

EVIDENTIAL VALUE OF CONFESSION

By

Md.Saiful Islam
ID: LLB 03106092

Supervised By

Mousumi Kabir Sumi
Lecturer, Department of Law

Date of Submission: 15th April 2010

Department of Law
Stamford University Bangladesh

EVIDENTIAL VALUE OF CONFESSION

A dissertation presented to the Department of Law in partial fulfillment of
The requirements for the degree of Bachelor of Laws

By

Md. Saiful Islam

ID: LLB 030106092

Supervised By

.....

Mousumi Kabir Sumi

Lecturer, Department of Law.

.....

Signature of the Dissertation Committee

Date of Submission: 15th April 2010

Department of Law

Stamford University Bangladesh

DECLARATION

I, hereby, declare that unless otherwise mentioned by quotation or reference, this dissertation has been entirely and solely composed by me. It has not been published or submitted to another degree.

I further declare that all the rules prescribed for writing the dissertation have strictly been complied with. I will be subjected to penal action to be taken by the university in case these declarations are proved to be false.

.....

Md.Saiful Islam

Date: 17 April 2010

ID: LL.B. 03106092

Batch: 31st B.

Department of Law,

Stamford University Bangladesh.

CERTIFICATE OF SUPERVISOR

This is to certify that Md. Saiful Islam is a student of LL.B. (Honours.), ID No. LLB 03106092 successfully completed his “Dissertation” entitled “Evidential value of Confession” under my supervision as the partial fulfillment for the award of LL.B. (Honours.) degree.

He has done his job under my supervision and guidance. He has tried his best to do this successfully. I think this program will help him in the future to build up his career. I wish him success and prosperity.

.....
Mousumi Kabir Sumi
Lecturer,
Department of Law,
Stamford University Bangladesh.

ACKNOWLEDGEMENTS

First of all, I wish to acknowledge the immeasurable grace and propound kindness of the Almighty Allah. I express my gratitude to my honorable dissertation supervisor, Mousumi Kabir Sumi, Lecturer, Department of Law, and Stamford University Bangladesh for giving me the opportunity to complete my dissertation report under her supervision. She gave me her valuable time and important information to complete the dissertation report. As without her proper guidance it was quite impossible for me to complete the dissertation.

I also express my gratefulness to my parents and my family members who encouraged me all the times.

Finally, I express thanks to my friends and well wishers.

.....
Md. Saiful Islam
ID: LLB 03106092
Batch: 31st B.
Department of Law,
Stamford University Bangladesh.

TABLE OF CONTENTS

Title	pages
<i>Abstract</i>	vi
<i>List of the cases</i>	vii
Chapter 1	
INTRODUCTION	1
Chapter 2	
GENERAL CONCEPT	
2.1 Definition	
2.2 Characteristics of Confession	4
2.3 Classification of Confessions	
2.4 Weight of Confession as Evidence	
2.5 Evidentiary value of confession	10
Chapter 3	
LAW RELATING TO CONFESSION	
3.1 The Code of Criminal Procedure, 1898.	13
3.2 The Evidence act, 1872.	20
Chapter 4	
PROCEDURE OF TAKING CONFESSION	
4.1 Confession recorded on oath	26
4.2 Confession must be voluntary	26
4.3 Confession not only voluntary, but also be true	28
4.4 Presumption of voluntaries	28
4.5 Question to be put to accused in the time of taking confession	29

4.6 How to put into evidence:	30
4.7 Language of record	31
4.8 Confession during police custody	31
4.9 Police officer not to be present at or within sight	32
4.10 Warning to the accused	32
4.11 Proof of confession	33
4.12 Statement of a witness	33
4.13 Time for reflection	34
4.14 Objection to recording of confession	35
4.15 Confessing accused not to be sent to police custody	35
4.16 Question regarding motive	36
4.17 Confession if true and voluntary, conviction can be given even on retraction.	36
4.18 Question after recording confession	37

Chapter 5

SOME CASES STUDIES ON CONFESSION

5.1 <i>Bakur Chandra Sarkar v. The state</i> , 45 (1993) DLR, SC,P.260	38
5.2 <i>Nazrul Islam v.The state</i> 45 (1993) DLR, P.142	39
5.3 <i>Ketab Ali v. The State</i> 22 (1970) DLR, P.472	40
5.4 <i>Abul Hossain and others v. State</i> 46 (1994) DLR, P.77	41

Chapter 6

CONCLUSION

5.1 Recommendations	43
5.2 Concluding remark	45

REFERENCES	46
-------------------	----

ABSTRACT

Since a confession is an acknowledgement in expressed word of the truth of the main fact charged or of some essential part of it, it plays a vital role in a criminal case. This paper intends to focus the general concept and laws related to confession in order to scrutinize the rules and regulations of when record confession statement, who are authorized to conduct the record and how to ensure the acceptability of confessional statement. Accordingly, this dissertation attempts to evaluate the evidential value of confession under the light of some relevant case references.

LIST OF CASES

- Abul Hossain v. The state*, 46 (1994) DLR, 77
- Abdul Kashem v. The State*, 43 (1991) DLR, 420
- Muhammad Bakhsh v. The State*, 9 (1957) DLR, SC, 11
- The State v. Jatindra Kumar Sutradre*, 20 (1968) DLR, WP, 84
- Jufar Alam Choudury v. The State*, 20 (1968) DLR, SC, 666
- Alaluddin v. The State*, 49 (1997) DLR, HCD, 127
- The State v. Abul Hashem*, 3 (1951) DLR, AD, 30
- Nazrul Islam v. The state* 45 (1993) DLR, 142
- Wazir v. The State*, 13 (1961) DLR, WP, 5
- The State v. Abul Hashem*, 50 (1998) DLR, HCD, 17
- Nurul Haque v. State*, 20 (1968) DLR, 780
- Mohar Ali Khan v. The Crown*, 7 (1955) DLR, 633
- Bakul Chandra Sarkar v. The state*, 45 (1993) DLR, 260
- The State v. Manik Bala*, 41(1989) DLR, 435
- Salauddin v. State*, 32 (1980) DLR, SC, 227
- State v. Abdur Rashid*, 45 (1993) DLR, 195
- The State v. Mollah*, 41(1989) DLR, HCD, 11
- Ismail Sarkar v. state*, 33 (1981) DLR, 320
- Juma v. The Crown*, 7 (1955) DLR, WP, 45
- The State v. Lutfar Fakir*, 24 (1972) DLR, 217
- Farida v. The State* 18 (1966) DLR, SC, 283
- State v. Shfique*, 43 (1991) DLR, AD, 203

Chapter 1

INTRODUCTION

The term confession is not defined anywhere in any Act. But it is thought that an Admission in case of a criminal matter is Confession. The same was stated by STEPHEN in his digest that that a confession is an admission made at any-time by a person charged with a crime, stating or suggesting the inference that he committed the crime. However, Privy Council, in case of *Pakala Narayan Swami v. Emperor* AIR 1939, did not accept this definition. In this case Lord ATKIN observed that no statement that contains self exculpatory matter can amount to a confession. Further, a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence. An offence of a gravely incriminating fact is not in itself a confession. For example, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession is not a confession even though it strongly suggests that the accused has committed the murder.¹

The decision by Privy Council in *Pakala Narayan Swami Case* was approved by SC in the case of *Palvinder Kaur v. State of Punjab*, AIR 1952. In this case, Palvinder was on trial for murder of her husband along with another, who all the time remained absconding. In her statement to the court, her husband was hobbyist photographer and used to keep handy photo developing material which is quick poison. On this occasion, he was ill and she brought him some medicine and the medicine was kept near the liquid developer and by mistake swallowed the liquid and died. She got afraid and with the help of the absconder, she dumped the body in the well. The statement, thus, partially admitted guilt and partially showed innocence. Here, the lower courts sorted

¹ <http://www.historyofconfession.htm>, last visited on 10 March 2010.

out the exculpatory part and convicted her on the inculpatory part. However, SC rejected this approach and held that the rule regarding confession and admission is that they must either be accepted or rejected as whole.²

Section 164 of the code of criminal procedure, 1898 is very important. It is important to the extent that accused could be punished in accordance with his confessional statement Magistrates are empowered to record confessions since it is very important in criminal cases and accused sometimes could be inflicted on the basis of his confessional statement. The magistrate recording confessional statement must follow some rules, regulation laid down in section 164 of the code of criminal procedure. Accused are of liberty to make statement to the magistrate, any type of influence pressure is strictly prohibited while receiving and recording confession there are some provisions in the evidence Act regarding confessional statement. Through the whole study I have endeavored to focus those materials relating to confession confessional statement has evidential value when it is followed by rules and regulation and it is not made by inducement, threat or promise if it is made by unauthorized means. Then it will be irrelevant in proceeding.³

² <http://www.historyofconfession.htm>, last visited on 10 March 2010.

³ *Ibid*

Chapter 2

GENERAL CONCEPT

2.1 Definition

Confession is a species of admission. The term “Confession” has not been expressly defined in any statute; this term finds mention in the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. According to the dictionary meaning confession is “an acknowledgement of offence”. As defined, in a very wider sense, by Stephen in his Digest of the Law of Evidence, confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed a crime. Confession is a statement which is a direct acknowledgement of guilt and does not include merely inculpatory admission which falls short of being admission of guilt. Lord Atkin observed [AIR 1939 PC 47(52)] that no statement containing self-exculpatory matter could amount to confession, if the exculpatory statement was of some fact, which if true, could negative the offence alleged to be confessed. As considered in *State v. Lahu Miah and another*, 39 DLR(AD) 117 (per M.H. Rahman J). “A confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence”.⁴

The confessional statement, not being a mere statement of the occurrence, is the direct and specific admission of the guilt or admission, in substance, of all the facts constituting the offence, made by the confessing accused voluntarily giving a true statement of the occurrence implicating himself, sometimes other co-accused, as being involved in commission of the offence. A self exculpatory statement or, a statement in which the maker denies his guilt is no confession.

⁴Ratanlal and Dhirajlal, *The law of evidence*, 21st ed.,(Nagpur,wadhwa and company , 2004)
p.164

Confession

Confession means admission of the guilt in terms of the offence. No statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which if true would negative the offence alleged to the confessed. Moreover, a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence. An admission of gravely incriminating facts, even a conclusively incriminating fact is not of itself a confession, e.g. an admission that the accused is the owner of land was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Exculpatory statements may however in certain circumstances subsequently become evidence of guilt itself. In that way they become confessions and attract sections 24 and 27, Evidence Act. A statement is confession; if it be of such nature that it alone can be the basis of conviction. A statement containing self exculpatory matter is never a confession.⁵

“A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it”⁶

Admission

Any statement or assertion made by a party to a case and offered against that party. In other words an acknowledgement that facts are true.⁷

2.2 Characteristics of Confession

1. Confession must be an assertion or affirmative statement, mere conduct like absconding cannot amount to confession.

2. A confession being an admission made by a person stating that he committed the crime, exculpatory statement denying the guilt are not confession (*Sattar Khan v. State* PLD 1970, p 185)

⁵ Md. Zahurul Islam, *The Code of Criminal Procedure*, 4th ed., (Dhaka: Mrs. Enayet Murshida Islam, 2000), p. 471

⁶ Quoted by John H. Wigmore, *Black's Law Dictionary*, Edited by Bryan A. Garner, 8th ed., P. 317

⁷ *Ibid*, p. 50

3. Confession made to a police officer will never be accepted as confession on the basis of which conviction may be given.

4. Judicial confession may form the basis of conviction.

5. Confession must be voluntary and cannot be obtained by force or inducement. ⁸

2.3 Classification of Confessions

A confession may occur in any form. It may be made to the court itself, or to anybody outside the court. In this manner, a confession may be divided into two categories - Judicial Confession and Extra-judicial Confession.

(a) Judicial Confession

A judicial confession is a confession that is made in front of a magistrate or in a court. It may be made in the course of a judicial proceeding. Following confession are judicial confession in the eye of law

1. When the accused person makes confession before the judge in the open court while testifying.

2. When the accused person makes confession before magistrate or judicial officer under the provisions of section 164 of the code of criminal procedure read with section 26 of the evidence Act 1872.

3. When confession is made by pleading guilty to a charge framed by the trial court under section 243 of the code of criminal procedure 1898.⁹

(b) Extra - Judicial Confession

When confession is made to a police officer or to any other third person, that confession is called extra-judicial confession.¹⁰

An extra-judicial confession is a confession that is made by the party elsewhere than before a magistrate or in a court. It is admissible in evidence under Section 21 and it is proved by the witnesses who had heard the speaker's words constituting the confession.

⁸ Md. Abdul Halim ,*The law of Evidence* 1st ed.,(Dhaka: CCB Foundation,2008)p.84

⁹ *Ibid* ,p.88

¹⁰ *Ibid* ,p.88

A confession even consists of conversation with oneself. For example, in case of *Sahoo v. State of UP*, AIR 1966, an accused who was charged with murder of his daughter in law with whom he was always quarreling was seen on the day of the murder going out of the home saying words to the effect, "I have finished her and with her the daily quarrels.". The statement was held to be a valid confession because it is not necessary for the relevance of a confession that it should communicate to some other person.¹¹

Extra-judicial confession by its very nature has been held to be a weak type of evidence. It has to be scrutinized minutely and received with great caution. It is held that usually and as a matter of caution Courts require some material corroboration to extra-judicial confessional statement, which connects the accused person with the crime in question.

Where an extra-judicial confession has been retracted, it would require some other corroboration coming from independent sources before conviction can be safely based upon it. Where extra-judicial confession is retracted at the earliest possible opportunity and it is not corroborated in material particulars and there are serious inconsistencies in the evidence or witness, or where the confession is not corroborated and there is evidence to show that it was extracted by force, it should not be acted upon.

Confession, judicial or extra-judicial, retracted or not can form basis of conviction if believed to be true and voluntary and not extracted under coercion etc¹². Retraction of confession, whether judicial or extra-judicial is immaterial if once it is found voluntary and true and as against the maker can be formed the basis of conviction¹³

If at all made appears to be wholly untrue-no reliable evidence of corroboration of the alleged extra judicial confession and it is not at all safe to rely and act upon such extra-judicial confession. Circumstantial evidence and extra judicial confession not corroborated by any reliable evidence. . No question relating to blood-stained cloth or Injury In the hand was put to the con-

¹¹Ratanlal and Dhirajial, *The law of evidence*, 21sted., (Nagpur,Wadhwa and Company, 2004) p.189

¹² *State v. Abdur Rashid*, 45 (1993) DLR, 195

¹³*Salauddin v. State*, 32 (1980) DLR, 227

demned prisoner. This circumstance has no basis to base conviction. Mere absconding cannot always be a circumstance to lead to an Inference of guilt of the accused. Ascendance was not with any guilty mind. Existence of enmity is not disputed. Accused has been falsely Implicated In this case out of grudge and enmity.¹⁴

(c) Another type of confession is Retracted confession

The rule of prudence requires that a retracted confession needs corroboration inasmuch as it is open to suspicion. It is unsafe to rely on such confession without corroboration from other sources ¹⁵.When the confession was recorded in strict compliance with Section 164 & 364 of the code and the rules made there under, the confession would be admissible although it is retracted .It can not be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner can not be accepted as evidence of his guilt without independent corroborative circumstances. It is unsafe for a Court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by a credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker .The mere fact that a confession has been retracted does not necessarily show that the confession was the result of some improper inducement, threat of promise. An accused person can lawfully be convicted of on his own confession even when it has later been retracted if the Court is satisfied of its truth. There is no rule of law that an accused person can not be convicted on a confession made and subsequently retracted without corroborative evidence. Each case has to be dealt with on its own facts.. Retraction of confession whether judicial or extra judicial, is immaterial if once it is found voluntary and true and against the maker can be formed the basis of conviction.

¹⁴ *The State v. Badsbah Mollah* , 41 (1989) DLR, 11

¹⁵*Alaluddin v. The State*, 49(1997) DLR, 66

tion¹⁶ Conviction can be based on self inculpatory confession if found true and voluntary, though retracted sub-sequent. No reliance is placed on unsubstantiated allegations of torture and inducement raised at late stage¹⁷ once a man whose wife has been strangled to death at night in a house occupied solely by them has voluntarily confessed before a Magistrate of his guilt, he should not be acquitted. Confession, judicial or extra judicial, retracted or not can form basis of conviction if believed to be true and voluntary and not extracted under coercion etc¹⁸

2.4 Weight of Confession as Evidence

Confessions made to a magistrate can be divided into five classes;

(1) Those recorded with all the formalities prescribed by sections 164 and 364;

(2) Those imperfectly recorded but where the defect is cured by section 533.

(3) Where the defect is not cured and the confession is proved by the testimony of the magistrate.

(4) Where the Magistrate refuses to record the confession of an accused but he hears it.

(5) Where the accused appears before a magistrate of his own accord and makes an oral confession.

Confessions falling under classes (1) and (2) above are recorded under great precautions and should, therefore, obviously carry more weight than those falling under the remaining classes. A confession falling under class (3) would be less weighty, because some of the precautions prescribed by law were not observed. A confession under class (4) should have very little weight unless the magistrate can explain to the entire satisfaction of the court why he refused to act under section 164 and 281. The weight to be attached to a confession under class (5) would depend on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the court

¹⁶ *Salauddin v. State*, 32 (1980) DLR, SC, 227

¹⁷ Md. Zahurul Islam, *ibid*, p. 492

¹⁸ *Saad Ahmed v. State*, 35(1983) DLR, 41

to decide in each case on consideration of the cumulative effect of the entire evidence in the case¹⁹.

It is commonly and generally alleged by the confessing accused persons and their lawyers that the confession has been extracted by police torture. Also in many of the retraction petitions and during examination under section 342, Cr.P.C. the allegation of mental and physical torture is raised. There is no guideline, nor is there any practice to separately dispose of the retraction petition upon any inquiry into the allegation of torture for compelling an accused to make the confessional statement. The Constitution of the People's Republic of Bangladesh, the supreme Law of the land [Article 35(4)], provides "no person accused of any offence shall be compelled to be witness against himself". If, in fact, confessions are obtained by compelling the accused in any manner, it is clearly violative of the constitutional right guaranteed to the accused. Therefore, the recording Magistrate must be careful in ascertaining whether the accused placed before him for making confessional statement was compelled by torture or by any other manner to make a statement against himself. On the other hand, the trial court as well as the appellate court should make a careful scrutiny of the confessional statement, the entries in the Form for recording such statements, comments of the Recording Magistrate and his evidence given in the court.

Since the confessional statements alone can form the basis of conviction, the Magistrate should not act mechanically in recording the confessional statements; it is the solemn duty of a Magistrate to strictly follow the provisions of sections 164 and 364 of the Code of Criminal Procedure for avoiding the possibilities of causing injustice. There may be cases where only for non-compliance of those provisions a confessional statement may be left out of consideration by the trial court and appellate court though confessional statement was made voluntarily. It is important that the procedure and manner followed by the recording Magistrate must be reflected in the prescribed Form so that the trial court/ appellate court can see whether the recording Magistrate

¹⁹ Md. Abdul Halim, *Text Book on Criminal Procedure Code*, 2nd ed., (Dhaka: CCB Foundation, 2008), p. 138.

has made real endeavour for ascertaining voluntary nature of the confession.

The recording Magistrate must keep in view that for his omission to follow the procedure and guidance, for his slightest negligence and carelessness, an innocent person may be convicted upon a confession shown to be voluntary but not in fact voluntary and, on the other hand, a real culprit may be acquitted though he has made a true confession.

It is not enough for the recording Magistrate that he himself be satisfied that the confession is true and voluntary; he should also reflect everything as required by law for scrutiny of the court which is the ultimate forum to arrive at the decision as to whether the confessional statement is true and voluntary.

2.5 Evidentiary value of confession

The Supreme Court has laid down that the following principles of law are deducible:

(1) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.

(2) That a statement of an accused that contained self-exculpatory matter cannot amount to confession.

(3) That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.

(4) That though the confession of a co-accused cannot be made foundation of conviction but it may be used in support of other evidence.

(5) That the confession of a co-accused is an evidence of a weak character.

(6) That under Islamic Jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.

(7) That any delay in recording of a confession may, or may not, be

fatal as to the evidentiary value of a retracted confession as in the case of *Syed Sharifuddin Pirzada v. Sohbat Khan and 3 others*. Supreme Court has held that the factum that the accused were in the police custody for 11 to 15 days, was not fatal as to the credibility of the retracted confessions for the reasons that the Court was satisfied that the retracted confessions were not tutored and were, in fact, made voluntarily.

(8) That any lapse on the administrative side, on the pan of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not in any way, adversely affected the voluntariness or truthfulness of the confession.

(9) That if an accomplice's evidence is not corroborated in material respect, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice. ²⁰

Relevant case

*State v. Shafiqur*²¹

Fact

On 9.9.1977 deceased Dudu Miah was called by accused Khokon, Rafique, Shah Alam, Shafique and Sultan from the grocery shop at Pauda Bazar in the presence of his brother Abdul Razzaque but he did not return home at night. In the morning it was found that the dead body of deceased Dudu was lying in the deserted bhiti of Adhar Nath in the village and going over there they found the dead body of dudou with throat cut.

Court observation

The court dismisses the appeal because he found that the circumstantial evidence is in conclusively, the only eye witness pw10 Abdul Mannan is not at all reliable and the confessional statement of co-accused Abid Ali is false and untrue and there is no corroboration on any material particular of the confes-

²⁰ Sharkar Mahmood, *The Code of Criminal Procedure*, 9th ed., (Lahore: Legal Research Center, 2006) p. 798

²¹ 43 (1991) DLR, AD, 203

sional statement accordingly acquitted the respondents.²²

In this case The Appellate Division held very clearly that a statement recorded under section 164 is not substantive evidence and hence it can never be used as substantive evidence of truth of facts. In other words, no conviction can be based on the sole basis of confessional statement under section 164. It can only be used either for contradiction or corroboration of the witness who made it. However, there are contradictory decisions also. For example, in *Ali Asgar v. State* the High court Division stated a judicial confession, if made freely, can be the basis of conviction.²³

Likewise, in *Abdur Rashid v. State (1983)* the High Court Division held that an accused may be convicted on the basis of his judicial confession only if that confession was made freely.²⁴

²² *State v. Shafiqur*, 43 (1991) DLR, AD, 203

²³ 6 BLD (HCD) 436

²⁴ *Abdur Rashid v State*, 6 (1983) BLD 206

Chapter 3

LAW RELATING TO CONFESSION

3.1 The Code of Criminal Procedure,1898.

3.1.1 Power to record statements and confessions under section 164

(1) Any Metropolitan Magistrate, any Magistrate of the first class] and any Magistrate of the second class specially empowered in this behalf by the Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it

and admitted by him to be correct, and it contains a full and true account of the statement made by him.²⁵

Explanation-

It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

Formalities or Conditions of recording a confessional statement under section 164-

1. Confession or statement must be made during investigation by the police or at any time afterwards but before the commencement of inquiry or trial.

2. Such statement must be made to the Magistrates specified in section 164.

3. The Magistrate must caution the person making the statement or confession before recording the same. In other words, the Magistrate shall, before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him.

4. The Magistrate shall not record it unless he is, upon inquiry from the person making it, satisfied that it is voluntary.

5. The Magistrate shall record and sign such confessions or statements in the manner as provided in section 364.

6. When he records any confession, he shall make a memorandum at the foot of such record to the effect mentioned in section 164.

Only when so recorded it becomes relevant and admissible in evidence.²⁶

3.1.2 Examination of accused how recorded under section 364

Whenever the accused is examined by any Magistrate, or by any Court other than High Court Division the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full,

²⁵ Md. Abdul Halim, *Text Book on Criminal Procedure Code*, 2nd ed., (Dhaka: CCB Foundation, 2008), P. 136

²⁶ *Ibid* P. 136

in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answer.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.

Manner provided in section 364

It is conditioned in section 164 that while recording statement or confession under section 164 by a Magistrate, he shall record the same in accordance with the manner prescribed in section 364. The manner provided in section 364 may be described as below:

(i) The whole of the examination, including every question put to the person making confession or statement and every answer given by him shall be recorded in full, in the language in which he is examined.

(ii) If the above is not practicable, it shall be recorded in the language of the Court or in English; and such record shall be shown or read to him.

(iii) If he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at

liberty to explain or add to his answers.

(iv) When the whole record has been made, it shall be signed by the accused and the Magistrate and such Magistrate shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.²⁷

A Magistrate while recording confessional statement of an accused under section 164 must comply with the requirements of section 364 of the Code of Criminal Procedure. Non-compliance with such requirements renders the confessional statement inadmissible in evidence. Similarly omission on the part of investigating officer to bring all the material witnesses to the scenario of the trial casts doubt on the prosecution case leading to acquittal of accused in heinous crime of murder.²⁸

2.3.1 The requirements of section 364 of the Code of Criminal Procedure, amongst others, are-

(a) The whole of the examination of an accused, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the court or in English.

(b) Such record shall be shown or read over to the confessing accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands.

(c) The accused shall be at liberty to explain or add to his answers.

(d) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate.

(e) In cases in which the examination of the accused is not recorded by the Magistrate himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and

²⁷ Md. Abdul Halim, *ibid*, P. 137

²⁸ *The State v. Md. Shahjahan*, 2 MLR , HC, 60

shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability. According to the letters and spirit of sections 164 and 364 of the Code of Criminal Procedure, section 24 of the Evidence Act, and according to a number of judicial pronouncements in the leading cases the following, amongst others, may be identified as the duties of the recording Magistrate:

(a) The recording Magistrate should disclose his identity before examining the accused brought before him. He must disclose that he is a Magistrate and not Police Officer.

(b) The Magistrate should make real endeavour to place the accused person at ease, dispel all the fear, inducement and hope from accused's mind enabling him to make the confession of his own volition, absolutely free and voluntary according to the best dictates of his own inner conscience. The magistrate should assure that the accused would not be remanded to the police custody. As held in *State v. Abul Hashem*, 3 MLR (HCD) 30, when the accused is produced from the police custody, it is the duty of the Magistrate to remove fear of police torture from the mind of the accused. When the accused was produced from police custody and again he was sent back to the police custody after recording the confessional statement, conviction basing upon such confession was held to have suffered from legal infirmity. But, according to the decision in [*Dipok Kumar Sarkar v. State*, 8 BLD(AD) 109] there is no legal requirement to inform the accused that he would not be remanded to police custody even if he does not make any confession. But of course, if the Magistrate has any reason to believe that the accused is under apprehension of police, he may assure him so. Therefore, for mere omission in informing the accused that he would not be remanded to police, the confessional statement will not take away the voluntary character of the statement.

(c) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him.

(d) The Magistrate should record the questions put to and answers obtained from the accused person. The following (Phraseology of questions may be different) may be some of the relevant questions:-

(i) Have you understood that you are not bound to make confessional statement?

(ii) Have you understood that if you make the confession it can be used against you as incriminating evidence?

(iii) Why are you making the confession?

(iv) Has anybody threatened or induced you or given you any hope or compelled you in any manner for making the confessional statement?

(v) Are you willing to make the confessional statement voluntarily?

(vi) If you are willing to make the confession, will you make the true statement?

The phraseology of questions is not material. Important is whether by those questions, the accused person understands the consequence of his confessional statement and he is made conscious of the fact that he is not bound to make confession and if he makes such confession it can be used as evidence against him. The object of putting questions and obtaining answers is to be satisfied that the confession is not a result of inducement, threat, hope, promise or torture.

The above questions and answers recorded in the prescribed Forms may be one of the important considerations for the courts in arriving at the conclusion as to the voluntary nature or otherwise of the confession.

(e) The Magistrate should record the particulars as to when and wherefrom the accused was arrested and wherefrom the accused was placed before him.

(f) The Magistrate should ask the accused persons whether he has been mentally or physically tortured while in police custody and record the answer. The Magistrate should make a note on whether or not any mark of physical torture is found on any part of the body of the accused.

(g) After making examination as above the accused should be given a reasonable time for reflection to ponder over the matter and during that time the accused should be placed under care of a person who is under control of the Magistrate. At that place no police should be allowed to stay. (Reasonable time is at least 3 hours).

(h) After the time given for reflection is over, the Magistrate should

again ask the accused whether he is willing to make the confession voluntarily and if the answer is yes, the accused should be warned again that his confessional statement may be used against him as incriminating evidence.

(i) Inside the room or within sight no police officer should be allowed to remain present and all the police officers should be turned out from that room.

(j) No oath should be administered to the accused before recording the confessional statement.

(k) Confession should be recorded in the words of the accused, but it is not always correct to say that confession not recorded exactly in the words of the accused is inadmissible [*Nausher Ali Sarder and others v. State*, 39 DLR (AD) 194-paragraph-9].

(l) The recorded statement should be read out and explained to the confessing accused.

(m) When the accused confirms that the confessional statement has been recorded correctly, it shall be signed by the accused and by the Magistrate.

(n) The Magistrate must make a memorandum at the foot of the recorded statement to the following effect-

“I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him” [Section 164(3), Cr.P.C.]. Making of the above memorandum is mandatory; its non compliance affects voluntary character of the confession.

(o) Again it is unavoidable duty of the Magistrate that he shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused [Section 364(2), Cr.P.C.]

3.1.3 Scope and application

The substantive law in respect of confession is contained in sections 24 to 30

of the Evidence Act. Section 164 may be read together with these sections and such reading yield the following results:

- (a) A confession shall not be made to a police officer;
- (b) It must be made in the presence of a Magistrate;
- (c) A Magistrate shall not record it unless he is, upon inquiry from the person making it, satisfied that it is voluntary
- (d) He shall record it in the manner laid down in this section; and
- (e) Only when so recorded becomes relevant and admissible in evidence. But a Magistrate has his discretion to record or not to record a confession.²⁹

3.2 The Evidence act,1872.

3.2.1 Relevancy of Confessions

3.2.1. (a) Confessions when Not Relevant

A confession becomes irrelevant and thus, inadmissible, in situations described in the Sections 24, 25, and 26 of The Evidence Act, 1872.

Section 24 Confession caused by inducement, threat, or promise from a person in authority

Confession made by an accused is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by inducement, threat, or promise, made by any person in authority and that in the view of the court such inducement, threat, or promise gives reasonable ground to the person that by making the confession he would gain any advantage or avoid any evil of a temporary nature in reference to the proceedings against him. The following conditions are necessary to attract the provisions of this section –

1. The confession must have been made because of inducement, threat, or promise - A confession should be free and voluntary. If it flows from fear or hope, it is inadmissible. In deciding whether a particular confession is because

²⁹ Zahirul Huq, *Law and Practice of Criminal Procedure*, 8th ed., (Dhaka: Bangladesh Law Book Company, 2003), p. 253

of threat, inducement, or promise, the question has to be considered from the point of view of the accused as to how the inducement, threat or promise would operate in his mind. For example, where the accused was told by the magistrate, "tell me where the things are and I will be favorable to you", it was held to be inadmissible.

2. The inducement, threat, or promise, must be made by a person in authority - A person in authority is not merely a police officer or a magistrate but every such person who can reasonably hold a sway over the investigation or trial. Thus, government officials such as a senior military officer, police constable, warden, clerk of the court, all have been held to be a person in authority. Even private persons such as the wife of the employer were also held to be a person in authority.

3. It should relate to the charge in question - This requirement is specifically stated in the section, which says that the inducement must have "reference to the charge against the accused person". Thus, in the case of *Empress v. Mohan Lal, 1881*, the confession by a person who was threatened to be removed from his caste for life, was held to be relevant because the threat did not have anything to do with the charge. The position in English law is not same. In fact, J ATKINSON has said that this rule is illogical and unreasonable. For example, a daughter is accused of shoplifting and later on her mother is also accused of the same offence. Now, if the mother is induced to confess by saying that if she confesses to the charge, proceedings against her daughter will be dropped, this will most like lead to an untrue confession. Yet, it would be valid under this section.

4. It should hold out some material, worldly, or temporal benefit or advantage - The inducement should be about some tangible benefit. For example, a reference to spiritual benefit such as, taking an accused to a temple to confess does not fall in this category but a promise to reduce the sentence would fall under it.

It is necessary that all the conditions must exist cumulatively. Further, this section merely requires that if it "appears to the court" that the confession was improperly obtained, it becomes inadmissible i.e. if the circumstances create probability in the mind of the court that the confession is improperly

obtained, it may hold it inadmissible.

Section 25 Confession to police-officer not to be proved

No confession made to a police-officer shall be proved as against a person accused of any offence. This section is very broadly worded. It strictly disallows any confession made to the police officer as inadmissible no matter what the circumstances. In the case of *Raja Ram v. State of Bihar*, AIR 1964, SC held that the term police-officer is not to be interpreted strictly but must be given a more comprehensive and popular meaning. However, these words are also not to be construed in so wide a sense as to include a person on whom only some powers exercised by the police are conferred. The test for determining whether such a person is a police officer is whether the powers are such as would tend to facilitate the obtaining of confession by him from a suspect. Thus, a chowkidar, police patel, a village headman, an excise officer, are all considered to be police officers.

Section 26 Confession by accused while in custody of police not to be proved against him

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. This section further tries to ensure that the confession is not extracted due to the influence of the police. Any confession made while the maker is in custody of the police is invalid unless it is made in the immediate presence of a magistrate. The presence of a magistrate is, by a legal fiction, regarded as equivalent to removal of police influence and the statement is therefore considered to be free from police influence.

Mere absence of the police officer from a room where confession is taken does not terminate his custody of the accused. The word custody does not just mean formal custody but includes such a state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction.

3.2.1 (b) Confessions when Relevant

The following three types of confession are relevant and admissible under sections 27, 28, 29 of The Evidence Act, 1872.

Section 27 How much of information received from accused may be proved

Provided that when any fact is proved to be discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Confession leading to a discovery

provides another exception when a confession made to the police is admissible. This is when a confession leads to the discovery of a fact connected with the crime. The discovery assures that the confession is true and reliable even if it was extorted. In order to ensure the genuineness of recoveries, it has become a practice to effect the recoveries in the presence of witnesses.

Constitutionality of Section 27 - Indian Evidence Act was written before the Constitution of India and Article 20(3) of the constitution says that no person shall be compelled to be a witness against himself. This article seemingly made Section 27 unconstitutional. SC considered this issue in the case of *Nisa Sree v. State of Orissa* AIR 1954, and held that it is not violative of Article 20(3). A confession may or may not lead to the discovery of an incriminating fact. If the discovered fact is non incriminatory, there is no issue and if it is self-incriminatory, it is admissible if the information is given by the accused without any threat.

Section 28 Confessions made after removal of threat

If the confession is obtained after the impression caused by threat, inducement, or promise is removed in the opinion of the court, then the confession is admissible.

Section 29 Confession made under promise, deception etc.

If a confession is otherwise relevant, it does not become irrelevant merely because it was made –

- (a) under a promise of secrecy or
- (b) in consequences of a deception practiced on the accused person for the purpose of obtaining it or
- (c) while the accused was drunk or
- (d) while answering the questions he need not have answered or
- (e) when the accused was not warned that he was not bound to make such confession and that evidence of it might be given against him.

The basis of this section is that any breach of confidence or of good faith or practice of any artifice does not invalidate a confession. However, a confession obtained by mere trickery does not carry much weight. For example, in one case, an accused was told that somebody saw him doing the crime and because of this the accused made a confession. The court held the confession as inadmissible. In *Rex v. Shaw*, A was accused of a murder and B, a fellow prisoner, asked him about how he did he do the murder. A said, "Will you be upon your oath not to mention what I tell you?" to which B promised on his oath that he will not tell anybody. A then made a statement. It was held that it was not such an inducement that would render the confession inadmissible. The five circumstances mentioned in the section are not exhaustive.

2.4.3 Consideration of proved confession affecting person making it and others jointly under trial for same offence, under sections 30 of The Evidence Act, 1872.

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession.

Explanation.- "Offence", as used in this section, includes the abatement of, or attempt to commit, the offence.

Illustrations-

(a) A and B are jointly tried for the murder of C. It is proved that A said-"B and I murdered C." The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said- "A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Chapter 4

PROCEDURE OF TAKING CONFESSION

4.1 Confession recorded on oath

Recording of confession by a magistrate under Section 164 is a criminal proceeding and where such a confession is made on oath, it comes within the ambit of section 5 of the Act and the magistrate acts illegally in recording it on solemn affirmation and its rejection must follow as a matter of course from that illegality³⁰. Provisions of sections 164 and 364 do not lay down that confession should be recorded on oath. Such confession on oath can not be relevant under Section 24 of the Evidence Act. Confession on oath is irrelevant. Confession on oath is illegal and not admissible or irrelevant. The illegality, however, in the absence of failure of justice, is curable under Section 537 and the confession would be admissible in evidence. Statement recorded under Section 164 can be accepted subject to condition laid down in Cr.P.C. Affidavit alleged by oath commissioner can not be admitted in evidence. Departure from normal procedure would make such affidavit highly suspicious document. Use of affidavits permitted by Section 74, 526 and 539A of the code of Criminal Procedure.³¹

4.2 Confession must be voluntary

It is hardly necessary to emphasis that the act of recording confession under Section 164 is a very solemn Act. The provisions under Section 164 (3) and 364 Cr.P.C. are mandatory and required to be strictly followed to make the confession voluntary and true and fit for reliance for convicting the accused on his confession³² Since the investigation itself has laid stress on the words

³⁰ *Muhammad Bakhsh v. The state*, 9 (1957) DLR, SC, 11

³¹ Md. Zahurul Islam, *ibid*, p. 472

³² *Abul Hossain v. The State*, 46 (1994) DLR, 77

"voluntary" and "true" the courts should adhere to the language strictly while acting upon the same. Conviction on basis of confession without ascertaining its voluntary character is not proper. The Magistrate must be satisfied that the confession is voluntary, true and trustworthy. It is the duty of every Court to enquire very carefully in to all circumstances which led to the making of confessional statement. He should not record any confession unless he has reason to believe that it is made voluntarily. A confession is inadmissible in evidence unless the Magistrate is found to have made real and substantial enquiries which he was bound to do, as to its voluntary nature, before recording it. Where the accused was not questioned by the Magistrate regarding voluntary nature of his confession before recording it, the confession can not be relied upon. A mere statement of the Magistrate to his satisfaction is not sufficient. Before recording the confession it must be explained to the accused that he is not bound to make a confession and if he makes a confession it may be used as evidence against him. It is a mandatory provision of law. No Magistrate should record any confession unless upon putting question to the accused he has reason to believe that the confession was made voluntarily. Any defect arising out of violation of any mandatory provision of law is not curable under Section 533 Cr.P.C.³³ unless there are reasons to suspect that the facts which were in the knowledge of the police were used by the prosecution in a confession, they may validity corroborate the confession. There may be cases where the interest of justice would require aid of the police diaries and in such case the same power should necessarily be exercised by the Court. The provisions in law that prohibit the reception of confession made by an accused person to police officer are contained in Section 25 of the Evidence Act. The provisions relying to confession as contained in the original procedure code are only in regard to recording of the same. Likewise the bar contained in S. 162 Cr.P.C. is in regard to statements of persons examined by the police during investigation. On the other hand Section 25 of the Evidence Act reads as follows "No confession made to a police shall be proved as against a person accused of any offence." The word "against" appearing in the above section is very signifi-

³³ *Nurul Haque v. The State*, 20 (1968) DLR, 780

cant. Section 25 of the Evidence Act only prohibits reception of confession against the accused but there may be cases where the accused may be relying his own confession. There is no reason why a confession made by an accused to police can not be relied on by the accused for the propose of sowing that the subsequent judicial confession was not voluntary.³⁴

4.3 Confession not only voluntary, but also be true

It has been held that even if the confession is held to be voluntary, it must also be established that the confession is true, and for the purpose of dealing with this question it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities in the case. And if on such examination it is found that the confession does not appear to be true it would be of no worth. Before a court acts upon confessional statement it has to affirmatively satisfy itself that the statement is voluntary and true. It has been held that the legal formalities complied with by the Magistrate are no sure guarantee of the truth of the confession. A confession which may be true but not voluntary is not admissible in evidence at all³⁵

4.4 Presumption of voluntaries

In case of a confession duly recorded under section 164, the presumption is that the confession was freely made. No court can blindly accept the ready-made opinions of the recording Magistrate. Whether a confessional statement was voluntarily made or not Is essentially a question .of fact. In ascertaining the voluntary nature of the statement, different tests will have to be applied to different sets of facts. The tests are evolved by constant process of judicial thinking. But In the very nature of things, there can be no rigidity about them. What test is best applicable to a given set of facts is for the Judge to decide.³⁶

In the case of *The State v. Lutfar* it was held that, Accused did not complain of any torture, threat or Inducement while making the confession

³⁴ *Ibid*, p. 488

³⁵ *Mohar Ali Khan v. The Crown*, 7 (1955) DLR, 63

³⁶ Zahirul Huq, *Law and Practice of Criminal Procedure*, 8th ed., (Dhaka: Bangladesh Law Book Company, 2003), p. 268

.Evidence on record also corroborate the statement. On a reading of the statement one finds a ring of truth in the same. The confession, held, is voluntary and true.³⁷ In the case of *Faqira v. The State* it was held that, Confessional statement, oral as well as in writing, made by the accused before a Magistrate to whom the accused came voluntarily and who was then put under arrest. Magistrate's evidence to prove accuser's confession is not Inadmissible under section 164.

4.5 Question to be put to accused in the time of taking confession

The Magistrate must question the accused with a view to discover whether he confesses voluntarily and this question must be in pursuance of a real endeavor to find out the object of it. The requirement can not be satisfied by putting a few formal questions.

Phraseology used in questions asked by Magistrate not improper which could cause prejudice to accused. Confession not extracted by applying third degree method or by inducement confession held was voluntary. Section 29 of the evidence Act, which makes an exception and the necessity of questioning the accused for the purposes of finding out whether the confession was made voluntarily. Such questioning is absolutely essential to make the confession. No Magistrate should pass any confessions unless upon putting questions to the accused, he has reason to believe that the question was made voluntarily. The Magistrate must put question to the accused to find out whether he is making the statement voluntarily. The questions put to the accused must be directed eliciting facts which enable the Magistrate to judge the voluntary character of the confession. This can not be done by merely repeating some formal or by merely asking the accused whether his confession is voluntary³⁸

When the accused were kept in police custody for two days, it was the duty of the Magistrate, who recorded their confession, to put questions as to how they were treated in the police station, why they wert

³⁷ *The State v. Lutfar Fakir*, 24 (1972) DLR, 217

³⁸ Md. Zahurul Islam, *ibid*, p. 485

making confession and that if they made a confession or not they would not be remanded to police custody.³⁹

4.6 How to put into evidence

The question often raised is whether the court can admit into evidence and base upon the confessional statement without calling the recording Magistrate. Under section 80 of the Evidence Act the court shall presume that the confessional statement and other document as specified under this section is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such confession was duly taken. But in all cases, presumption under section 80 as to the confessional statement is not available. The confessing accused should not be denied the opportunity of cross-examining the recording Magistrate. When there is no legal evidence against the confessing accused, for ascertaining whether the confessional statement is voluntary, the recording Magistrate should be examined. As a rule of law and prudence the Magistrate who recorded the statements must be examined before putting the confessional statements into evidence. As held in *Babul @ Abdul Majid Khan v. State*, 42 DLR(AD) 186, when there are many reasons for criticising the confession, this presumption is, nevertheless, rebuttable it is injudicious to rely upon confession without calling the Magistrate as witness. The court is required to see not only that the forms under sections 164 and 364, Cr.P.C. was complied with but the substance underneath the law equally adhered to.⁴⁰ It is important to note that for non-examination of the Magistrate the confessional statements may be treated to be inadmissible when there is a question of prejudice on the part of the accused. There may be circumstances when the Magistrate is not examined, confessional statement was not tendered and admitted into evidence marking as exhibit, identity of the maker was not established; and there was no proof who forwarded the confessing accused to the Magistrate, the confessional statement was not accepted as sole basis of conviction [*Sayed Ali v. State*, 7 BLC (HCD)180].

³⁹ *The State v. Abul Hashen*, 50 (1998) DLR, 17

4.7 Language of record

Confession was written in English and not in language of confessing accused. Accused neither knowing English nor signing confession in English no evidence of confession having been translated and explained to accused before accused was asked to sign same. Such confession is not reliable. It is true that a confessional statement should be recorded in the words of the prisoner. But it is not correct to say that the confession not recorded exactly in the prisoners own words are inadmissible⁴¹ .

4.8 Confession during police custody

Confession admitted to be correct after 5 or 6 months before committing Magistrate to accused being in judicial lockup saved by Section 28 of The Evidence Act.

When it is found that the man who makes a confession has been kept in police custody in defiance of the rules on the point for a number of days, the court is entitled to ask the prosecution to explain why the irregularities were committed.⁴² Accused alleged to have made extra judicial confession before and immediately after arrest but no effect was made to get such confession recorded before lapse of 18 days, long delay, held detracts from value of testimony. If the accused during the period between his arrest and confession remaining in police custody for a fortnight, the confession is in-admissible⁴³

Normally confession made before police or under police custody is inadmissible (Sections 25 and 26, Evidence Act). But when some incriminating article is recovered following such confession, it is admissible according to section 27 of the Evidence Act which provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. For example, when an accused confessed before police that he had concealed the dead body of his wife in a latrine-well and the

⁴¹ *Ibid*, p. 482

⁴² *Alaluddin v. The State*, 49 (1997) DLR, HCD, 127

⁴³ Md. Zahurul Islam, *Ibid*, p.488

dead body was recovered there from by police. Such information can be admissible and can be relied upon for basing the conviction. ⁴⁴

4.9 Police officer not to be present at or within sight

When police officer are present or are within sight and hearing of the place where the accused is kept during the time allowed for reflection or at the time of recording of confession the possibility of the accused being influenced by threat or by gesture from the police can not altogether be eliminated. The confession recorded under such circumstances can not but be viewed with some amount of suspecting that the accused might have been influenced by the police to make the confession⁴⁵.

4.10 Warning to the accused

It is an obligatory on even Magistrate acting under this section to warn the person making statement to him that it might be used against him and that is not bound to make a confession⁴⁶. The explanation to the accused that he is not bound to make a confession and that if he does so any confession which he may make may be used against him must be given before the confession is recorded and not at the end, as otherwise it would not help him in deciding whether the confession is voluntary.

The Magistrate may give only one warning. If he has given a warning and then some time is given for pondering over the matter, he can not give another warning before recording the confession. If continuity of confession is broken warning is to be repeated. Where after proceeding part of his confession on the preceding day the accused is produced the next day, the Magistrate before recording the confession must give a fresh warning to the accused. The defect is not cured under Section 533 Cr.P.C. But it has been held that it is not mandatory that the Magistrate should keep on repeating the questions or the warning to the accused the second or any subsequent day after every break in the recording for a long confession. Such omission will not render the confes-

⁴⁴ Abdul matin *ibid*, p. 223

⁴⁵ *Jufar Alam Choudhury v. The State*, 20 (1968) DLR, 666

⁴⁶ *State v. Jatindra Kumar Sutnadhya*, 20 (1968) DLR, WP, 84

sion inadmissible in evidence.⁴⁷

4.11 Proof of confession

Before the confession can be put to any use, it is necessary not only that the whole of it be proved but it be also proved that the requisite formalities had been observed in recording the confession. Confession admitted in evidence without being proved by the Magistrate who recorded it, the circumstances in which the confession made under Section 33. Evidence Act, not proved the confession is not admissible (3 DLR 353) The confession or statement, as the case may be, will be admitted into evidence without examining the Magistrate in the court, it is only when the court finds that any of the provisions of Section 164 or 364 Cr.P.C, have not been complied with by the Magistrate concerned then it shall take evidence of the concerned Magistrate. Examination of the Magistrate who recorded the confession under section 164 is not necessary. Magistrate recording confession examined after 3 years due to inordinate delay in disposal of case. Delay, in examining Magistrate, is not sufficient to doubt his evidence.⁴⁸

3.12 Statement of a witness

The word 'statement' in sub-section (1) has been used in a wider sense and may include statements either of a witness or even of a deceased person. If the statements are recorded behind the back of the accused they could not be used as substantive evidence against him these could be used by the accused, for the purpose of cross-examining the witnesses and discrediting their evidence at the trial. A statements made under section 164 is admissible in evidence and may be used to corroborate or contradict a statement made in the court in the manner provided by section 145 and 157 of the Evidence Act. It does not establish that what a witness stated in statement out of court under section 164 Cr. P. C. is true (AIR 1946 PC 38). The only object in recording such statement is to obtain a hold over the witness. A statement of a witness obtained

⁴⁷Md. Zahurul Islam, *ibid*, p. 482

⁴⁸ Zahirul Huq, *ibid*, p. 498

under this section always raises a suspicion that it has not been voluntarily made. The very fact that such statements are recorded under section 164 leads to a presumption on the showing of the prosecution itself that the witnesses are weak. The statement under section 164 is itself not evidence at all against the accused and its only purpose could have been to negative the evidence of the witnesses as given in the court. It is not necessary to call the Magistrate to prove that the witnesses to be cross-examined are the persons who made statements which were recorded under section 164. The records of such statements are presumed to be genuine under section 80 of the Evidence Act (39 Cr. U 864)⁴⁹

In the case of *Asaddar Ali v. The State* it was held that, Use of Statement by witness can in no way be used as substantive piece of evidence of the truth of the fact stated therein. It can only be used in cross-examination of the witness in order to show that the evidence given in court was false, but not to use it to show that the statement recorded was true.⁵⁰In the case of *Anis All Master v. The State* it was held that, Statement made by a witness under section 164 Cr. P. C. is not a substantive piece of evidence. Such statement can be used to corroborate the statement of the witness or to contradict him. No conviction can be based on such statement.⁵¹

3.13 Time for reflection

When an accused person is produced before the Magistrate by the investigating officer, it is of utmost importance that his mind should be completely freed from any influence of the police.

It would materially be difficult to lay down any hard and fast rule as to the form which should be allowed to an accused person in any given case. However, speaking generally, it would be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession.

⁴⁹ *Ibid* p. 267

⁵⁰ *Asaddar Ali v. The State*, 9 BLD 187

⁵¹ *Anis All Master v. The State*, 5 BLD 318

Where there may be reason to suspect that the accused has been persuaded or co-accused to make confession, long period may be given to him before his statement is recorded.⁵²

There is no rule of law which gives precisely the time that the Magistrate must allow for such purpose. The matter as to give time is entirely in the discretion of the Magistrate who must determine what reasonable time in the facts and circumstances of each case he finds it desirable to give such reflection⁵³.

3.14 Objection to recording of confession

An objection that the confession was not recorded by a magistrate empowered to do so must be raised on a very early stage. Where the objection was raised for the first time in appeal, the court refused to entertain it, in view of illustration (E) of Section 114 of the Evidence Act, which is to the effect that the court may presume that judicial and official acts have been regularly performed⁵⁴.

3.15 Confessing accused not to be sent to police custody

The confessing accused must in variably be sent to the judicial lockup as soon as possible after confession and on no account be returned to police custody. If the police thereafter require the accused for any particular purpose, the instruction lay down clearly that the police must put in an application stating the purpose for which the accused are required and for that purpose they may be handed over to the police.

When the Magistrate fails to remove the fear of torture by police while recording confessional statement of the accused produced from police custody and the accused is again sent back to the police custody after recording confessional statement, such confessional statement can neither be used against the maker nor against the co-accused so as to form the basis of conviction be-

⁵² Md. Zahurul Islam, *ibid*, p.484

⁵³ *State v. Jatindra Kumar Sutradbar*, 20 (1968) DLR, SC, 524

⁵⁴ *Ibid*, p. 474

cause of legal infirmity.⁵⁵

3.16 Question regarding motive

One of the important methods of finding out whether the confession is voluntary is to question accused as to his motive in making the confession and as to circumstance under which the question of confession and the willingness of the accused to confess first arose.

3.17 Confession if true and voluntary, conviction can be given even on retraction

Confession before the Magistrate was retracted in the Sessions Court. If the Sessions Court is satisfied that confession is not only true but also voluntary, it can impose sentence of death on the uncorroborated confessional statement, Retracted confession if found to be voluntary and true is above sufficient for conviction of accused. It is well settled that a person can be convicted on retracted confession alone if it is found to be true and voluntary, though as a matter of evidence some corroboration may be asked for. Retracted confession corroborated by recovery of blood stained dagger at accused evidence and by direct testimony of real paternal uncle of other accused (acquitted on appeal). Such a witness having no enmity with either accused confession supported by ample and satisfactory evidence. A retracted confession is always open to suspicion and can not be acted upon unless it is corroborated by credible independent evidence. Retracted judicial confession seldom made sole basis of conviction unless some corroborative evidence is forthcoming Court is entitled to read and look at a confession although it is retracted but it should not give the same credence to it that it should have done if it had not been retracted . Motive is not a confirmatory circumstance to corroborate retracted confessions.⁵⁶

Where satisfactory corroboration of accuser's retracted confession was not forthcoming prosecution, held, failed to prove beyond reasonable doubt

⁵⁵ *The State v. Abul Hashern* , 3 (1951) DLR , AD, 30

⁵⁶ Md. Zahurul Islam ,*ibid*.p.493

accuser's guilt. Where the confession was not only corroborated by any other evidence but evidence produced at variance with confession, Confession was held not true or voluntary. Where the shivering condition in which the accused made confession indicated that he was subjected to threat and fortune before he was produced for recording the confession⁵⁷

3.18 Question after recording confession

Where the accused is questioned after the confession is recorded the defect is one of mere form and does not alter the character of the confessions.

Besides putting the compulsory questions mentioned in sub-section (3) of the section 164 the Magistrate must put all possible question to explain to the accused that he is not be afraid of any extraneous pressure, threat proviso or inducement. The questions should not be too cryptic and general and should be intended to disabuse the mind of the accused from external influence.

In some cases, however, a different view has been taken and the question of the accused and recording of the question and answers in respect of the query as to whether the accused had understood the whole thing and the Magistrate was satisfied about the voluntary nature of the confession, has been held to be mandatory. The court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was voluntary one⁵⁸. Extra judicial confession is covered by privilege:

There are certain statements, called privileged statements which are excluded from proof to be given of them (Sections 122, 126, 127 Evidence Act). The person (Husband/Wife; Advocate; Clerks; etc.) to whom such confession is made cannot be compelled to give evidence of such confession.

⁵⁷*Ibid*, p. 493

⁵⁸ Md. Zahurul Islam, *ibid*, p. 487

Chapter 4

SOME CASES STUDIES ON CONFESSION

Case Reference 1

*Bakur Chandra Sarkar v. The state*⁵⁹

Fact of the case

On 20.11.1976 Nurul Amin lodged an ejahar on the accusation, that some miscreants from the other side of the border of Bangladesh were concealing themselves in the house of Subed Ali of Rahela under Dubarra police station with some weapons. Accordingly, the police raided the house of Subed Ali and apprehended the appellant and two other persons. The police recovered from the possession of appellant Bakul Chandra Sarker one pistol with one magazine containing 8 rounds of ammunition. A letter written by an absconding accused Delwar from Danikda camp in India was also recovered from the appellant.

Observation of the Court

The appeal made by the accused was dismissed.

The court found that the confession made by the accused was true and voluntary. The accused was found guilty of the charges framed against him. If a confessional statement is made voluntarily it can not be retracted because when the confession is made by the accused then he is considered that he is not bound to do so. Hence it can never be an excuse that the accused made confession was involuntary.

By this case it is found that if a statement recorded under the section 164 of the Code of Criminal Procedure is true and voluntary, the same alone is sufficient for convicting the confessing accused. Retraction of confession is immaterial once it is found to be voluntary and true.

⁵⁹ 45 (1993) DLR, SC, p.260

A retracted confession cannot be used to base a conviction for murder unless corroborated by credible independent evidence.⁶⁰

Case Reference 2

*Nazrul Islam v. The state*⁶¹

Fact of the case

On 21.4.1985 at about 8:00 PM Sabdul.(deceased) after taking his meal left his house telling his wife that it would be late in the night for him to return. Sabdul however did not return during the night. In the following morning his brother Kowsar Ali and Abdul Mannan and other neighbors in course of their search discovered the dead body of Sabdul at 6-00 AM next day in the field of village Molla Kua. None was aware about the manner in which Sabdul had met his death. There were multiple injuries on the dead body—on the neck, head, throat and other parts

Observation of the Court

The court allows the appeal and judgment and order of conviction passed by the learned Session judge is set aside and the accused Nazrul Islam, Md. Sukkiir Ali, Md. Shajahan, Md. Moslemuddin are found not guilty under section 302 of the Penal Code and they be set at liberty if not wanted in connection with any other case.

The confessional statement of accused appellant Nazrul and accused Kashem was recorded by Abdus sattar, magistrate 1st class that upazila and sent back to the police on remand for a period of 3 days. This fact shows that the confessional statement was not voluntarily made and the statements have to be rejected.

In view of the above facts and circumstances of the case the court holds that the impugned judgment and order of conviction passed by the learned Session Judge should be set aside.

In the case it is found that when an accused is under threat of being

⁶⁰ *State v. Manik Bala*, 41(1989) DLR,HCD, 435

⁶¹ 45 (1993) DLR, AD, p.142

sent back to the police remand he is likely to make confession out of fear. His statement in such a position should not be considered as voluntary.

After the recording of confession the accused person should be sent to the judicial custody and not to the police custody.⁶²

Case Reference 3

Ketab Ali v. The State⁶³

Fact of the case

4th April, 1967 at about Accor prayer time deceased Hasem Gazi, husband of the complainant left home for taking delivery of some gold ornaments which he had earlier given to a goldsmith. The complainant waited for the return of her husband till late hours of the night and then fell sleep. Then she went out and searches his husband but not having found. She was then informed by her step brother that a decapitated crops was found floating in the canal to the west of deotala Hat, tied up with the trunk of banana trees. She rushed in there and found the decapitated corpse of her husband which she recognized and identified in presence of many curious spectators. Then fatema khatun went to the bamna police station and file FIR. Then sub inspector Salimollah by information of other arrested accused Ketab Ali, who then disclosed certain fact and conducted to an open field near a tank. Accused Ketab Ali got down the tank and brought out a severed human head wrapped in a piece of lungi. The head was identified by his wife.

Observation of the court

The appeal is allowed and Commute the sentence of death to imprisonment for life.

Court found that whether the accused can be convicted under section 302/34 or he should be convicted under section 302/109 of The Penal code. It has been clearly established from the evidence on record that there were more than one person involved in the murder. The principle murderer has not been

⁶² *Wazir v. The state*, 13 (1961) DLR,WP,p.5

⁶³ 22 (1970) DLR, p.472

established. For that reason court thinks that the extreme punishment of death need not be passed upon the condemned appellant.

Case Reference 4

*Abul Hossain and others v. State*⁶⁴

Fact of the case

The informant PW 1Md.Abdur Rashid was a passenger of a bus no .Dhaka –ja 3508 Rupashi Paribahan. He got up in the said bus at about 18.00 hours on 9-5.86 from Mirzapur Bus-stand for going home. The said bus left Mirzapur for Safipur. One miscreant in the guise of a while dressed passenger got up in the bus at Hatu-Bhanga stoppage and sat down by the side of the informant. The said bus when arrived at Beltoil stoppage the said miscreant suddenly stood up and gave a whistle and asked the driver of the bus to stop it and put off the light. Accordingly, the driver stopped the bus and put off the light. Then approximately 9/10 unknown dacoits who were within the bus in the guise of passengers committed dacoity and looted away money and other articles of the passengers, in all worth Taka 30,945.00 and it occurred at about 9-45 al night.

Thereafter the informant got down from the bus and raised hue and cry by saying that dacoity was being committed in the bus. Hearing the alarm of the informant, a large number of people came near the bus and the informant also came to the bus along with others and saw that the dacoits had already left the bus with looted articles after committing dacoity. The informant came to know from one of the passengers Abdur Rashid that he was sitting over the roof of the bus with a bundle of piece-clothes along with some other passengers. But the helper of the bus snatched away the said bundle of piece-clothes and gave the same to the dacoits, some of whom caused grievous hurt to the passengers and snatched away cash money, watch, clothes, etc, from the passengers and as such Suspected that the dacoity was committed by the dacoits in collusion with the said helpers and the driver.

⁶⁴ 46 (1994) DLR,p.77

Observation of the Court

The court allowed all the appeals and set aside judgment of conviction and order to acquit accused for the charge brought against them.

In this case it is observed the provisions of the section 164 and 364 are mandatory and required to be strictly followed to make the confession voluntary and true and fit for reliance for conviction the accused on his confession.

Chapter 5

CONCLUSION

5.1 Recommendations

The provisions laid down for confession under the Code of Criminal Procedure and the Evidence Act 1872 should be implemented more perfectly. In case of taking confession, one of the harmful hurdles is partiality. It can simply be said, where there is partiality, justice can not be accepted thereon. In case of criminal proceedings confession plays very important role. Unfortunately numerous controversies arise in this regards. For example, whether the accused confesses his guilt voluntarily or not. In many cases confession is made by the accused under the pressure of police, though it is ensured under the law that no confession to be made before the police, it should be voluntary. It is unfortunate to say that it is the fact. Where confession made with the interference of police, does not come to light because of either political influence or bribery .So, to make confession unquestionable, both the police and magistrate have to keep themselves away from partiality, nepotism, political influence and bribery.

It can be said that, police arrest persons and threatens to them. On the basis of forced confession, innocent people are arrested by police and punished by the court. Since this goes against law, authorities have to ensure the impartiality in case of taking confession.

Since the confessional statements alone can form the basis of conviction, the Magistrate should not act mechanically in recording the confessional statements; it is the solemn duty of a Magistrate to strictly follow the provisions of sections 164 and 364 of the Code of Criminal Procedure for avoiding the possibilities of causing injustice. There may be cases where only for non-compliance of those provisions a confessional statement may be left out of

consideration by the trial court and appellate court though confessional statement was made voluntarily. It is important that the procedure and manner followed by the recording Magistrate must be reflected in the prescribed Form so that the trial court/ appellate court can see whether the recording Magistrate has made real endeavour for ascertaining voluntary nature of the confession.

The recording Magistrate must keep in view that for his omission to follow the procedure and guidance, for his slightest negligence and carelessness, an innocent person may be convicted upon a confession shown to be voluntary but not in fact voluntary and, on the other hand, a real culprit may be acquitted though he has made a true confession.

It is not enough for the recording Magistrate that he himself be satisfied that the confession is true and voluntary; he should also reflect everything as required by law for scrutiny of the court which is the ultimate forum to arrive at the decision as to whether the confessional statement is true and voluntary

It is commonly and generally alleged by the confessing accused persons and their lawyers that the confession has been extracted by police torture. Also in many of the retraction petitions and during examination under section 342, Cr.P.C., the allegation of mental and physical torture is raised. There is no guideline, nor is there any practice to separately dispose of the retraction petition upon any inquiry into the allegation of torture for compelling an accused to make the confessional statement. The Constitution of the People's Republic of Bangladesh, the supreme Law of the land [Article 35(4)], provides "no person accused of any offence shall be compelled to be witness against himself". If, in fact, confessions are obtained by compelling the accused in any manner, it is clearly violative of the constitutional right guaranteed to the accused. Therefore, the recording Magistrate must be careful in ascertaining whether the accused placed before him for making confessional statement was compelled by torture or by any other manner to make a statement against him. On the other hand, the trial court as well as the appellate court should make a careful scrutiny of the confessional statement, the entries in the Form for recording such statements, comments of the Recording Magistrate and his evidence given in the court.

5.2 Concluding remark

Confessional statement alone can form the basis of conviction against its maker and, in appropriate cases; it lends assurance to the other substantive evidence as against other co-accused tried jointly for the same offence. It is, therefore, of great importance that the recording Magistrate should be well acquainted with the procedure and principles governing recording of confessional statement and, on the other hand, the trying Magistrates and the Judges, whenever they deal with the confessional statement, must apply their judicial mind with analytical insight and it is their duty to evaluate the confessional statement in accordance with the established norms of appreciation of the confessional statement, both judicial and extra judicial, to base upon it in a particular case.

REFERENCES

Books

1. Ratanlal and Dhirajial, *The law of evidence*, 21sted., (Nagpur: Wadhwa and Company, 2004)
2. Md. Abdul Halim , *Text Book on Criminal Procedure Code*, 2nd ed., (Dhaka: CCB Foundation, 2008)
3. Zahirul Huq, *Law and Practice of Criminal Procedure*, 8th ed.,(Dhaka: Bangladesh Law Book Company, 2008)
4. Md. Zahurul Islam, *The Code of Criminal Procedure*, 4th ed.,(Dhaka: Mrs. Enayet Murshida Islam, 2005)
5. Sharkar Mahmood, *The Code of Criminal Procedure*, 9th ed., (Lahore: Legal Research Center, 2006)
6. Abdul Matin,*The Evidence Act*,1st ed.,(Dhaka:Tahia Enterprise,1995)
7. Ratanlal Ranchhoddas and Dhirajial Keshavlal Thakore,*The Code of Criminal Procedure*, 17th ed., (New Delhi: Wadhwa and Company Nagpur, 2006)

Statutes

1. *The Code of Criminal Procedure*, 1898(Act No. V of 1898).
2. *The Constitutional Law of People's Republic of Bangladesh*, 1972 (as modified April 2008)
3. *The Evidence Act*, 1872(Act No. I of 1872).

Web side

1. <http://www.historyofconfession.htm>, last visited on 10 March 2010.