



THE LEGAL PRINCIPLES AND INJUSTICES OF THE DOCTRINE OF CONFESSION:
AN ANALYSIS OF THE JUDICIAL PROCESS IN BANGLADESH

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ABSTRACT

The goal of this study is to undertake a discourse on the doctrine of confession. It specifically explores the laws and principles regarding confession and legal requirements for the recording confessional statement in Bangladesh. Confession at the present phase as extracted from torture and erroneously recorded is the very nomenclature of injustice as the substantial number of confessional statements hails from oppression and suppression by concerned where the right based approach of the individual is ignored. In the modern welfare state, negation of justice through confession in its present milieu is neither expected nor desirable. All the stakeholders should come forward to eradicate the malpractices prevailing pertaining to record the confessional statement to uphold rights preventing the frustration of constitutional and human rights.

Keywords: Confession, Criminal Law, Prosecution, Bangladesh.

1. INTRODUCTION

“Who knows the truth better than the person who did it?” Confession through the creation of inner sanction, modern technological or any other device devoid of undue influence and torture is a milestone for the criminal administration of justice. A confession free from suspicion and recorded in consonance with the law is a valuable piece of evidence which possesses a probative force as it emanates directly from the person committing the offence.¹ But in the zigzag path of evolution of confessional statement, we discover confession has retreated from its spirit and philosophy. Now a day, it is considered as the surname of torture and tyranny driven extraction which is false and the third degree method of police made the accused to do so due to save his life for the time being in maximum cases. But in an independent country, this kind of illegal confession through inhumane, so called third degree method of police violates every norm of human rights and the constitution.²

¹ State vs Bbul Miah 63 DLR (AD)2011.

² The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment (UNCAT), 1984 which is ratified by the government in October 1998; Articles 27, 31, 32, 33 and 35 of the Constitution of the People's Republic of Bangladesh

The term “Confession” has not been expressly defined in any statute; this is mentioned 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 wide sense, by Stephen in his Digest of the Law of Evidence³, 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. M.H. Rahman J. in *State Vs. Lulu Miah and another*⁴, stated that “A confession must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence”.

In a criminal case, a confessional statement is considered to be an important piece of evidence.⁵ The conviction on confession alone can be maintained if it is found inculpatory in nature, true and voluntary.⁶ 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. In the *State vs. Anjuara Khatun*⁷ Justice A.K. Badrul Huq observed- Confessional statement when found true and voluntary can well form the basis of conviction. Subsequent retraction is of no avail. A confession like any other admission is relevant evidence unless it is rendered inadmissible by some provisions of the Evidence Act itself.

The weight to be attached to a confession depends on the facts and circumstances of each case.⁸ If the making of a confession is proved beyond any shadow of doubt, it has a significant value in law, providing effectual proof. It is common knowledge that no rational being could be expected to make a false admission detrimental to own interest, and safety. The law requires that the confession should not only be voluntary, but it must also be true. Even such a statement may be the sole basis for convicting the maker if such statement is found to be voluntary and true even though the statement may be retracted at a subsequent stage.⁹ A confessional statement cannot be the basis for, the conviction of a co-accused unless there is other corroborative evidence against that co-accused.

The provision of section 30 of the Evidence Act only empowers the court to take into consideration such a confessional statement against a co-accused, but under this section, such a statement cannot be used against the other accused persons jointly tried with the maker unless there is some other evidence against those persons.¹⁰ It may happen that a statement made by an accused may not be a confessional statement, but if such statement contains an admission of certain facts of the occurrence; such a statement is admissible under sections 18-21 of the Evidence Act provided it is voluntary.¹¹

2. LAWS AND PRINCIPLES GOVERNING RECORDING OF CONFESSORIAL STATEMENT

Sections 164 and 364 of the Code of Criminal Procedure 1898, provide how the confession should be recorded and signed. Sections 24 to 30 of the Evidence Act 1872, deal with admissibility and inadmissibility of confessional statement. Rules 78 and 79 of the Criminal Rules and Orders¹² have laid down a practical road map regarding how

³ Stephen, James Fitzjames (1904) “A Digest of the Law of Evidence.”

Online at: <https://archive.org/details/chasedigestoflawof00step> accessed 11/12/2014

⁴ 39 DLR (AD) 117.

⁵ Justice Mohammad Hamidul Haque “ Trial of Civil Suits And Criminal Cases”, 1st ed. 2010,P.

⁶ Gour Chandra Pal Vs State 59(DLR) 1227, Hazrat Ali and others Vs State 44 DLR 51 relied.

⁷ 12 MLR (HC) 2007.

⁸ AIR 1936 Lah. 247, 37 Cri.L.Jour 432(DB).

⁹ 29 DLR (SC) 271, 59 DLR 17, 396, 6 MLR 205, 51 DLR 244, 53 DLR 268, 49 DLR 573, 55 DLR 137.

¹⁰ 25 BCR (AD) 239, 44 DLR (AD) 10, 45 DLR (AD) 175, 55 DLR 382, 7 BLC 362, 3 BLC (AD) 53.

¹¹ 25 BCR (AD) 239 para 20.

¹² The Criminal Rules and Orders (practice and procedure of subordinate Courts), 2009.

to record a confessional statement. Also with a plethora of judicial pronouncements¹³ the principles have been laid down for governing the recording of confessional statement, its admissibility and use as evidence and the norms of appreciation as to its reliability and forming the basis of conviction.

3. LEGAL REQUIREMENTS FOR RECORDING THE CONFESSIONAL STATEMENT

Recording of confessional statement is a matter not only of form but also substance. The recording Magistrate should make his real endeavor for ascertaining that the accused is making the statement voluntarily and should record the confessional statement by strictly following the provisions of sections 164 and 364 Cr. P.C., 1898.

Section 164 (2) of the code provides- "Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion best fitted to the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364." Sub section (3) of the same section provides- "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 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".

The requirements of section 364 of the Code of Criminal Procedure, 1898 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 English¹⁴; (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 shall be annexed to the record. If a Magistrate or a judge is unable to make a memorandum as required, he shall record the reason of such inability.

According to the content of sections 164 and 364 of the Code of Criminal Procedure, 1898, section 24 of the Evidence Act, 1872 and according to a number of judicial pronouncements in the leading cases the following, amongst others, may be identified as the inviolable 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 a Police Officer.

- (b) The Magistrate should make a real endeavor to place the accused person at ease, dispel all the fear, inducement and hope from the accused's mind, enabling him to make the confession of his own volition, absolutely free and voluntary to the best dictates of his own inner conscience. The magistrate should assure that the accused would not be remanded to

¹³State vs Lalu 39 DLR (AD) 117

¹⁴ 39 DLR (AD) (1988) 108

the police custody. A held in *State Vs. Abul Hashem*¹⁵, when the accused is produced from the police custody, it is the duty of the Magistrate to remove fear of police torture of the mind of the accused. When the accused are 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*¹⁶ 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.

The Magistrate should record the questions put to and answers obtained from the accused person.¹⁷ The phrase of the 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 questions and answers recorded in the prescribed Form 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.

The Magistrate should record the particulars as to when and wherefrom the accused was arrested and wherefrom the accused was placed before him; 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; After making an 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 the 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;¹⁸ 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 and if the answer is yes, the accused should be warned again that his confessional statement may be used against him as incriminating evidence; 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; No oath should be administered to the accused before recording the confessional statement.

Accordingly, in *Nausher Ali Sarder and others Vs. State*,¹⁹ the court directed that, 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 thus, the

¹⁵ 3 MLR (HCD) 30.

¹⁶ 8 BLD (AD) 109

¹⁷ The following (Phraseology of questions may be different) may be some of the relevant questions:- Have you understood that you are not bound to make confessional statement? Have you understood that if you make confession it can be used against you as incriminating evidence? Why are you making the confession? Has anybody threatened or induced you or given you any hope or compelled you in any manner for making the confessional statement? Are you willing to make the confessional statement voluntarily? If you are willing to make the confession, will you make the true statement?

¹⁸ 1980 Sc MR 654, 20 DLR 524

¹⁹ 39 DLR (AD) 194-paragraph-9.

recorded statement should be read out and explained to the confessing accused; When the accused confirms that the confessional statement has been recorded correctly, it shall be signed by the accused and by the Magistrate and the Magistrate must make a memorandum at the foot of the recorded statement. In essence, it is imperative that the magistrate certify under his own hand that the examination was taken in his presence and hearing and the record contains a full and true account of the statement made by the accused.²⁰

4. MISCELLANEOUS LEGAL GUIDELINES

The form (M-84) used for recording confessional statement by the Magistrate itself is a small guiding booklet. The left margin of the form contains certain instructions. The Form states, inter alia: “Magistrates should clearly understand the great importance of giving their closest attention to the procedure to be followed, from first to last, in the recording of confessions. This procedure should be followed without haste, with care and deliberation, it being understood that this duty is not a distasteful and minor, appendage or addition to their normal functions, but one which is of consequence to the confessing accused, his co-accused and court responsible for the administration of criminal justice. A confession which is recorded perfunctorily and hastily is a source of embarrassment to the trial court, the prosecution and the defence.”

When the accused is not given any time for reflection, no question was put to him to ascertain whether he was prepared to make the statement of his own free will, it cannot be said that the Magistrate has made any genuine effort to find out the real character of the confession. If the Magistrate does not fill up the important paragraphs of the Form, the manner of recording the confession is not acceptable. Recording of the confession in such manner casts serious doubt as to the voluntary character of the confessional statement -*Md. Azad Shaikh Vs. state*.²¹

The sole object and the dominant purpose behind all the instructions are that they must always make a real and earnest endeavor to ensure that the confessions of the accused recorded by them are free and voluntary and are not caused by any inducement threat or promises or under any undue influence.²² When recording the confession of an accused the first and the foremost duty of the magistrate is to ask the accused as to the custody from which he is produced and the treatment he has been receiving in such custody in order to ensure that there is no scope for doubted of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the accused mind. In the event magistrate fails to do so, the confession recorded by him has been held not to be voluntary.²³

5. PRAGMATIC IMPEDIMENTS

There are multidimensional causes behind ram shackling /illegal reality of confession. In general, torture is applied to extort information or confessional statements by force or to force the persons in custody to give false statements and sometimes to take revenge on the opponents.²⁴ “The torture techniques employed in Bangladesh, whether of the long standing practice or of more recent origin, are brutal. Methods documented by Human Rights Watch and other human rights organizations include burning with acid, hammering nails into toes, drilling holes in legs with electric drills, electric shocks, beating on legs with iron rods, beating with

²⁰ Section 364(2), of *Code of Criminal Procedure, 1898*.

²¹ 8 BLD (HCD) 505.

²² (1993 Lah: 354: P. Cr. L. J. 1978 SC 21, DLR 1978 SC).

²³ (1986 Cr. L. J. 439 Ori).

²⁴ Odhikar Observes International Day in Support of Victims of Torture 26 June 2010, National Press Club, Dhaka (see at http://www.odhikar.org/Torture/Int'l_Day_in_Support_of_Victims_of_Torture.pdf p.2).

batons on the backs after sprinkling sand on them, ice torture, finger piercing and mock executions.²⁵

The police are poorly trained about the dangers of interrogation and false confession. Police officers are rarely instructed regarding how to avoid torturous mechanism of eliciting confessions, how to understand what causes false confessions, or how to recognize the forms false confessions take or their distinguishing characteristics.

The absence of feasible accountability mechanisms of the confessional statement recording officer is a major problem to detect indifference and callousness as prevail encircling them. Lack of profound training in this regard is also a tremendous problem. The complexities and nuances of form (M-84) is itself a problem as even many first class magistrates do not understand how to work with it. Lack of commitment and accountability to justice seekers is also a major cause. Sometimes pressure from vested group indirectly accelerates this process. Colonial degenerated mentality, traditional oppressive mindset and lack of right based approach. Soaring ignorance about constitutional rights /human rights among the concerned is also a major problem.

There is no guideline nor is there any practice to dispose of the retraction upon any inquiry into the allegation of torture for compelling an accused to make the confessional statement. Lack of right based approach in the whole gamut of the state machineries is the core aspect of this crucial aspect of improper and illegal recording of confessional statement. The roles of pressure groups are also very feeble in this regard.

6. CONCLUSION

The act of recording confessional statement is a very solemn act and in discharging his duties, the magistrate must take care to see that the requirements of law are fully satisfied.²⁶ Justice and free from any kind of torture is a constitutional flavor which should be protected and preserved at any cost. Torture free, confessional statement as recorded in consonance with the letter and spirit of the law can ventilate an ascertained door of justice seems to be done setting aside the mammoth and the colossal injustice as a pragmatic present phase of it through an extracting confessional statement via torture, inhumane and degrading treatment along with illegal, irregular, injudicious and a negligence record of it.

The state should ensure true and voluntary confession in consonance with prescribed laws and philosophy behind it and no magistrate shall record any confessional statement unless he has reason to believe that it was made voluntarily and when it was made in his presence. Any form of indifference, irregularity and malpractices to record confessional statement should be avoided for the sake of justice.

²⁵ February 2008 report released by Human Rights Watch

²⁶ *Ibid*