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Critical Analysis on the Evidentiary Value of Retracted Statements

Authored By:

Jitendra Kumar and Jutirani Talukdar

Designation: Student(s) B.A. LL.B. (Hons.),
SYMBIOSIS LAW SCHOOL, PUNE

E-mail ID: jitendrakumar.slsp@gmail.com

E-mail ID: jutirani.97@gmail.com

Contact: +91-96363023**

EVIDENCE LAW

“Critical Analysis on the Evidentiary Value of Retracted Statements”

AUTHORED BY: JITENDRA & JUTIRANI

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ABSTRACT

A confession made by an accused whilst in custody, either to the police or to the magistrate and later repudiated is known as a retracted confession. Confessions, whether retracted or not, are treated the same when it comes to their evidentiary value, they are used to bring about conviction when a few conditions are satisfied. This paper deals with the present issue by critically analysing the concept of retracted confessions, its evidentiary value and its current legal position in India. The paper also covers major cases as well as landmark instances of retraction of confessions as in the case of Kasab (Mumbai terror attack, 2006) and the Afzal Guru case. The paper further provides observations and recommendations based on the research material as well as preceding judicial pronouncements. The relevant material is collected from legal instruments, statutes, judgments, books of legal experts of national and international repute, online newspaper reports and articles, law journals, law reports, online references and opinions of research scholars, academicians and other experts who have dealt with this subject.

Keywords: Confession, Retraction, Evidence, Statement, Magistrate, Police Custody.

INTRODUCTION

The Indian Evidence Act does not define “confession”. Lord Atkin defines confession as – “A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession.”¹ A confession can act as substantive evidence only if the court is satisfied that it is *voluntary* and *true*.

Retracted Confession means the act to recanting the confession.² ‘Recant’ can be understood to mean the act of withdrawing or renouncing prior statements formally.³ A retracted confession is understood to mean a statement made by the accused before the commencement of the trial through which the accused admits the commission of the offence, but which he repudiates at the trial. A confession is said to be retracted only where the accused admits that he/she made the confession and then denies the truth to what is stated therein.

CRITICAL ANALYSIS: EVIDENTIARY VALUE OF RETRACTED STATEMENTS

Afzal Guru Case (State vs Mohd. Afzal and Ors. 107 (2003) DLT 385)

After the Parliament Attack on December 13, 2001, Mohammed Afzal Guru was arrested. The Supreme Court delivered the final verdict after a period of three and a half years, out of the four accused Afzal Guru was sentenced to death. One of the most intriguing aspects of this case was the custodial confession made by Afzal Guru, he was produced before the DCP Special Cell who recorded the supplementary disclosure statement and was later produced before the Additional Chief Metropolitan Magistrate (ACMM), Delhi where Afzal Guru confirmed that he had voluntarily made the confessional statement to the DCP Special Cell after being informed about all procedures that were to be followed and he was under no threat or pressure.

¹ Pakala Narayan Swami v. Emperor, AIR 1939 PC 47

² P Ramanatha Aiyar, Advanced Law Lexicon, 4122 (3rd Edition, Volume IV, Wadhwa and Co, Nagpur, 2005)

³ Ibid.

This supplementary disclosure statement was retracted after a period of seven months, the accused claimed that he was made aware of the details of the confession only after the copy of the charge sheet was served to him. He claimed that he had made a confession before the police during custody and not before the DCP, and his statement had been grossly manipulated and twisted.

The supreme court in deciding the evidentiary value of the confession was of the view that under section 25 and 26 of the Indian Evidence Act⁴, no confession made to a police officer, and no confession made while in custody of a police officer (unless made in the presence of a Magistrate), shall be proved against such person. However, the main issue in this case is that the provisions of the Indian Evidence Act seem to have been completely ignored by the police officials who recorded Afzal Guru's confessional statement by following the POTA.

There was no reasonable explanation as to why he was not produced before a Judicial Magistrate. Even though the Supreme Court set aside the confession due to misuse of procedural safeguards, this case ignited important debates on the evidentiary value of retracted statements.

Status of the Retracted Confession

Evidence Act makes no distinction between retracted and an unretracted confession, both are equally admissible against the accused.⁵ The legal approach to be adopted by courts in cases of convictions in the light of retracted statements was summarized in the case of ***Bharat v. State of U.P.***⁶

The court held that it may take a retracted confession into consideration but it must look for reasons for the making of the confessions as well as the retractions and must weigh the two to determine whether the retraction may not weigh in the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its use, therefore, it can be stated that a retracted confession to be acted upon requires the general assurance that the retraction was an afterthought and the earlier statement was true. From the above-mentioned judgement, it is clear that **the weight to be**

⁴ Sec. 25, Indian Evidence Act, 1872; Sec. 26, Indian Evidence Act, 1872.

⁵ Re: Kodur Thimma Reddi and Ors, AIR 1957 AP 758

⁶ (1971) 3 SCC 950

attached to a retracted confession must depend on the circumstances under which it was given and retracted including the reasons for the same.

Importance of corroboration

“A retracted confession may form the legal basis of conviction if the court is satisfied that it was true and voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. The same is a rule of prudence, it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars.”⁷

Subramania Gounden’s⁸ case explained the extent of corroboration required. Every single circumstance in the retracted confession regarding the complicity of the maker need not be independently corroborated. It is sufficient that the confession is substantiated by some evidence which would tally with what is contained in the confession.

However, there must be a general assurance that the retraction was a mere afterthought when using the retracted confession as in the case of **Mohammed Ajmal Mohammad Amir Kasab & Abu Mujahid v. State of Maharashtra**⁹. In **Haroom Hazi Abdulla v. State of Maharashtra**,¹⁰ it was stated that unless it is very apparent that the reasons for giving a retracted confession is false, they must be looked at with greater concern.

Retracted confession need not be dumped Apex Court Perspective

If from the evidence (especially independent incriminating evidence) on record it can be safely inferred that the accused is guilty, the court can choose to eschew the confessional statement of the co-accused. In the case of **Manjit Singh & mange v. C.B.I**¹¹ a bench of justices P.Sathasivam and H.L. Dattu held that Retracted Confessions are held to be good confessions if they are made voluntarily and in accordance with law. There can be no doubt that a free and voluntary confession deserves the highest credit. It is presumed to flow from a sense of guilt.

⁷ Pyare Lal Bhargava v. State of Rajasthan AIR (1963) SC (1994)

⁸ Subramania Gounden v. The State of Madras, 1958 SCR 428.

⁹ Criminal Appeal Nos. 1899-1900 of 2011

¹⁰ Haroom Hazi Abdulla v. State of Maharashtra, 1968 (2) SCR 641.

¹¹ CRIMINAL APPEAL NO. 1778 OF 2008

The SC further held that a confessional statement given by an accused under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act should not be discarded merely for the reason it has been retracted during trial.

CONFESSIONS MADE IN POLICE CUSTODY AND WITH MAGISTRATE

Confession recorded by the magistrate or an extra-judicial confession,¹² is the confession recorded after the police completes its investigation and submits a charge-sheet, but before the Magisterial enquiry has commenced, is inadmissible in evidence.¹³ A confession made to a police officer while in custody, unless made in the presence of a Magistrate, can be proved against such a person.¹⁴ A retracted extra-judicial confession bears an even heavier burden of proof.¹⁵

A strict approach is used towards statements made to the police, with disregard to the legal procedure and safeguards without, which increases the possibility of inducement, threat, or promise.¹⁶ While they are to be treated with a certain amount of care and caution, the court is not entitled to blindly proceed on the presumption that extra judicial confessions are inadmissible.¹⁷ Herein, the nature of the circumstances, provocation for the confession, the time when the confession was made and corroboration vide independent evidence must be considered.¹⁸

Judicial confessions even when retracted have greater authority to suggest that a conviction substantially or solely based on a judicial confession would be justified.¹⁹ These are those confessions which are made before a magistrate or in court in the due course of legal proceedings.²⁰

¹²Section 164, 281, Code of Criminal Procedure, 1973.

¹³Babubhai Udesinh Parmar v. State of Gujarat, (2007) 1 MLJ (Cri.) 747 (SC).

¹⁴Pancho v. State of Haryana, (2012) 1 SCC (Cri) 223.

¹⁵Rameshbhai Chandubhai Rathod v. State of Gujarat, (2009) SCC 740.

¹⁶Sakharam Shankar Bansode v. State of Maharashtra, AIR 1994 SC 1594; Kotari Suri v. State of Orissa, (1984) 1 Ori LR 199; State v. Ram Autar Chaudhry, AIR 1955 All 138.

¹⁷State of Rajasthan v. Raja Ram, 2003 CriLJ 3901.

¹⁸Kishore Chand v. State of Himachal Pradesh, AIR 1990 SC 2140.

¹⁹State v. Balchand, AIR 1960 Raj 101; Emperor v. Lal Baksh, AIR 1945 Lah 43.

²⁰Section 164, Code of Criminal Procedure, 1973.

OBSERVATIONS & RECOMMENDATIONS

Section 24 of the Indian Evidence Act (IEA) states that a confession shall not be admissible if not made freely and voluntarily. No inquisitor should offer any inducement, threat or *promise to the accused*.²¹ This concept of voluntariness is a common law principle,²² and the Indian Penal Code has created a safeguard for the prisoner against threat and torture by drawing from this common law principle.

Retraction of confessions is very common in most criminal cases.²³ This can be attributed to quite a few reasons which may be the inadequate police protection or the ill-developed mechanism for witness protection or the inherent securities of the witnesses or the accused under the influence of the status of the opposing party as happens in almost all the high profile cases.

Right to Retract Confessions

Retraction is the right of the confessor and all the accused have invariably adopted that right.²⁴ But the exceedingly large number of retractions in India go on to show that these confessions do not proceed from a feeling of penitence and remorse as they should, but that they have their source in the inducement, threat, torture, hope or any other non-validating cause.²⁵

Once a confession has been retracted the court has to fulfil certain duties in regards to the evaluation of the evidence concerning the confession by looking at all aspects.²⁶ As it has already been stated above the general law applicable to retracted confessions can be summarised in the following manner. It is not a rule of law, but a rule of prudence, that if made voluntarily and the court is satisfied of its truthfulness, a retracted confession may form the legal basis of a conviction, after it has been broadly corroborated with material particulars.

²¹ Sec. 24, Indian Evidence Act, 1872

²² Dorcas Quek, The concept of voluntariness in the law of confessions, 17 Singapore Academy of Law Journal 819 (2005).

²³ *Queen Empress v. Babulal*, (1884) ILR 6 All 509

²⁴ *State of Tamil Nadu v. Kutty @ Lakshmi Narasimhan*, AIR 2001 SC 2778; *Rajen Boro v. State of Assam*, 2003 (2) GLT 632

²⁵ *R v. Thompson*, [1893] 2 QB 12; *The Deputy Legal Remembrancer v. Karuna Baistobi* (1895) ILR 22 Cal 164; *Dikson Mali v. Emperor*, AIR 1942 Pat 90

²⁶ *State of Tamil Nadu v. Kutty @ Lakshmi Narasimhan*, AIR 2001 SC 2778; *Rajen Boro v. State of Assam*, 2003 (2) GLT 632

The author of this article believes that the above mentioned legal position of admissibility of retracted confessions is based on ambiguous tests and should not be the sole criteria for conviction in cases such as death penalty. The author also believes that this situation may be improved if a provision similar to Section 76 A (2) (b) of the Police and Criminal Evidence Act of 1984 in the UK is enacted in India.

CONCLUSION

A confession is one of the most important pieces of evidence against a person. Once a confession is retracted, whether the same is done in days or months a doubt is created as to its validity. In the law of evidence, retraction is an important and practical principle. The legal position of the retracted confession emanates from the principle against self-incrimination but it is also a set position law that it is not illegal to base a conviction upon the uncorroborated confession of an accused person, provided that the court is satisfied that the confession was voluntary and true in fact which is the test of validity of the retracted confession.

The Indian Law requires corroboration of the retracted confession in a broad sense and it “has to” base its decision on the retracted confession itself, without setting it aside, then strong corroboration is an absolute essential.

Though the above mentioned test is ambiguous and death sentences as in the case of Afzal Guru should not be based on retracted confessions given the diminished evidentiary value of the same.

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.

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