
(2004) 03 J&K CK 0020
In the Jammu And Kashmir High Court
Case No : 561. A/51 of 2003

State	Vs	APPELLANT
Mohd Yasin Malik and Others		RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Prevention of Terrorism Act, 2002 — Section 32, 32(5)

Citation : (2005) CriLJ 275 : (2004) 2 JKJ 242

Hon'ble Judges : Yash Paul Nargotra, J

Bench : Single Bench

Advocate : K.S. Johal, AAG, for the Appellant; Z.A. Shah and Yogesh Bakshi, for the Respondent

Final Decision : Dismissed

Judgement

Y.P. Nargotra, J.—In what manner the Chief Judicial Magistrate has to act when the person whom a confession has been recorded u/s

32(1) of Prevention of Terrorist Act 2002 (POTA) before a police officer, is produced before him? Is the question arising for consideration in this

case? For better appreciation of the point involved Section 32 is being reproduced hereunder: --

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

rules made hereunder.

(2) A police officer shall, before recording any confession made by a person under Sub-section (1) explain to such person in writing that he is not

bound to make a confession and that if he does so, it may be used against him;

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes

it.

(4) The person from whom a confession has been recorded under Sub-section (1), shall be produced before the court of a Chief Metropolitan

Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or

electronic device within forty-eight hours;

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall record the statement, if any, made by the person so produced and get

his signatures or thumb impression and if there is any complaint of torture such person shall be directed to be produced for medical examination

before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter he shall be sent to judicial custody.

2. It may be notice that the section opens with a non-obstante clause indicating thereby that the provisions made in the section is an exception to

the provision contained in the Code of Criminal Procedure and in the Indian Evidence Act in this behalf. By incorporating said clause in the section

the confession made before a police officer has been made admissible in a court of law. In Sub-section (1) it has been provided that such

confession recorded by a police officer shall be admissible in the trial of such person for an offence under the Act. Some safeguards for the benefit

of such person who makes the confession have been enshrined in Sub-sections 2 to 5. Sub-section (2) enjoins upon the police officer to explain in

writing to such person that he is not bound to make such confession and that if he does so it may be used against him. Sub-section (3) provides

that such confession should be recorded in an atmosphere free from threat or inducement whereas Sub-section (4) makes production of such

person with the original statement of confession before the court of Chief Judicial Magistrate within 48 hours mandatory and finally Sub-section (5)

makes it obligatory on the part of such Magistrate to record the statement of the

person who has made the confession and get his signatures or thumb impression thereon. It is further provided therein that if there is any complaint of torture then the Magistrate is required to direct for his medical examination.

3. Here in this case we are concerned with the scope of powers of the Magistrate under Sub-section (5). Let us first take notice of the facts involved.

On 24.3.2002 Head constable Prem Nath No. 37 U sent a docket to Police Station Kud stating therein that he along with other officials of police

station Kud was on VIP and frisking duty on national highway at Kud. A tempo-traveler bearing registration No. 2067-JK02M coming from

Jammu and bound to Srinagar was stopped. It was driven by driver Rakesh Kumar. While checking and frisking travelers one Miss Shazia D/O

Ghulam Rasood Dar R/O Bypass Batmaloo Srinagar was found carrying 70000 US dollars, which she had hidden in her shalwar. Her co-

passenger was Mushtaq Ahmed Dar. He was also found to be carrying 30000 US Dollars besides Rs. 90000/- in Indian currency. On inquiry

both the passengers disclosed that they had received this money from Altaf Qadiri Executive Member All Parties Hurriet Conference presently in

Pakistan at Kathmandu at the instance of Mohd Yaseen Malik JKLF Chief. They also disclosed that the said money was to be handed over to

said Mohd Yasim Malik at Srinagar and was meant to be distributed amongst militants ranks and organizations. On receipt of said information FIR

No. 14/2002 for commission of offences Under Sections 3/6 POTA was registered in Police Station Kud and investigation was taken up by

Dy.SP HQ Udampur. During the course of investigation currency recovered was seized. The designated authority under POTA, Divisional

Commissioner Jammu, was also informed about the recovery of foreign currency and arrest of both accused. On the disclosure of accused persons

respondents 2&3, a requisition for arrest of Mohd Yaseen Malik was made to Kashmir Zone Police. Consequently he was arrested from Srinagar

and brought to Udampur on 25.3.2002. While investigation was in progress with Udampur police the case was transferred vide PHQ order No.

1303/02 dated 26.3.2002 to Crime Branch Jammu for further investigation. A team of officers headed by Mr. M.H. Malik Dy.S.P. was

constituted. During the course of investigation respondents 2&3 namely Mushtaq Ahmed and Mst. Salima @ Shazia made confessions, which

were recorded by the then SSP Crimes & Railways Jammu u/s 32 POTA.

4. The confessional statements made by the accused respondents 2&3 before the then SSP Crime and Railways Jammu along with accused 2&3

were produced by the Investigating Officer before the Chief Judicial Magistrate Jammu in terms of the requirement of Sub-section (4) of Section

32 within 48 hours. On the production of accused 2&3 along with confessional statements, learned C.J.M. proceeded to record the statements of

the accused. The learned C.J.M. inquired from them as to whether they wanted to make statements. When the answer was in the affirmative he

proceeded to record their statements. The accused made statements for retracting from the confession made before the SSP. These statements

recorded by the C.J.M. are being sought to be quashed by the State by invoking the provisions of Section 561A,Cr.PC.

5. The contention of Mr. Johal, learned AAG, is that the Chief Judicial Magistrate was not required to record a general statement with regard to

confession etc. According to him he was empowered under Sub-section 5 only to find out whether the accused had been tortured for extracting

the confession by the police. According to him as there was no grievance that the police had used any threat, torture or third-degree methods to

obtain the confessions from the accused, the learned C.J.M. erred in recording the statement of the accused persons regarding retraction of the

confessions made. Mr. Johal has argued that the learned C.J.M. has abused his powers conferred upon him under Sub-section 5, therefore, the

statements recorded by him are not in accordance with law and are required to be quashed.

6. On the other hand the contention of Mr. Shah, learned counsel for the accused is that Sub-section 5 does not require such interpretation as is

suggested to be put on it by the learned Addl. Advocate General. According to Mr. Shah this section has been enacted for giving liberty to such

person who has made the confession to make any statement before the magistrate concerning the confession. Thus whatever statement is made by

such person in respect of the confession recorded that is required to be recorded by the C.J.M. so that when confession is admitted in evidence

against the accused under Sub-section (1) the court takes into consideration the circumstances alleged by such person in his statement before the

C.J.M. concerning making of such confession. Mr. Shah further submits that in case the person whose confession has been recorded by a police

officer discloses it to the C.J.M. also that for extracting confession force or torture has been used in that event a further duty is cast upon the

magistrate to direct medical examination of the said person.

7. I have considered the respective contentions of learned counsel for the parties. From the plain reading of Section 32 POTA it is manifest that

under Sub-section (5) the legislature intended to provide for a further safeguard in order to ensure that the person who makes the confession

before the police officer makes it voluntarily and not by use of force, threat or inducement. The section does not place any restriction upon such

person whose confession has been recorded as to what kind of statement he should make. Whatever statement is made by such a person before

the magistrate is required to be recorded by the magistrate in exercise of the obligation cast upon him by the mandate of Sub-section (5). The

provision made u/s 32 of the Act is a departure to the general rule that a confession made before a police officer is not admissible. A confession is

made admissible only if it had been recorded after following the procedure prescribed strictly as enshrined u/s 32 itself.

8. Therefore, there is no merit in the contentions of Mr. Johal. This petition, as such, is dismissed.