

**THE EVIDENTIARY VALUE OF RETRACTED CONFESSIONS:**  
**A CRITICAL STUDY OF THE INDIAN SUPREME COURT RULING ON**  
**THE DECEMBER 2001 TERRORIST ATTACK ON PARLIAMENT**

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**INTRODUCTION**

The Indian Supreme Court judgment that led to the hanging of Afzal Guru draws our attention to the immense human and financial costs involved in false confessions and wrongful convictions.<sup>2</sup> One of the many versions of confessions that Afzal Guru made while in police custody was used as evidence against him in this judgment. And even though the Supreme Court eventually set aside the confession, the judgment draws much attention to a highly sensitive issue of custodial confessions and their retraction. In this paper the researcher aims to *first* give an overview of the confessional statement made by Afzal Guru and the later retraction of this confession, and the reasoning of the Supreme Court to set aside the confession. *Secondly*, the legal approach to be followed when courts are called to decide on the basis of retracted confessions is explained with the help of judicial decisions and the IEA. *Thirdly*, the paper provides a critique of the Afzal Guru judgment, with the intention of proving that retracted confessions should carry very little evidentiary value.

**CHAPTER ONE: AN OVERVIEW OF AFZAL GURU'S CONFESSION**

In the morning of 13<sup>th</sup> December 2001, a white Ambassador car fitted out with a bomb was driven through the gates of the Indian parliament by five armed men. When challenged, they jumped out of the car and opened fire. In the firefight that ensued, eight security personnel, a gardener and all the armed men were killed. Surprisingly, and unlike most terrorists, they left behind a trail of evidence, which included weapons, mobile phones, phone numbers, photographs and ID cards. The day after the attack, the Special Cell of the Delhi Police claimed to have tracked down several suspects, and on the 15<sup>th</sup> of December it announced that it had cracked the

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<sup>2</sup> Richard A. Leo, Deborah Davis, *From false confession to wrongful conviction: Seven psychological processes*, 38 The Journal of Psychiatry and Law 9 (2010).

case. The conspiracy to attack parliament was attributed to a joint operation by two Pakistan based terrorist groups, and three Kashmiri men, S. A. R. Gilani, Shaukat Hussain Guru, Mohammed Afzal Guru, and Shaukat's wife, Afsan Guru. These four were arrested. Almost three and a half years later, the Supreme Court delivered its final verdict on this case by endorsing the view that an attack on parliament must be looked upon as an act of war. And out of the four persons arrested, Afzal Guru was sentenced to death.<sup>3</sup>

One of the most interesting aspects of this case is the custodial confession made by Afzal Guru, which he later retracted. Rajbir Singh (ACP) Special Cell took over investigation of the case and recorded Afzal Guru's supplementary disclosure statement. Immediately after, Afzal Guru was produced before DCP Special Cell because he had expressed the desire to make a confessional statement. The police stated that all procedures were followed and Afzal Guru was under no pressure or threat. And before the Additional Chief Metropolitan Magistrate (ACMM), Delhi Afzal Guru confirmed that he had voluntarily made the confessional statement to the DCP Special Cell.<sup>4</sup>

Even though the evidence against Afzal Guru included his confessional statement, the Supreme Court was angered by the police officials, who in their over zealousness arranged a media interview before the recording of the actual confession. After seven months, when Afzal Guru retracted this confession, the Supreme Court cited the following reasons and did not accept the confession as evidence against him.<sup>5</sup>

- There was no reasonable explanation as to why Afzal Guru was not produced before a Judicial Magistrate to record a confession under the provisions of Cr.P.C.
- It was highly unlikely that Afzal Guru, who is alleged to be a hard core terrorist, would have developed feelings of repentance and come forward voluntarily implicating himself and others including a lady who had nothing to do with the terrorists.
- The conduct of the so called terrorists in the confessional statement, which included meetings and going about Delhi making plans seemed unnatural and unlikely.

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<sup>3</sup> State v. Navjot Sandhu and Ors., AIR2005SC3820.

<sup>4</sup> State v. Navjot Sandhu and Ors., AIR2005SC3820.

<sup>5</sup> State v. Navjot Sandhu and Ors., AIR2005SC3820.

- The implication of Gilani in the confessional statement conflicts with the statement made by Afzal Guru to the media.
- Afzal Guru only became aware of the details of the confession when the charge sheet was filed and a copy was served to him. He was not aware of the contents of the confessional statement when he was produced before the ACMM, which was the cause of the delayed retraction of the confession. 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.

It was the view of the Supreme Court that the confessional statement was not reliable due to the violation of safeguards envisaged under Sections 32 and 52 of the POTA (Prevention of Terrorism Act, 2002). Furthermore, the conduct of the police in this case went contrary to the scheme of the law of evidence with regard to confessions. According to Section 25 and Section 26 of the IEA,<sup>6</sup> 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. The POTA departs from the general law of evidence by making a confession to a high ranking police officer admissible in evidence in a trial under the POTA.<sup>7</sup> There is no reasonable explanation as to why Afzal Guru was not produced before a Judicial Magistrate to record a confession under the provisions of the Criminal Procedure Code, 1973 (Cr.P.C), when he had already made a disclosure statement with his signature on it, and most of the investigation relating to the recovery of incriminating materials was over. The only reason given for this was that, since Afzal Guru was not willing to make a confession before court, for the purpose of the investigation, they had to add the offences under POTA so that a confession could be recorded before a police officer.<sup>8</sup>

Even though the Supreme Court set aside this confession due to the obvious abuse of procedural safeguards, it has resulted in an interesting debate on the evidentiary value of retracted

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<sup>6</sup> Sec. 25, Indian Evidence Act, 1872; Sec. 26, Indian Evidence Act, 1872.

<sup>7</sup> Sec. 32, Prevention of Terrorism Act, 2002.

<sup>8</sup> State v. Navjot Sandhu and Ors., AIR2005SC3820.

confessions. The crucial question in this case was whether the confessional statement by Afzal Guru recorded by the DCP could be safely relied upon. Therefore, the legal approach to determine the evidentiary value of retracted confessions will be analysed in the next chapter.

## **CHAPTER TWO: THE EVIDENTIARY VALUE OF RETRACTED CONFESSIONS**

Section 24 of the Indian Evidence Act, 1872 (IEA) makes it clear that a confession will be irrelevant if not made freely and voluntarily. No inquisitor should offer any inducement, threat or promise to the accused.<sup>9</sup> This is further augmented by Section 164 of the Cr.P.C. which requires a Magistrate to explain to the person making the confession that he is not bound to make a confession, and if he does so, it may be used as evidence against him.<sup>10</sup> This concept of voluntariness is a common law principle,<sup>11</sup> and the Indian Penal Code has created a safeguard for the prisoner against threat and torture by drawing from this common law principle. This law is claimed to be an administrative measure designed to eradicate the evil modes of obtaining confessions that was prevalent in the past, which included various methods of torture.<sup>12</sup>

The legal approach to be taken by courts when they are to decide on the basis of a retracted confession has been discussed in a number of cases. Hidayatullah, C. J., on behalf of a three judge bench in the case of *Bharat v. State of U. P.*<sup>13</sup> stated that it is safe to rely on a confession when the voluntary character and truth of the statement are accepted. Its voluntary nature depends on whether there was any threat, inducement or promise, and its truth can be determined by examining the entire prosecution case. A retracted confession however is treated differently. As laid down in an earlier case of *Subramania Gounden v. The State of Madras*,<sup>14</sup> a retracted confession may be taken into account by a court, however, it must look for the reasons for making the confession and the reasons for its retraction. These reasons must be weighed in order to determine whether the retraction affects the voluntary nature of the confession. It can be said that a true confession, which is made voluntarily, may be acted upon, even with slight evidence

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<sup>9</sup> Sec. 24, Indian Evidence Act, 1872

<sup>10</sup> Sec. 164, Code of Criminal Procedure, 1973.

<sup>11</sup> Dorcas Quek, *The concept of voluntariness in the law of confessions*, 17 Singapore Academy of Law Journal 819 (2005).

<sup>12</sup> Sayed Ali Hasan, *Law of Confessions in India*, 5 Police Journal 221, 222 (1932).

<sup>13</sup> *Bharat v. State of U. P.*, 1971 (3) SCC 950.

<sup>14</sup> *Subramania Gounden v. The State of Madras*, 1958 SCR 428.

to corroborate it. However, there must be a general assurance that the retraction was a mere after thought when using a retracted confession. In *Haroom Hazi Abdulla v. State of Maharashtra*,<sup>15</sup> 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.

In addition to this, a four judge bench in *Pyare Lal v. State of Assam*<sup>16</sup> clarified the legal position with regard to retracted confessions. 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, if it is corroborated in material particulars.

*Subramania Gounden's*<sup>17</sup> 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.

The twin test to be applied in order to evaluate a confession was laid down in the case of *Shankaria v. State of Rajasthan*.<sup>18</sup> First, the court must ascertain as to whether the confession was perfectly voluntary, and secondly, whether it is true and trustworthy. If the first test is not satisfied, the second test is automatically not applied. In addition to this, the court also indicated a broad method of evaluating a confession. After looking at the surrounding circumstances, the probabilities of the case, and by comparing the confession with the rest of the evidence, if the confession fits naturally with the rest of the evidence, it may be taken to have satisfied the second test.

The term “corroboration of material particulars” used in *Pyare Lal Bhargava's* case was further clarified in *Parmanand Pegu v. State of Assam*.<sup>19</sup> The expression corroboration of material particulars does not imply meticulous examination of the entire material particulars. It is sufficient that there is broad corroboration in conformity with the general trend of the confession. Therefore, it is not contrary to what has been clarified in *Subramania Gounden's* case.

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<sup>15</sup> *Haroom Hazi Abdulla v. State of Maharashtra*, 1968 (2) SCR 641.

<sup>16</sup> *Pyare Lal v. State of Assam*, AIR 1957 SC 216.

<sup>17</sup> *Subramania Gounden v. The State of Madras*, 1958 SCR 428.

<sup>18</sup> *Shankaria v. State of Rajasthan*, 1978 (3) SCC 435.

<sup>19</sup> *Parmanand Pegu v. State of Assam*, 2004 (7) SCC 779.



Moreover, the fact that a confession is made voluntarily, free from threat and inducement can be regarded as presumptive evidence of its truth. Still there may be circumstances that indicate that the confession is not wholly or partly true, in which case it loses most of its evidentiary value. Hence, in order to be assured of the truth of a confession, the court should look to corroboration from other evidence. However, each and every material particular need not be corroborated. The court should ideally have assurance from all angles that the retracted confession was in fact, voluntary and it must have been true.

After referring to these decisions, the legal position was further clarified by a Constitutional Bench in *Haricharan Kurmi v. State of Bihar*.<sup>20</sup> When dealing with a case against an accused, the court must begin by examining the evidence adduced by the prosecution, and after forming an opinion with regard to the quality and effect of the evidence, it may turn to the confession to further lend assurance to its decision.

Therefore, 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.

### **CHAPTER THREE: A CRITIQUE OF AFZAL GURU'S CONFSSIONAL STATEMENT**

The researcher completely agrees with the Supreme Court when it stated that the various discrepancies in the retraction do not give rise to an inference that the statement made earlier was voluntary and true.<sup>21</sup> Even though this reasoning goes against the general law on the treatment of retracted confessions, it is clear that the Supreme Court decided to set aside Afzal Guru's confession by following what was laid down in the case of *Subramania Gounden*, which stated that a retracted confession may be taken into account by a court by looking for the reasons for making the confession and the reasons for its retraction. In the Afzal Guru case, instead of building up a case on the basis of inconsistencies in the defence plea, and stating that the retraction did not corroborate with the rest of the evidence, the Supreme Court set aside the confession by looking at the substance of what the accused said while refuting the statement.

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<sup>20</sup> *Haricharan Kurmi v. State of Bihar*, 1964 (6) SCR 623.

<sup>21</sup> *State v. Navjot Sandhu and Ors.*, AIR2005SC3820.

Even though retracted confessions may form the legal basis of a conviction, in the light of the Afzal Guru judgment, the researcher finds the evidentiary value of retracted confessions to be very less. Even if the court looks at the reasoning behind both the original confession and the retraction in order to make a decision, such a confession should not be the basis of conviction in a case that leads to the hanging of an individual. While a confession is one of the most important pieces of evidence against a person, it loses most of its value once retracted. This is because, once retracted, a doubt is created as to the validity of the original confession. Furthermore, it must be noted that many prisoners in most instances are unwilling to challenge a false confession as many believe it to be a futile exercise. This is probably why it took Afzal Guru almost seven months to retract his confession. Therefore, merely on the basis that it took a while for the accused to retract his confession, or that there were certain inconsistencies in the subsequent retraction, the court cannot conclude that the confession was made voluntarily and freely, and make it the basis for a conviction.<sup>22</sup> Furthermore, the researcher finds the test laid down to determine the validity of a retracted confession too ambiguous. Such a vague test cannot be used as the sole basis of conviction. Especially for a case such as Afzal Guru which resulted in the hanging of an individual.

The researcher 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 as well. Which provides that a confession obtained by oppression, a confession in consequence of anything said or done which was likely to render it unreliable must be excluded by court, unless the prosecution is able to prove beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid.<sup>23</sup>

## **CONCLUSION**

There is no doubt that the Afzal Guru judgment is one of far reaching importance from the viewpoint of evidence law.

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<sup>22</sup> Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 (4) *New England Law Review* 689, 691 (2012).

<sup>23</sup> Jenny Mcewan, *Striking a Balance in Unlawfully Obtained Confession Cases: United Kingdom Pragmatism Against Principle*, 44 *San Diego Law Review* 597, 602 (2007).

The law laid down by the courts in relation to retracted confessions has formed a test to judge its validity. If the retracted confession is proved to be made voluntarily, freely and is corroborated broadly with the rest of the evidence, it is held to be valid. However, the researcher believes that this is a vague test. And punishment such as death sentence, as given in the Afzal Guru judgment should not be based on such a test. Elements such as fear, threat, punishment that are involved in such a criminal case make it very difficult to completely prove that a statement was made voluntarily, and freely. Therefore, the researcher believes that retracted confessions should be given very less evidentiary value. This contention is further supported by the case of *Haricharan Kurmi*, which stated that the court must begin by examining the evidence adduced by the prosecution, and after forming an opinion with regard to the quality and effect of the evidence, it may turn to the confession to further lend assurance to its decision.

A confession is one of the most important pieces of evidence against a person. However, once it is retracted, whether it takes the person days or months to do so, a doubt is created as to its validity. Therefore, even if the test mentioned above is satisfied, the researcher believes that a retracted confession should not be the sole basis of conviction and should be given very less evidentiary value. This is mainly because false confessions carry a grave risk of convicting innocent people, and the human cost involved is too high.<sup>24</sup> Moreover, even though the Indian law requires corroboration in a broad sense, once a confession is retracted, if the court “has to” base its decision on the retracted confession itself, without setting it aside, then strong corroboration is an absolute essential.

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<sup>24</sup> Dr. Boaz Sangero, *Miranda is not enough: A new justification for demanding strong corroboration to a confession*, 28 (6) *Cardozo Law Review* 2791 (2006-2007).