

Locus of Confession Under TADA, POTA and Indian Evidence Act, 1872: A Comparative Study

Sumedha Saxena¹

Abstract

As India pursues an adversarial criminal justice system which speculates Miranda rights propounded by the United States of America as the right to remain silent during interrogation by a police officer, when the police try to extract a confession from the suspect or accused. Such extracted confession shall not be admissible at the time of trial against the accused in the court of law. It is a settled law under the Bharatiya Sakshya Adhiniyam 2023 that a confession made either before a police officer or in police custody shall not be admissible. Only such information or statements that lead to the discovery of new facts shall be admissible as confession. However, the legislature provides an exception to this concept of admissibility of confession before a police officer under some special laws which have been inclined towards security, sovereignty and integrity of India, also known as anti- terrorism laws like Terrorist and Disruptive Act, 1987 (hereinafter referred to as TADA), Prevention of Terrorist Act, 2002 (hereinafter referred to as POTA) etc. In this article, it will be endeavoured to put forward a comparative study as to the confession extracted under general law i.e. the Bharatiya Sakshya Adhiniyam 2023 and the special laws like TADA and POTA, along with mentioning the ratio decidendi of a few judgements of the Hon'ble Supreme Court of India which evinces the present scenario as to the locale of confession in general law and in special laws as well.

Keywords: Confession, Anti-terrorism laws, TADA, POTA.

1. Introduction

Every criminal justice system aspires to the illusory conceptual standard known as the best evidence rule, meaning thereby only the best evidence must come before the court of law at the

time of trial. So, a confession can be considered the best evidence. However, the ideal of confession is nevertheless tempered by harsh reality which is why judges ardently avoid the possibility that a confession will be forced, threatened or be made against one's volition and support the legislative intent which has been expressly mentioned in section 23(1) and section 23(2) of the Bharatiya Sakshya Adhiniyam 2023 which mandatorily makes the confession before police officer involuntary and irrelevant aiming to prevent the practice of oppression or torture by the police for the purpose of extracting confession from the accused person during investigation which possesses the objective of collection of evidence. India, being a common law country, presumes that an accused is considered innocent until proven guilty. So, the confession made by such an accused person should be corroborated with other evidence collected during investigation under section 180 and section 181 of the Bharatiya Nagarik Suraksha Sanhita 2023; even then, accused police officers torture persons to confess to a particular crime. On the other hand, as per the 69th report of the Law Commission of India, 1977, it recommended that all confessions made to a police officer should be made admissible subject to certain conditions. In response to this, the legislature passed the anti-terrorism law TADA, 1987, and because of its extensive misuse, it had to be repealed; thereafter, another anti- terrorism law, POTA, 2002, was passed. However, these two counterterrorism laws are no longer in force and have been repealed. However, the cases booked under these acts still keep the spirit of underlying principles regarding confession alive. These laws drastically altered the balance of power between the legislature, executive, and judiciary and are essential in providing checks on any laws.

2. Meaning and Definition of Confession:

¹Research Scholar, Teerthanker Mahaveer College of Law and Legal Studies, TMU, India.

The Bharatiya Sakshya Adhiniyam 2023 does not incorporate any definition for the term confession. However, in a criminal case, admissions are considered confessions. So, an admission made by a person who is facing criminal charges, if it suggests an inference as to any fact in issue or as to relevant facts, is considered a confession. Furthermore, voluntary and direct acknowledgement of guilt is a confession. According to Stephen:

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting an inference that he committed that crime."

However, for the Bharatiya Sakshya Adhiniyam 2023, the Privy Council rejected this definition in the case of *Pakala Narayan Swami v. Emperor* (1939) and it was observed by Lord Atkin that a confession cannot be implied from a statement that includes self-exculpatory content. The Hon'ble Supreme Court of India approved this view of Lord Atkin in the case of *Palvinder Kaur v. State of Punjab* (1952) and it was held that -- "A confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence."

3. Confession Under Tada:

To skirmish unprecedented circumstances, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was implemented as a stopgap measure on 23 May 1985. The Act had a sunset clause stating that it would expire on 24 May 1987, that is, two years after its enactment. However, taking into account the circumstances prevailing at that time, the government modified the same Act and again passed it in 1987, which remained in force till 1995. This Act had been misused thoroughly because a large number of innocents were being arrested in the name of terrorists, as the Act gave power to police to book any person as a terrorist, created provisions to remand an accused up to one year, extracted confessions by beating those accused, and the onus of proof shifted to the accused. TADA's introduction in such a context only made matters worse by granting police officers unrestricted authority to detain, arrest and punish people. TADA had been brought as a

preventive measure and not to punish the accused. Furthermore, section 15 of TADA added fuel to the fire, as it provided that a confession by a police officer of the rank of SP or above, made in police custody, is admissible in evidence. Under sec. 15 of TADA, even co-accused's, abettor's, or conspirator's confession who is tried during the same trial is admissible. This section lifts the prohibition against accepting confessions made to police officers and begins with a non-obstante clause; to record a confession under this section, the following conditions are essential:

(1) [Confession can be made by a person before a police officer not lower in rank than Superintendent of Police.

(2) It can be made either in writing or on any mechanical device like cassettes, tapes or sound tracks from which sounds or images can be reproduced.

(3) Confession of a co-accused, abettor or conspirator for an offence under this Act shall be admissible in the trial; however, the pre-requisite is that such co-accused, abettor or conspirator should be charged and tried in the same case together with the accused.

(4) Before recording any confession, the police officer must inform the accused that he is under no obligation to confess and if he chooses to do so, it can be used against him.

(5) A police officer must have reason to believe that such confession is being made voluntarily.] (Terrorist and Disruptive Activities Act, 1987, § 15) Thus, while recording confession under section 15 of TADA, the above-mentioned essential conditions must be fulfilled.

4. Confession Under Pota:

In 2001, when the Indian Parliament was attacked, then to protect the nation from any kind of terrorist activities, Parliament thought to make more effective laws and as a result passed the Prevention of Terrorism Act, 2002 (POTA), which replaced the old Act TADA and the Prevention of Terrorism Ordinance, 2001 (POTO). In this Act, authorities have been given wide powers to curb the 'state-sponsored cross-border terrorism'. Further, the apex court of the nation has consistently

maintained the legality of both the Act and the conduct of the police officers involved in procuring the confession, even though the confession made to the police and in police custody may seem blatantly unfair and abusive. The court has protected such actions under the aegis of special laws dealing with unique circumstances like terrorism. An accused person's clear acknowledgement of guilt is called a confession. It is considered substantive evidence; hence, the accused person's explicit confession cannot be overruled by any evidence. Section 32 of POTA, which is similar to section 15 of TADA, the POTA's parent act, deviates from the general rule of evidence as to the admissibility of confession by allowing confession made to a high-ranked police officer to be used as evidence against the maker. To record a confession under this section, the following conditions are essential:

- (1) [Confession must be made by a person before a police officer not lower in rank than superintendent of police.
- (2) It should be recorded either in writing or on any mechanical or electronic device like cassettes, tapes, or sound tracks from which sounds or images can be reproduced.
- (3) Before recording any confession, the police officer must inform the accused in writing that he is under no obligation to confess and if he chooses to do so, it can be used against him. However, if an accused wishes to remain silent, the police officer is not allowed to compel or induce him to make any confession.
- (4) It should be recorded in an atmosphere free from threat or inducement and must be in the same language in which it is made by the accused.
- (5) An accused person whose confession has been recorded must be produced in front of chief metropolitan magistrate or the chief judicial magistrate, as the case may be, within 48 hours along with his original statement of confession.
- (6) It shall be the duty of the metropolitan magistrate or chief judicial magistrate to record the statements made by such accused person and to get his signature or thumb impression and if such magistrate receives any complaint of torture, he

shall direct such person to be produced for medical examination before a medical officer who must not be lower in rank than an assistant civil surgeon and thereafter he must be sent to judicial custody.] (Prevention of Terrorism Act, 2002, § 32) Thus, being controversial in nature, this section has been scrutinised many times.

5. Comparative Analysis Through Judicial Pronouncements

The general rule under sections 23(1) and 23(2) of the Bharatiya Sakshya Adhiniyam 2023 is that the custodial confessions shall not be relevant and admissible as evidence at the time of trial aiming the legislative intent to curb upon the incidents of custodial torture which was pursued by the decision in case of *Queen Empress v. Babu Lal* (1884) in which it was held that the object of above mentioned sections of the Bharatiya Sakshya Adhiniyam 2023 is to prevent the practice of oppression or torture by the police for the purpose of procuring confessions from accused persons. However, the need for special legislation changed the system of excluding police confessions, meaning thereby that in some special legislations confessions to police officers were considered relevant and admissible. It was held in the case of *Lal Singh v. State of Gujarat* that under the Terrorist and Disruptive Act, 1987(TADA) and the Prevention of Terrorist Act, 2002(POTA), a confession made to a police officer is admissible in evidence and hence deviates from the general rule of custodial confession under the Indian Evidence Act, 1872. However, the constitutional validity of custodial confessions in relation to TADA was challenged in the case of *Kartar Singh v. State of Punjab* (1994) and envisaged that sec.15 of the impugned act is violative of art. 14 and 21 of the Indian Constitution and is against the established rule envisaged in sec.23(1) and 23 (2) of Bharatiya Sakshya Adhiniyam 2023and sec.180 and sec.181 of the Bharatiya Nagarik Suraksha Sanhita 2023 as well. Supreme Court upheld the constitutional validity of the Act. It held that it is critical to consider the Act's justifications and declarations, which were put into effect because of the seriousness of the terrorist threat to the country's security, sovereignty and integrity. Furthermore, even the public hesitates to give evidence, risking their lives. Therefore, sec.15 is not

unconstitutional, and the principle of equality is also not violated on the ground that there is a specific distinction between terrorists and disruptionists and other criminals, because the Act clearly defines the terms "terrorist" and "disruptionist". Still, Justice Sahai and Justice Ramaswami gave their dissenting opinion and held sec.15 of TADA unconstitutional. Further, the constitutional validity of sec.32 of the Prevention of Terrorist Act, 2002 (POTA) was challenged in the case of *People's Union for Civil Liberties v. Union of India*, (2004) and the main argument before the case was that the rule of appearance of the accused before the magistrate within 48 hours was unjustified; the standard of 24 hours should be observed instead. On this point, the court said that such a clause was necessary in the wake of terrorism, citing Kartar Singh's case. The court upheld the validity of the section, urging that the rights of the accused were not being violated. However, the 185th Law Commission's Report, 2003 stated that such provisions would be unconstitutional and in violation of Articles 20(3) or 21 of the Indian Constitution in the light of the earlier observations. POTA, 2002 violated the human rights and fundamental rights enshrined in the Indian Constitution and hence got repealed in 2004, which came in place of TADA, which also got repealed due to its gross misuse. Thus, the current laws in force now are the Unlawful Activities (Prevention) Act, 1967 (UAPA) and state laws, together with central criminal laws like the Bharatiya Nyaya Sanhita, 2023, the Bharatiya Nagarik Suraksha Sanhita, 2023, and the Bharatiya Sakshya Adhiniyam, 2023.

6. Conclusion

On analysis, we find that sec. 23(1) and 23(2) of the Bharatiya Sakshya Adhiniyam, 2023 superseded the underlying principles of sec.15 and 32 of TADA and POTA, respectively, in various judicial pronouncements regarding the admissibility of confessions to the police under the Sakshya Adhiniyam and the aforementioned counter-terrorism laws. Evidently, the primary reason for the downfall of counter-terrorism laws was their inconsistency with the country's general legal framework, which resulted in misunderstandings, abuse and ultimately the repeal of laws. Now, the central government needs to pass

a central law to control terrorist activities in India because there is a tendency for anti-terrorism laws to be abused for political purposes, as demonstrated by the TADA and POTA regimes. The law needs to adhere to the most recent version of the Law of Evidence.

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