

HARBANS SINGH
v.
STATE (GOVT. OF NCT OF DELHI)

FEBRUARY 15, 2007

[S.B.SINHA AND MARKANDEY KATJU, JJ.]

*Prevention of Terrorism Act, 2002—ss. 3(5), 20, 22(2), 32, and 52—
Hawala transaction to a member of terrorist group by the accused—Recovery
of money immediately after transaction—Confessional statement by the
accused—Confirmed by the Chief Metropolitan Magistrate to be as per
provisions of s.32—Purpose of transaction not explained by the accused—
Conviction by Courts below—On appeal, held: Conviction justified—Since
the purpose of transaction was within the knowledge of the accused alone,
s.106 of Evidence Act casts upon them responsibility of advancing an
explanation for the same—Accused having failed in discharging their onus,
an adverse inference is attracted—ss.32 and 52 were also complied with—
Evidence Act, 1872—s.106.*

The police, after receiving an information that 'A' a member of Laskar-e-Taiba (Let) would receive an amount sent through hawala at a particular place, followed his movements. On the relevant day, 'A' was identified by details of his clothes. Appellant-accused came to him, 'A' took out a 10 rupee note, appellant matched the same with a paper slip and then gave a black polythene packet to 'A'. Both were immediately arrested. 'A' admitted his contacts with Let and receipt of the amount by hawala. The amount was found in the polythene packet. Police also arrested 'B' who allegedly had handed over the money to the appellant. All the three were chargesheeted for offences under Prevention of Terrorism Act, 2002. DCP, Special Branch (PW4) recorded the confessional statements of the appellant and co-accused 'A'. Co-accused 'B' declined to make confessional statement. Appellant as well as 'A' denied to have made the confessional statement, when produced before Judicial Magistrate. During trial, PW4 described the manner in which the confessional statement was recorded. Trial Court on the basis of the confessional statement and recovery of the polythene packet containing the amount and recovery of the slip and 10 rupee note, convicted the appellant and co-accused 'A'. Co-accused 'B' were acquitted. Appeal against order of

A trial Court was dismissed by High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The High Court has recorded a finding that the prosecution has sufficiently proved that the confession of the accused was genuine and it was made and confirmed by the Chief Metropolitan Magistrate as per the provisions of Section 32 of Prevention of Terrorism Act, 2002. As seen from the record, the recovery of the money immediately after the transaction in question has been sufficiently proved. Admittedly, the two accused i.e. appellant and 'A' were strangers to each other till the time the money was being handed over. Neither of the two claimed to have had any kind of transaction with each other at any earlier point of time. They were neither partners in business nor had any occasion to deal with each other. In this situation, the purpose of handing over the cash is especially within the knowledge of the two accused, Section 106 of the Evidence Act casts upon them a responsibility of advancing an explanation for the same. [Para 13] [695-C, D, E, F]

State of West Bengal v. Mir Mohammad Omar and Ors., [2000] 8 SCC 382 and *Sucha Singh v. State of Punjab*, JT (2001) 4 SC 107, relied on.

1.2. In their statements under Section 313 Cr.P.C. they denied having made any such confession. Instead of coming out with some explanation of their own about the purpose of handing over the money, they denied that there was ever any transaction of giving and taking the sum of Rs.7 lakhs. They even denied that they were arrested by the police on the spot and the sum of Rs.7 lakhs was recovered from them. Appellant who said that he was actually arrested from the office of one 'P' has not cared to prove this allegation by production of evidence. [Para 14] [695-G; 696-A]

1.3. It can be seen that the entire case of the prosecution has been proved by the prosecution witnesses except the purpose of the transaction. In the absence of any explanation from the accused in this regard, an adverse inference is attracted. They have failed to discharge their onus. It is only for this missing link that the confessional statements were used. [Para 15] [696-B, C]

2. The plea that Section 32 (2b) of POTA was not complied with because the warning given by the police officer was in English, whereas the appellant does not understand English, cannot be accepted because no such plea was taken originally before the trial court. During the trial, the DCP who recorded

the confession was thoroughly examined and cross-examined. No question was put to him suggesting that the warning was given in English, which the accused could not understand. In fact, the DCP stated in his evidence that he explained to each accused that he was not required to confess and that if he did, the confession could be used against them. Sections 32 and 52 of POTA were complied with in the present case. [Para 17] [696-A; 697-A-B]

State of NCT Delhi v. Navjot Sandhu Afsan Guru, (2005) 3 Crimes 87 (SC), referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 212 of 2007.

From the final Judgment and Order dated 9.1.2006 of the High Court of Delhi at New Delhi in Criminal Appeal No. 331/2004.

Harjinder Singh, Yogesh Saxena, Vandana Sharma, Ranjan Mukherjee, Seema Juneja and S.V. Deshpande for the Appellant.

Vikas Sharma, R.C. Kathia and D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. This appeal has been filed against the impugned judgment dated 9.1.2006 of the Delhi High Court in Criminal Appeal No.331 of 2004.

3. Heard learned counsel for the parties and perused the record.

4. Harbans Singh-appellant and one Mohd. Ayub Mir were convicted by a common judgment dated 6.4.2004 in FIR 34/2002 under Sections 3/20/22 of Prevention of Terrorism Act, 2002 (in short 'POTA') dated 2.7.2002 P.S. Special Cell (S.B.). Both the appellants have been sentenced to 14 years of rigorous imprisonment under Section 22 of POTA. Mohd. Ayub Mir has been sentenced to life imprisonment and to pay a fine of Rs.1,000/- and in default simple imprisonment for one month under Section 3(5) of POTA and to rigorous imprisonment for 10 years for the offence under Section 20 of POTA.

5. As per the prosecution case the co-accused Mohd. Ayub Mir, a terrorist of Lashkar-e-Taiba (in short 'LeT') was staying in Room No.204,

A Hotel Tamanna, Gali Kasimajan, Bajlimaran, about which an information was registered in Daily Diary of Police Station Special Cell, Lodhi Colony on account of which he was kept under watch. It is alleged that the police had also received information from Jammu & Kashmir police that Mohd. Ayub Mir was a resident of Sri Nagar and was a surrendered militant of Jammu & Kashmir Liberation Front and was an active terrorist of LeT, a terrorist organization, and was required by the J & K police. The police further claims to have received an information that on 28.6.2002 the appellant-Mohd. Ayub Mir would receive an amount sent through hawala in the Central Park near Palika Bazar, Connaught Place. The police was alerted and followed his movements. On the relevant day one Tejinder Singh s/o Shri Gurcharan Singh was joined in the raiding party. Mohd. Ayub Mir was identified by his clothes, namely, blue jeans and yellow T-shirt. At 2.30 p.m., another person, Harbans Singh (the appellant before us) came to him and talked with him. The prosecution alleged that Mohd. Ayub Mir took out a 10 rupee note from the pocket of his shirt and gave it to Harbans Singh who matched the same with the paper slip which he took out from his own shirt pocket. Harbans Singh then put the note and the slip in his pocket and handed over a black polythene packet to Mohd. Ayub Mir. Both were immediately arrested. Further, the prosecution case is that on interrogation, Mohd. Ayub Mir admitted of his contacts with LeT and delivery of Rs.7 lakhs through hawala payments for the above militant organization from Harbans Singh. The polythene packet contained 14 packs of 100 notes of denomination of Rs.500/-. The 10 rupee note and the slip of paper were also recovered from the pocket of Harbans Singh and both were booked for the offence under Section 3/20 & 22 of POTA.

6. During investigation, confessional statements of both the appellants were recorded. The police also arrested Bachraj Bengani @ B.R. Jain, who allegedly had handed over the money to Harbans Singh for the purpose of delivering the same to Mohd. Ayub Mir. Sanction for prosecution under Section 50 of POTA was obtained and all the three were charge-sheeted for offences under POTA. Mohd. Ayub Mir was charged under Section 3(5) and Sections 20 & 22(2) of POTA whereas Harbans Singh as well as Bachraj Bengani were charged with offence under Section 22(3) of POTA.

7. The prosecution examined 13 witnesses. The important witnesses for the prosecution were PW-6 Neeraj Kumar, SI, Special Cell, PW-9 Ved Prakash, Inspector, Special Cell, PW-10 Rajinder Singh and PW-12 Rajbir Singh, all of

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whom were present when the two appellants. Mohd. Ayub Mir and Harbans Singh were apprehended on 2.7.2002. PW-4 Ujjwal Misra, DCP, Special Branch recorded the confessional statement of Mohd. Ayub Mir and Harbans Singh. Both the appellants were eventually also produced before the Chief Metropolitan Magistrate, Delhi, Ms. Sangita Dhingra Sehgal, PW-5 for confirmation of the confessional statements. The accused denied having made the confessional statements. Harbans Singh further denied having been arrested from the Central Park, Connaught Place and claimed that he was arrested from the office of Deepak Jain, Gali No.76, Regarpura, Karol Bagh on 28.6.2002. Both the accused denied having confirmed their confessional statements when they were produced before the Chief Metropolitan Magistrate, Delhi. Both of them claimed to have been framed in the case.

8. The trial court after hearing the defence and the prosecution convicted the appellant and Mohd. Ayub Mir but acquitted Bachraj Bengani. The conviction is based on the confessional statements coupled with recovery of black polythene packet containing Rs.7 lakhs, the 10 rupee note and the slip. The contradictions in the evidence pointed out by the defence were held to be insignificant.

9. Against the judgment of the trial court, an appeal was filed before the High Court, which was dismissed by the impugned judgment and hence this appeal.

10. It was submitted before us that the appellant never made any confessional statement. However, we are not inclined to accept this submission. DCP Ujjwal Mishra who recorded the confessional statement appeared as PW-4. He has described the manner in which the confessional statement was recorded. As per his version in the witness box, ACP Rajbir Singh produced accused Mohd. Ayub Mir and Harbans Singh before him for getting their confessional statements recorded on which he immediately asked the ACP and his staff to leave the room. He also sent accused Harbans Singh out of his room. Thereafter he explained to Mohd. Ayub Mir that whatever he (Mohd. Ayub Mir) was going to say would be recorded and could be used against him in evidence during trial. Mohd. Ayub Mir still expressed his willingness to get his confessional statement recorded. He also stated that he could speak in Hindi. He then summoned a computer from his office as well as one SI who is a Hindi Typist competent to type on the computer. PW-4 Ujjwal Mishra, goes on to say that he proceeded to record the statement of

A the accused which took approximately two hours. The initial warning given by him is Ex. PW-4/A which appears in the extracted portion above. The confessional statement made by Mohd. Ayub Mir is proved as Ex.PW-4/B. Each page of the confessional statement is signed by the accused at point 'B' whereas DCP Ujjwal Mishra signed at point 'A'.

B 11. PW-4 then says that after having recorded the statement of Mohd. Ayub Mir he called the second accused Harbans Singh to his chamber and proceeded to record the statement of Harbans Singh in the same manner and this statement is Ex.PW-4/D. ACP Rajbir Singh then made a request for the copies of the statements which was allowed. The original was sealed in his presence in an envelope and the same was sent to Shri V.K. Maheshwari, C
ACMM, Patial House, Delhi. This envelope is Ex.PW-4/E. Another important aspect of the testimony of PW-4 is that the third accused Bachraj Bengani after being explained that if he confessed, his statement could be read against him during trial declined to make any confessional statement. The proceedings in respect of Bachraj Bengani, is Ex.PW-4/F. During cross-examination this D witness re-affirmed that he had explained the consequences of making the confessional statement. He denied that accused Mohd. Ayub Mir and accused Harbans Singh were coerced to make the confessional statements. He denied that any rough draft was made. He reiterated that Mohd. Ayub Mir had stated that he could understand and speak Hindi. He said that what was supplied to ACP Rajbir Singh was not another copy from the computer but a photocopy E of the original.

12. The two accused were produced before Ms. Sangeeta Dhingra Sehgal, Chief Metropolitan Magistrate, Delhi (as she then was). She appeared in the witness box as PW-5. She had received the confessional statement in F a sealed cover. She stated that ACP Rajbir Singh had brought the two accused in her chamber and he had been sent out of her chamber before the sealed covers were opened. She stated that she then enquired from the accused persons whether they had been tortured or harassed by the police but the accused persons did not complain of any harassment or torture. They confirmed that the statements were made by them before the DCP. She made G an endorsement on the confessional statement of Mohd. Ayub Mir, which is Ex.PW-5/A, and an endorsement on the confessional statement of Harbans Singh, which is Ex.PW-5/B. The signatures of Mohd. Ayub Mir and the signatures of Harbans Singh were taken on the application of ACP Rajbir Singh EX.PW-5/D. Thereafter the confirmation proceedings and the statements

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of the two accused were sealed in the envelope Ex.PW-5/E. In cross-examination she was categorical that had she not satisfied herself about the absence of any duress, she would not have recorded her endorsement. She stated that she did not tell the accused persons that at this stage they could call their counsel and consult them and that she did not tell them that they could be provided with an Advocate on that day at Government expense. She said that she herself made no attempt to provide any advocate to the accused. Admittedly, the two accused persons were sent to judicial custody immediately after the confession. The CMM, however, stated that she did not tell the accused persons that they would not be sent to police custody even if they have not confirmed the statements. She stated that she had completely satisfied herself that the accused persons were free from all duress and coercion and had not conducted the proceedings in a mechanical way. She stated that she had gone through the provisions of POTA and only thereafter conducted the proceedings.

13. The High Court has recorded a finding that the prosecution has sufficiently proved that the confession of the accused was genuine and it was made and confirmed by the Chief Metropolitan Magistrate as per the provisions of Section 32 of POTA. As seen from the record, the recovery of the money immediately after the transaction in question has been sufficiently proved. Admittedly, the two appellants, namely, Harbans Singh and Mohd. Ayub Mir, were strangers to each other till the time the money was being handed over. Harbans Singh identified Mohd. Ayub Mir with the colour of his dress of which he had made a note in a slip of paper. The number of the 10 rupees note was another such factor in identifying each other. Neither of the two claimed to have had any kind of transaction with each other at any earlier point of time. They were neither partners in business nor had any occasion to deal with each other. In this situation, the purpose of handing over the cash is especially within the knowledge of the two accused/appellants, Harbans Singh and Mohd. Ayub Mir. Section 106 of the Evidence Act casts upon them a responsibility of advancing an explanation for the same. The applicability of Section 106 of the Evidence Act in the criminal law has been recognized by the Supreme Court in several judgments. Two recent judgments on the point are *State of West Bengal v. Mir Mohammad Omar & Ors.*, [2000] 8 SCC 382 and *Sucha Singh v. State of Punjab*, JT (2001) 4 SC 107.

14. In their statements under Section 313 Cr.P.C. they denied having made any such confession. Instead of coming out with some explanation of

A their own about the purpose of handing over the money they denied that there was ever any transaction of giving and taking the sum of Rs.7 lakhs. They even denied that they were arrested by the police on the spot and the sum of Rs.7 lakhs was recovered from them. Harbans Singh who said that he was actually arrested from the office of one Pawan has not cared to prove this allegation by production of evidence.

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15. It can be seen that the entire case of the prosecution has been proved by the prosecution witnesses except the purpose of the transaction. In the absence of any explanation from the accused in this regard, an adverse inference is in our opinion attracted. They have failed to discharge their onus. It is only for this missing link that the confessional statements were used.

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16. The objection to the two confessional statements is that the procedural safeguards for recording such confession as given in Sections 32 and 52 of POTA was complied with. Strong reliance is placed on the recent judgment of the Supreme Court in the case of *State of NCT Delhi v. Navjot Sandhu Afsan Guru*, (2005) 3 Crimes 87 SC, popularly called the Parliament Attack case in which the Supreme Court examined the effect of failure to comply with the provisions of Section 32 and 52 of POTA. The peremptory provisions embodied in Section 32 of POTA are laid down as under:

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E “(a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him (vide sub-section (2)). (b) 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 (vide sub-section (3)). (c) The person from whom a confession has been recorded under sub-section (1) shall be produced before the Chief Magistrate along with the original statement of confession, within forty-eights hours (vide sub-section (4)). (d) The CMM/CJM shall record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be directed to produce for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to judicial custody (vide sub-section (5)).”

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17. Learned counsel for the appellant submitted before us that Section 32 (2b) of POTA was not complied with because the warning given by the

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police officer was in English, whereas the appellant does not understand English. We cannot accept this submission because no such plea was taken originally before the trial court. During the trial, the DCP Ujjwal Misra who recorded the confession was thoroughly examined and cross-examined. No question was put to him suggesting that the warning was given in English, which the accused could not understand. In fact, Shri Ujjwal Misra, DCP stated in his evidence that he explained to each accused that he was not required to confess and that if he did, the confession could be used against them. In our opinion Sections 32 and 52 of POTA were complied with in the present case. A B

18. The High Court has considered all submissions of the accused in great detail in its well considered judgment and we see no reason to interfere with the same. The appeal is dismissed. C

K.K.T.

Appeals dismissed.