by which the Presiding Officer of the Designated Court, Jammu, under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA Act), has acquitted the Respondents.

Briefly stated the facts are as follows:
Initially there were 12 persons who were charged under Sections 302 read with 120B of the Indian Penal Code and Section 3 of the TADA Act. Out of those 4 persons died and 5 others were absconding. Therefore, only the three Respondents were put to trial. The only evidence against these Respondents were their confessional statements recorded under Section 15 of the TADA Act.

The case of the prosecution was that they were part of a terrorist group under the name and style of Jamait-Ul-Mujahidin. The case of the prosecution was that the aim of the group is to overthrow the Government duly established by law and to segregate Jammu and Kashmir from Union of India. The case of the prosecution was that with these purposes in mind these persons spread terrorism. The case of the prosecution was that they condemned the activities of a Hinduism forum whose moving spirit was one Mr. H. N. Wanchoo. The case of the prosecution was that in the months of July and November, 1992 the accused persons (including these Respondents) hatched a criminal conspiracy to eliminate Mr. H. N. Wanchoo and that in pursuance to such conspiracy they kidnapped Mr. H. N. Wanchoo from his house in Srinagar, took him to Bal Garden and shot him dead.

As stated above, the only evidence against the Respondents is their confessional statements. The 1st Respondent gave a confessional statement which is recorded in English on 27th and 28th June, 1993. The 2nd Respondent gave a confessional statement which is recorded in English on 13th and 14th January, 1994. The 3rd Respondent gave a confessional statement which is recorded in Hindi on 4th and 5th May, 1994.

The Designated Court has held that the Superintendent of Police, CBI has failed to ask the accused material questions to satisfy himself as to whether the accused were going to make the confessional statements voluntarily. The Designated Court has held that Superintendent of Police, CBI has not asked the accused whether they knew before whom they were standing. It is also held that he had not explained to the accused that he is the Superintendent of Police, CBI and that if any confessional statement is made before him it will be used as evidence against them. It is further held that during his evidence the Superintendent of Police has stated that the confessional statements were recorded in his own hand, but in cross-examination he admitted that the confessional statements had been recorded by his

Steno under his dictation. It is further held that the confessional statement should be in the language of the accused and if that is not possible then in the official language of the Recording Officer or the language of the Designated Court. It is held that the confessional statement of the 3rd Respondent is in Hindi, whereas the official language was Urdu or English. It is held that the I.O. did not make written request to the Superintendent of Police for recording the confessional statement of the accused and that was a mandatory provision of law. It is further held that the Superintendent of Police, CBI, had not asked the accused whether they wanted to add or subtract anything from their confessional statements. It was held that the Superintendent of Police, CBI had therefore not recorded the confessional statements in conformity with the provision of law and that therefore the confessional statements could not be considered as a substantive piece of evidence against the accused persons. On this basis the Respondents were acquitted.

In order to consider the correctness or otherwise of the above findings, it would be appropriate to set out the relevant provisions. Section 15 and Rule 15 of the TADA Act and the rules framed thereunder read as follows:

"S.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 a 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:

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

"Rule 15. Recording of confession made to police officers.- (1) A confession made by a person before a police officer and recorded by such police officer under Section 15 of the Act shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court and it shall form part of the record.

(2) The confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

(3) The confession shall, if it is in writing, be -

(a) signed by the person who makes the confession ; and

(b) by the police officer who shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect :-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Sd/- Police Officer."

(4) Where the confession is recorded on any mechanical device, the memorandum referred to in sub-rule (3) in so far as it is applicable and a declaration made by the person making the confession that the said confession recorded on the mechanical device has been correctly recorded in his presence shall also be recorded in the mechanical device at the end of the confession.

(5) Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence."

This being the legal position one has now to see whether these provisions have been complied with. We have seen all the three confessional statements. In all the three confessional statements the Officer has first ascertained whether the Respondent who is making the statement was making the statement voluntarily. The Respondents have been informed that the confessional statements made by them could be used against them as evidence. They were then asked whether they still wanted to make the confessional statements. They have been told that they are not bound to make the confessional statements and that if they make the confessional statements the same would be used against them and that therefore they should think over the matter and let the Officer know whether they still wanted to make the confessional statements. The Superintendent of Police, CBI has signed as such. The Respondents have also signed. This clearly shows that the Respondents were aware that they were making their confessional statements before the Superintendent of Police, CBI.

The Respondents were then given one day's time to think over the matter. On the next day the Superintendent of Police, CBI again informed them that they were not bound to make the confessions and that if they make the confessions the same could be used as evidence against them. It has been recorded that even after this warning they were willing to make the confessions. It has been recorded that the Superintendent of Police, CBI was satisfied that the confession was being made voluntarily. This note has been signed by the

Superintendent of Police, CBI as well as the concerned Respondent. It is only thereafter that the confessional statement has been recorded. At the end of each confessional statements it has also been recorded that the confessional statement had been read over and admitted to be correct. The required memorandum under Rule 15(3)(b) of the TADA Act is also made on each of the confessional statements.

We are therefore unable to accept the reasoning of the Designated Court that the confessional statements are not in conformity with the provisions of law. The Designated Court was wrong in holding that it was not explained to the Respondents that he was a Superintendent of Police or that it was not explained to the Respondents that the confessional statements could be used as evidence against them. The Designated Court was wrong in concluding that the Superintendent of Police, CBI did not satisfy himself whether the accused were going to make the confessional statements voluntarily.

We are also unable to appreciate the relevance of the observations of the Designated Court that the Superintendent of Police, CBI stated that the statements were in his hand-writing but in cross-examination admitted that they had been recorded by his Steno under his dictation. In our view, when a confessional statement is dictated to a Steno and typed on a typewriter, the same amounts to a confessional statement being in writing. This view is supported by an authority of this Court in the case of State of Tamil Nadu versus Sivarasan reported in (1997) 1 SCC 682. In this case it has been held that the words "recorded in writing" in Section 15 includes a type-written confessional statement. It is held that the Police Officer need not record the statement in his own hand-writing, but can take the help of a Steno or use a type-writer.

At this stage, it would be appropriate to mention that in the case of Devender Pal Singh Vs. State of NCT of Delhi reported in 2002 (5) SCC 234, a confessional statement was recorded on a computer by a Steno under dictation of the D.C.P. The certificate required to be given by the D.C.P. was type-written. It is held that the confessional statement could not be discarded or its authenticity doubted on these grounds. It is held that non-observance of procedural requirements, as laid down in Rule 15, does not cause any prejudice to the accused. It is held that procedure is the hand-maid and not the mistress of law. It was held that procedures are intended to subserve and facilitate the cause of justice and not govern or obstruct it. It is held that minor deficiencies, if any, cannot be considered to be fatal for the prosecution.

In the case of State through Superintendent of Police, CBI/SIT vs. Nalini and others reported in 1999(5) SCC 253 a confessional statement was recorded on 18 pages. The first 16 pages contained signatures but the last two pages did not have any signatures. An argument that the confessional statement should be discarded was repelled with the following observations:

"125. The requirement that a confessional statement shall be signed by the maker has been substantially complied with despite the slip in obtaining the signatures in the last two pages. According to PW 52 - the Superintendent of Police who recorded it - the said slip was an inadvertent omission. But that omission does not mean that the confession was not signed by her at all. The certificate which is required by Rule 15(3) has also been made at the foot of Ext.P-77, but that happened to be made on one of the two pages where the signature of A-1 is absent.

126. On the facts we are not persuaded to uphold the contention that Rule 15(3) has not been

complied with. That apart, even if there was such an omission the question is whether it would have injured the accused in her defence. Section 463 of the Code permits such an approach to be made in regard to the omissions in recording the confession under Section 164 of the Code. That approach can be adopted in respect of the confession recorded under Section 15 of TADA as well. The resultant position is that the said omission need not be countenanced since it was not shown that the omission has caused any harm to the accused."

The observations of the Designated Court that the Respondents had not been asked whether they wanted to add or subtract anything appear to have been made on a misunderstanding of Rule 15(2). Under Rule 15(2) the recorded confession has to be (where it is in writing) shown and read back to the person concerned and if he does not understand the language in which it is recorded it has to be interpreted to him in a language he understands. That person is at liberty to explain or add to his confession. In this case the confessional statements were shown and read back to the Respondents. If they wanted they could have explained or added to these confessional statements. They chose not to do so. Thus the requirement of Rule 15(2) was fully complied with. There is one other aspect, which is required to be clarified. As the confessional statements were in writing Sub-rule (4) of Rule 15 of the TADA Act was not applicable at all. Sub-rule (4) of Rule 15 would only come into play if the confessional statement was not in writing but was recorded on some mechanical device like a cassette, tape or on sound tracks. In this case the confession being in writing Sub-rule (3) would be applicable. The requirements of Sub-rule (3) have been fully complied with. The other ground on which the Designated Court has held that the requirements of law were not complied with is that the confessional statement of 3rd Respondent is in Hindi. The Court has held that this is not the language of the Designated Court, i.e. Urdu or English, and therefore it was not according to law. Under Rule 15(1) the confessional statement must be recorded in the language in which the confession is made. It is nobody's case that 3rd Respondent did not know Hindi or that that was not the language in which he made the confessional statement. A confessional statement is to be in an official language or a language of the Designated Court only, provided it is not the language in which it was made.

Thus none of the reasons given by the Designated Court can be sustained. It is thus held that these confessional statements, could under Section 15 of the said Act, be used against the Respondents.

We have read all the confessional statements. In the confessional statements each of the Respondents admits that they were part of the organisation and that they had taken part in the conspiracy to eliminate Mr. H. N. Wanchoo. So far as 3rd Respondent is concerned he had actually participated in the kidnapping of H. N. Wanchoo and had then given orders in writing that H. N. Wanchoo be killed. Therefore, the offence under Section 3 of the TADA Act as well as under Sections 302 read with 120B of the Indian Penal Code is made out. We therefore convict the Respondents under Section 3 of the TADA Act and under Section 302 read with 120B IPC.

Mr. B. B. Singh submitted that leniency should be shown whilst sentencing the Respondents. He submitted that the 2nd Respondent was a lecturer who had been forced to join the terrorist group because of threats of torture. He submitted that the occurrence had taken place on 5th December, 1992. He submitted that the 2nd Respondent had been arrested on 29th December, 1993 and was in jail till 14th July, 2001 when he was acquitted by the Designated Court. He submitted that thereafter, pursuant to an Order of this Court, he surrendered on 26th November, 2001 and was granted bail by this Court on 14th

December, 2001. He submitted that after being released on bail he has not participated in the activities of the terrorist group and there is no allegation that he has done any other illegal act. He submits that the same set of circumstances would apply to 1st Respondent also. He submitted that so far as Respondents 1 and 2 are concerned, this Court should show leniency, particularly in view of the fact that at present the trend of the Government is to have a healing touch. He submitted that such a healing touch would give these persons an opportunity to reform themselves. He submitted that the Court should sentence Respondents 1 and 2 to the term already undergone by them.

In our view, having seen the activities which had been carried on by the Respondents and that they had conspired and murdered Mr. H. N. Wanchoo, this is a fit case where the sentence should be life imprisonment.

Accordingly, the Appeal is allowed. The Judgment of the Designated Court is set aside. The Respondents are sentenced to life imprisonment. Their bail bonds shall stand cancelled. They shall be taken into custody forthwith. They shall be given benefit of the period already undergone by them.