

ADMISSIBILITY AND EVIDENTIARY VALUE OF CONFESSION: CONFLICTS AND HARMONY BETWEEN RULES OF LAW AND RULES OF PRUDENCE IN BANGLADESH, INDIA AND PAKISTAN

Sheikh Anisuzzaman
Senior Lecturer
Department of Law and Justice,
Metropolitan University, Sylhet, Bangladesh
e-mail: sobuj.anis@gmail.com

Shanjida Israt Jahan Efat
Lecturer
Department of Law and Justice,
Metropolitan University, Sylhet, Bangladesh
E-mail: efat1313@gmail.com

ABSTRACT

Confession is a self harming statement made by an accused acknowledging his guilt. It is the strongest evidence against the maker thereof but all confessions are not equally valuable. The admissibility, evidentiary value and probative force of confessions vary from circumstance to circumstance under which, and from person to person to whom that is made by the accused. The statutory laws of evidence (the Evidence Act, 1872) and that of criminal procedures (the Code of Criminal Procedure, 1898) which were enacted in the colonised India, now comprised of three independent countries namely Bangladesh, India and Pakistan are, with subtle changes, still in force in these countries. The provisions relating confession in the Evidence Act, 1872 merely provide when a confession can be used as a piece of evidence in a court of law and presumption of genuineness of judicial confession but whether a confession can be the sole basis of conviction that is not stated in any statutory law, which are hereafter called rules of law, and therefore one has to rely on case laws. The sagacity and judiciousness of the judges determine, depending on facts of cases before them, when a confession, admitted in evidence, can be the basis of conviction. Sometimes the confessor may be convicted based only on his confession and sometimes a confessor cannot be convicted based on his confession if not corroborated by other evidence. But the case laws in this respect are not always harmonious. There are conflicts between case laws as well as conflicts between case law and rules of law. This article aims at exploring and analysing the statutory rules, made by the legislative assemblies, the rules of prudence and the rules of caution made by the judges of the Indian sub-continent to promote procedural fairness in convicting a person on the basis of his confession.

Keywords: True, Voluntary, Corroboration, Basis, Conviction.

Introduction

Definition of Confession

The term *confession* has not been defined under the Evidence Act, 1872; the General Clause Act, 1897; the Criminal Procedure Code, 1898 or any other statutory laws prevalent in Bangladesh and India to date. In the absence of any statutory definition of confession we have to rely on the definitions suggested by the jurists and the definitions given in different judgements to understand the meaning of confession. Confession is a direct acknowledgement of guilt by the accused. Sir James Fitzjames Stephen who drafted the Evidence Act, 1872 defined confession thus: "A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime"¹ This definition was formerly adopted in various cases by the judges in the Indian sub-continent till 1939.² But the Privy Council disapproved this definition in 1939 and held that a statement merely suggesting inference that the maker of the statement has committed a crime cannot be considered as a confession.³ A confession must in terms admit offence or at any rate substantially all the facts which constitute the offence.⁴ The definition of confession given in *Narayanswami* case has been accepted and been applied over the years till now by the courts of Bangladesh, India and Pakistan. An accused must admit his involvement in all the physical and psychological facts that constitute a crime in a confessional statement. Straight J. held that only statements which are direct acknowledgements of guilt should be regarded as confessions and it cannot be construed as including a mere inculpatory

¹ Stephen, Sir James Fitzjames, *Digest of the Law of Evidence*, article 21

² *R v Babu Lal*, 6 A 500; *R v Nana*, 14 B 260; *Muthu Kumaraswami V R*, 35 M 397 etc

³ *Narayanswami v Emp.*, 1939 PC 47

⁴ Monir, M CJ, *Law of Evidence*, 6th Ed., p. 158.

admission which falls short of being an admission of guilt.⁵ If an accused makes an exculpatory statement or takes care at every stage to show that he did not take any part in the crime, he cannot be said to have made the confession.⁶ Confession must admit in terms of the offence or substantially all facts constituting the offence. Exculpatory statement is not confession.⁷ Previously, the view was that if a confessional statement is partly true and partly false, the statement should not be taken into consideration but the recent view is that a confessional statement partly true and inculpatory and also partly false and exculpatory may be taken into consideration and conviction may be given on the basis of such statement (Haque J, 2011).⁸ However, Pakistan enacted the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 which defines confession as follows:

2 (aa) “confession” means, notwithstanding any judgment of any court to the contrary, an oral statement, explicitly admitting the commission of the offence of zina, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203 A of the Code of Criminal procedure, 1898 (Act V of 1898)”

This definition is certainly a very narrow and strict definition and covers only judicial confession and applies only to the trial of a person accused of *zina* which is not a grave offence in India and Bangladesh. According to section 8 (a) of the said act, an accused is liable to *hadd* based solely on the basis of his confession of committing *zina* before a court of competent jurisdiction. However, in other cases the definition of confession as given in *Narayanswami* case is applicable in Pakistan.

2. Statutory laws of Confession in Bangladesh, India and Pakistan

Laws of confession are codified in Bangladesh, India and Pakistan. During the colonial period, the substantive law contained in sections 24 to 30 of the Evidence Act, 1872 and the adjunctive law contained in sections 163, 164, 364 and 533 of the Code of Criminal Procedure were enacted and given effect in the whole Indian Sub-continent by the British (M. Munir, 2002). Sections 24-26 of the Evidence Act, 1872 laid down when confession is relevant or, in other word, provable while section 27-30 imposed some limitations on their operation. Besides, section 80 of the Evidence Act, 1872 provides, *inter alia*, rules on presumption as to judicial confession. Section 163 of the Code of Criminal Procedure directed the police not to use force, inducement, threat to exhort confession, section 164 of the said act speaks about the power of certain judicial officers to record confession, section 364 contains the manner of recording confession by a judicial officer while section 533 of the enabled the court to admit a judicial confession even if the Magistrate recording the confession failed to comply with all the provisions of sections 164 and 364 of the Code of Criminal Procedure, 1898 provided that the court is satisfied that such non-compliance has not injured the accused in his defence on the merits (Ratanlal & Dhirajlal, 2004).

The Evidence Act, 1872 and Code of Criminal Procedure, 1898 are still in force in Bangladesh.

The Evidence Act, 1872 as titled the Indian Evidence Act, 1872 is in force in India and sections 24-30 are 80 of the acts are same. India enacted the Code of Criminal Procedure, 1973 repealing the Code of Criminal Procedure, 1898.⁹ However, the heading and contents of section 163 and 164 of both the acts are same, while the heading and contents of sections 281 and 463 of the Code of Criminal Procedure, 1973 and that of sections 364 and 533 respectively of the Code of Criminal Procedure, 1898 are same.

Pakistan, like Bangladesh, has not repealed the Code of Criminal Procedure, 1898. But the Evidence Act, 1872 has been repealed by section 166 of the order titled Qanun-e-Shahadat, 1984 (Law of Evidence, 1984). However, the substantive law of confession as contained in articles 37-43 and that contained in section 24-30 of the Evidence Act, 1872 are same. The rule on presumption of court as to the genuineness of judicial confession as contained in articles 91 of the Qanun-e-Shahadat, 1984 is same to the rule contained in section 80 of the Evidence Act, 1872. The headings of the articles of Qanun-e-Shahadat and that of the sections of the Evidence Act stated above are also same.

3. Classification of Confessions

A confession is either judicial or extra-judicial on the basis of the person to whom it is made. When a confession is made by an accused before a judicial officer¹⁰ and the later records that according to the provision¹¹ of the Criminal Procedure Code, 1898 that is called judicial confession. On the other hand when an accused makes a confession to any person other than a judicial person empowered to record a confession that is called an extra-judicial confession. A judicial confession is always reduced to a document by the recording magistrate but an extra-judicial confession may be either written or oral.

4. Relevancy vs. Admissibility of Confessions

⁵ *R v Jagrup*, 7 A 646

⁶ *Sattar Khan vs State* PLD 1970 Pesh. 185

⁷ *Abdul Jalil vs State* 1985 BLD 137(a)

⁸ 44 DLR (AD) 51 Para 16, 3MLR 57, 6MLR 205

⁹ India repealed the Code of Criminal Procedure, 1898 by section 484 of the Code of Criminal procedure, 1973.

¹⁰ According to section 164(1) of the CrPC, a metropolitan magistrate, a magistrate of the first class or a magistrate of the second class especially empowered by the government in this behalf may record a confession in the course of an investigation, before the commencement of the inquiry or trial.

¹¹ Code of Criminal Procedure, 1898, s. 364 (effective in Bangladesh and Pakistan), Code of Criminal Procedure, 1973, s. 281

The term admissibility has not been defined in the Evidence Act, 1872 rather it says that all facts, declared relevant by the said Act, can be proved.¹² The term relevant facts means and includes those facts which are connected with the facts-in-issue or principal facts of a case and from which a logical inference can be drawn as to the existence or non-existence of a facts-in-issue which are also called principal facts or main facts. Unlike facts-in-issue the relevant facts do not constitute any right or liability. Facts which are relevant are matter of substantive law while procedural law more precisely law of evidence enumerates the relevant facts. Relevant facts are also called evidentiary facts or presumptive facts. Admissibility means receivability in evidence.¹³ Admissibility is wider than relevancy. All admissible evidence is relevant, but all relevant evidence is not admissible.¹⁴ Relevant evidence would not be received if its prejudicial value is greater than its probative value (Collin Tappar, 2004). Admission of a confession makes it evidence within the meaning thereof stated in the Evidence Act, 1872. Even a hearsay statement amounting to confession may be admitted in evidence in absence of the maker.¹⁵ Sections 24-30 of the Evidence Act, 1872 contain the rules on relevancy of confession. There are statutory conditions contained in those sections which must be met for a confession to be considered relevant:

- i. It must perfectly be voluntary.¹⁶
- ii. It must not be made to any police officer.¹⁷
- iii. It must not be made in police custody in absence of a magistrate.¹⁸

It is a fundamental right of any person living in Bangladesh not to be compelled to be a witness against himself.¹⁹ This right is also constitutionally guaranteed in India²⁰ and Pakistan²¹. Although the term voluntary has not been used in the Evidence Act, 1872, the wording of section 24 thereof shows that a confession will not be admissible if it is obtained by any non validating circumstances, e.g. threat, inducement, promise etc.²² Moreover our constitution also provides that a person shall not be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.²³ The police officers and persons in authority are also directed by law not to offer any promise, inducement, threat etc as mentioned in the Evidence Act.²⁴ However a confession made after full removal of the impression, in the opinion of the court, caused by such non-validating circumstances is admissible.²⁵ Any magistrate who records a confession is required by law to refrain from recording a confession unless he believes after questioning the accused that it was made voluntarily.²⁶ It is obligatory for the recording magistrate to explain to the accused that he is not bound to make a confession and to warn the latter that if he chooses to make a confession that may be used as evidence against him.²⁷ However a confession otherwise relevant does not become inadmissible only because the confessor was not warned by the magistrate that he was not bound to make such confession and that evidence of it might be given against him.²⁸ Some case laws suggest that the magistrate should also ensure an accused, produced by the police, that he would not be remanded to police custody if he does not make a confession.²⁹ The trial courts must even exclude a true confession if the court doubts its voluntariness.³⁰ It is the duty of the prosecutor to prove the voluntariness of a confession. A confession which is voluntary on the face is admitted as evidence even though that may be false since voluntary confession is naturally presumed to be true based on the logic that no person voluntarily makes a self-harming statement unless it is true. Previously it was the duty of the jury to decide whether a confession is true or not for determining its worth³¹ after the courts admitted that in evidence but now, after the abolition of jury trial, the judges play both the roles. A voluntary confession may not be a true confession and vice-versa. Although the Evidence Act did nowhere provide that a confession is to be true it must be established that a confession is not only voluntary but also true before convicting a person on the basis of that. And not but the least even a true and voluntary

¹² Evidence Act, 1872, s. 5 and Qanun-e-Shahadat, 1984, art.18

¹³ Munir, M. C.J., *Law of Evidence*, 6th Edition, p. 69

¹⁴ Best-Evidence, p.252 cited at p.69, *Law of Evidence*, Munir, M. C.J

¹⁵ Evidence Act, 1872, Section 32(3) and Qanun-e-Shahadat, art.44(3)

¹⁶ The Evidence Act, 1872 or the Qanun-e- Shahadat, 1984 nowhere stated that involuntary confession is irrelevant but the language of section no 24 of the Act suggests that involuntary confession is irrelevant.

¹⁷ See section 25 of the Evidence Act, 1872 and article 38 of the Qanun e Shahadat, 1984.

¹⁸ See section 26 of the Evidence Act, 1872 and article Qanun e Shahadat, 1984.

¹⁹ Article 35(4) of the Constitution of the Peoples' Republic of Bangladesh: No person accused of any offence shall be compelled to be a witness against himself.

²⁰ The Constitution of India, 1949, art.20 (3)

²¹ Constitution of the People's Republic of Pakistan, art.13 (b)

²² Section 24 of the Evidence Act, 1872 and article 37 of the Qanun-e-Shahadat, 1984

²³ 35(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

²⁴ Code of Criminal Procedure, 1973 s. 163

²⁵ Evidence Act, 1872, s. 28 and Qanun-e-Shahadat, art. 41

²⁶ S 164(3), The Code of Criminal procedure, 1898(in force in Bangladesh and Pakistan) and S 164(3), The Code of Criminal procedure, 1973.(India)

²⁷ *ibid*

²⁸ Evidence Act, 1872, s.29 and Qanun-e-Shahadat, 1984 art. 42

²⁹ Abdus Shakur 16 DLR (Dac) 148

³⁰ R V Panchkari, 52 C 67; In re Tadipamula A 1959 AP 419

³¹ Sarkar, M.C.; Sarkar, S.C. and Sarkar, Prabhas C., *Law of Evidence*, 15th Edition, Wadhwa and Company, Nagpur, 1999 (Reprint 2004); p. 218.

confession must be rejected if it is made to any police,³² and thereby a confession made in the FIR by the accused cannot be used against him.³³ Section 26 of the Evidence Act, 1872 goes further that a confession made by any person while he is in police custody is inadmissible unless that be made in the immediate presence of a magistrate. However, these statutory rules are sometimes construed liberally to admit confession made to a person in authority but without threat, inducement or promise is admissible.³⁴ A confession is not made inadmissible simply because it is made in presence of a person in authority. In order to attract the operation of section 24 it must in addition be shown that the person in authority held out to the confessor some threat, promise or inducement having reference to the charge against him.³⁵ Beside the statutory rules there is a rule of prudence made by the judiciary that prolonged police custody before making a confession makes it inadmissible.³⁶ There is another rule of caution that police custody before and after the confession makes it unacceptable.³⁷ A true and voluntary confession which is legally relevant may not be received in evidence if it is contained in a privileged communication as enumerated in the relevant provisions³⁸ of the Evidence Act unless the privilege is waived by the claimant thereof. That is why a confession made by a person to his or her spouse, as the case may be, during marriage is inadmissible.³⁹ For the same reason a confession made by an accused to his lawyer is admissible.⁴⁰ A confession prompted by the prosecution by adopting unfair means is also inadmissible. It is a fundamental right of the citizens to have the privacy of his correspondence and other means of communication.⁴¹ So, therefore, a confession contained in a communication which is collected in violation of his right to privacy is inadmissible. So if the prosecution wants to prove a confession contained a telephone conversation or e-mail which was collected by tapping his phone or hacking his e-mail id is inadmissible in evidence.

5. Admissibility and Evidentiary values Confession

The statutory provisions and the case laws in Bangladesh, India and Pakistan will now be studied for useful guidelines for overcoming the evidentiary challenges in admitting various confessional statements and convicting the maker of the confession.

5.1 Admissibility and Evidentiary values Judicial Confession

Of all confessional statements, the evidentiary value of judicial confessions is the most. However, all judicial acts and official acts may be presumed by law to be regularly performed.⁴² More precisely the trial courts are legally bound to presume that a confession has been duly recorded and statements made by the magistrate, as to the circumstances under which confession is made, in the memo⁴³ at the foot of the record of the confession is true.⁴⁴ That means the prosecution need not prove the voluntariness of a judicial confession even if that is in question. Since all judicial confessions are declared voluntary those are always admissible. However, the defence has right to rebut the presumption of the trial courts as to the voluntariness of a judicial confession. But to disprove voluntariness of a judicial confession the defence cannot call the recording magistrate to the witness box as he is not bound to testify as to the circumstances under which he recorded a confession if not specially ordered by a superior court.⁴⁵ So an accused can be convicted solely on the basis of a judicial confession even without formal proof thereof. However, the highest courts of Indian Sub-continent are not unanimous as to whether the recording magistrate shall be called to witness box. For example in *Abul Khayer and 3 others vs. State* (1994)⁴⁶ the constitutional court of Bangladesh provides:

“It is not always necessary that the Magistrate who recorded the confessional statement should be produced in court as a witness. Section 80 provides that even without production of the Magistrate such statement may be taken into consideration and presumed to be genuine”

Similar view was expressed in *State vs Tajul Islam*(1998)⁴⁷ while interpreting section 80:

“It dispenses with the necessity of a formal proof of a confession duly recorded by a Magistrate in accordance with the provisions of section 164 of the Code of Criminal procedure. In such a case the examination of the recording Magistrate is not imperative.”

³² Section 25 of the Evidence Act, 1872

³³ *State vs. Ghandal* 13 DLR (WP)62

³⁴ *Rahim Buksh* 4 DLR 199; PLD 1952 FC I

³⁵ *State Vs. Yunus Ali* 13 DLR 665

³⁶ ‘Confession made after being in custody for a long time-Presumption is not being voluntary’ (Muhammad Hussain 1960 KLR 591(DB))

³⁷ *Abdus Sakur*, 16 DLR (Dac) 148.

³⁸ Evidence Act, 1872, ss. 121-131, Qanun-e-Shahadat, 1984, art.4-12

³⁹ Evidence Act 1872, s.122 and Qanun-e-Shahadat, 1984, art. 5

⁴⁰ Evidence Act 1872, s.126 and Qanun-e-Shahadat, 1984, art. 9

⁴¹ Constitution of the Peoples’ Republic of Bangladesh, 1972, art. 43

⁴² S. 114(e) of the Evidence Act, 1872 and Qanun-e-Shahadat, 1984, art.129(b)

⁴³ Section 164 of the Code of Criminal Procedure, 1898 in Bangladesh and Pakistan and section 164 of the Code of Criminal Procedure, 1973 in India

⁴⁴ S. 80, the Evidence Act, 1872 and Qanun-e-Shahadat, 1984, art. 91.

⁴⁵ S. 121, the Evidence Act, 1872 and Qanun-e-Shahadat, 1984, art. 4.

⁴⁶ *Abul Khayer and 3 others vs State* 46 DLR 212

⁴⁷ *State vs Tajul Islam* 48 DLR 305.

The judicial pronouncements mentioned above clearly states that the rule of law suggest that a judicial confession can be acted upon even without examining the recording Magistrate in the trial court. But the rule of prudence speaks the opposite. In *Bimal Chandra Das alias Vim and 3 others vs State* (1999) the Supreme Court of Bangladesh held:

“It was injudicious to rely upon confession without calling the Magistrate as a witness. The Court is required to see not only the forms under sections 164 and 364 were complied with but the substance underneath the law equally adhered to.”

Peshwar High Court held in *Fazlur Rahman vs The State* (1960)⁴⁸ held that a satisfaction of Magistrate that the confession was voluntary does not make it voluntary and thereby other things should be kept in view while determining the voluntariness. In *Babul vs State* (1990), the Appellate Division of Bangladesh Supreme Court provided:

“Even though provision is there for making certain presumption in respect of a confession by an accused person produced before a court taken in accordance with law and purporting to be signed by a Magistrate, having regard to the facts of the case it was injudicious to rely upon such confession without calling the Magistrate as a witness. In respect of a confession the court is required to see not only that the forms under section 164 CrPC were complied with but the substance underneath the law was equally adhered to-There must not be any reason for doubt as to the truth of the statements, be it circumstantial or proved otherwise. In this particular case it is difficult to deny accused appellants an opportunity to cross-examine the Magistrate who allegedly recorded their statement”⁴⁹

In conclusion it can be said that according to rules of law a judicial confession can be sole basis of conviction of the maker thereof but according to the rule of law judicial confession should be supported by the testimony of the recording Magistrate for conviction an accused.

5.2 Admissibility and Evidentiary value of extra-judicial Confession

There is no statutory direction as to whether an extra-judicial confession can be the sole basis of conviction. So, there is no legal bar to convict an accused based on an extra-judicial confession if it meets the conditions of admissibility i.e. if it is voluntary and not made to any police officer. In *State Vs. Sadek Matbar* it was held that extra judicial confession can be acted upon, if true, even if retracted⁵⁰. The Supreme Court of Bangladesh observed that extra-judicial confession can form a basis for conviction if found voluntary and true.⁵¹

However the rules of prudence suggest that an extra-judicial confession should not be the basis of conviction unless corroborated materially. In *State vs. Mozammel and others* (9BLC 2005) the Supreme Court of Bangladesh observed:

“An extra-judicial confession is a very weak piece of evidence. It can never form the basis of the conviction of the accused unless the actual words of the accused person making the confession is brought on record and such a confession finds reliable corroboration. Courts have always treated extra-judicial confession as suspicious evidence and cautioned against its acting in the absence of corroborative evidence. In the instant case the PWs1, 2 and 3 adduced evidence regarding extra-judicial confession but their evidence is contradictory.”

Similar view has been expressed in many other cases.⁵²A conviction can also be rested upon extra-judicial confession subject of course to the fact that such statements are corroborated by other materials on record.⁵³ Extra-judicial confessions are not usually considered with favour but it does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support his statement should not be believed.(Syed Ahmed vs. Abdul Khaleque and others). If the prosecution witnesses failed to state the exact words of extra-judicial confession as alleged to have been made by condemned prisoner cannot be relied upon in the absence of exact words used by the accused person getting aid of corroborative circumstantial evidence.⁵⁵

5.3 Admissibility and Evidentiary value of retracted confession

Sometimes the accused may retract his confession before the trial court. Then two questions may be raised, i.e. whether the retracted confession is voluntary and if the answer to this question is affirmative then the second question is can it be sole basis of conviction. There is no direct statutory provision on admissibility retracted confession and conviction of an accused on the basis of the same. In common law the accused is presumed innocent by the court unless the prosecution can prove his guilt beyond reasonable doubt. The accused does not have to produce any evidence to prove his innocence. Burden of establishing the case against the accused is always on the prosecution.⁵⁶ This burden of the prosecution may be relieved when the accused admit

⁴⁸ *Fazlur Rahman vs The State* PLD 1959(1). WP 982; PLD 1960 (WP) *Peshwar* 74 (DB)

⁴⁹ *Babul vs State* 42 DLR (AD) 186.

⁵⁰ *State Vs. Sadek Matbar* 13 DLR 591; 13 DLR(WP) 58; (1960) PLD (Kar.) 769

⁵¹ *Nausher Ali Vs. State* 39 DLR(AD) 194

⁵² *State vs. Moslem* 55DLR 116; *Mobarak Ali Gazi(MD) vs State* 55DLR 325; *Syed Ahmed vs. Abdul Khaleque and others*

⁵³ *State vs. Moslem* 1993

⁵⁴ *State vs. Moslem* 55DLR 116

⁵⁵ *State vs Hasen Ali* 4 BLC 582

⁵⁶ Section 101 of the Evidence Act, 1872 and Qanun-e-Shahadat, 1984, art.117

his guilt.⁵⁷ But if the accused retracts his confession it may raise a doubt as to the voluntary nature of the confession and thereby the accused may claim the benefit of doubt. When a retracted confession is given in evidence, the Court has first to see if it is admissible. When the confession is held to be admissible then the court is to consider what weight should be given to it.⁵⁸ The Lahore High Court of Pakistan held that from the view of admissibility alone, the mere fact that the confession is retracted is immaterial, unless it is shown to be improperly induced.⁵⁹ Similar view was taken in *Ram Prakash V. State of Punjab*⁶⁰ by the Supreme Court of India:

“The Evidence Act nowhere provides that if a confession is retracted it cannot be taken into consideration against the co-accused or the confessing accused”

The judges of the Indian Sub-Continent gave conflicting decisions whether an accused can be convicted based only on his retracted confession. The earlier decisions suggested that a conviction on the basis of a retracted confession is good in law. In *Hari Panda* case the Supreme Court held that the retraction of a confession is wholly immaterial once it is found that it is voluntary as well as true.⁶¹ Retracted confession if found true and voluntary can form the basis of conviction.⁶² On consideration of evidence on record, if it is found that a confession is voluntary and true, conviction of the maker himself can solely be based on the same; no matter whether it is retracted or not.⁶³ The cases mentioned above suggest that if the Court believes that a retracted confession was voluntary at the time of making it then it will receive that as a piece of evidence and conviction of the maker based on such confession is not violative of any statute.

However another group of decisions provide that a retracted confession is very weak and should not be acted upon. In *State Vs. Ali Kibria* (1991) the Supreme Court of Bangladesh held:

“It is rule of prudence that a retracted confession needs corroboration in as much as it is always open to suspicion and cannot be acted upon unless corroborated by independent and credible evidence.”⁶⁴

In another case the same court rules out:

“When confessional statement was recorded taking the condemned prisoner into prolonged police custody such confessional statement was neither voluntary nor true and the belated retraction of such confession will not presume her guilt as no legal assistance was available to the condemned prisoner till the appointment of an Advocate by the State.”⁶⁵

In conclusion it may be said that although the rule of law provides that an accused can be convicted based solely on his confession even though he retracts it but the rule of prudence suggests that an accused should not be convicted on the basis of his confession without any satisfactory corroborative evidence. This rule of law, by practice over the time, has ripened into a rule of law.

5.4 Admissibility and evidentiary value of a confession made by a co-accused against another co-accused

Section 30 of the Evidence Act, 1872 (the Indian Evidence Act, 1872) and contain the conditions of admissibility of confession one person against another. This section enabled the court to admit an inculpatory confession in evidence against the co-accused if the following conditions are met:

- i. If both of them are jointly tried
- ii. If they are tried for the same offence
- iii. If the confession is legally proved

Article 43 of the Qanun-e-Shahadat, 1984 contains the similar rule. Unlike section 30 of the Evidence Act, 1872 and that of the Indian Evidence Act, 1872 it clearly states that a confession can be used as substantive evidence only against the maker and the court may take into consideration of such confession against the co-accused as a circumstantial evidence.⁶⁶ There is no clear statutory provision whether confession of an accused can be the sole basis of conviction of another accused. Besides section 114(b) of the Evidence Act, 1872 and article 129(b) of the Qanun-e-Shahadat, 1872 provides that the court may presume that an accomplice is unworthy of credit. In this respect Bangladesh Supreme Court held as follows:

⁵⁷ Section 58 of the Evidence Act, 1872 and Qanun-e-Shahadat, 1984, art.113

⁵⁸ Monir, M CJ, *Law of Evidence*, 6th Ed. 2002(Reprint 2004), p. 164.

⁵⁹ Ghulam Mohamed Vs. E, 1942 Lah 271.

⁶⁰ AIR 1959 SC 1

⁶¹ Hari Panda 19 DLR 573

⁶² State vs Masudur Rahman 1984 BLD(HC) 228(b) State vs Abu Bakkar 1983 BLD 240 (C)

⁶³ Abdur Rouf vs. State, 1986 BLD 436

⁶⁴ State vs Ali Kibria 43 DLR 43 DLR 512

⁶⁵ Bilkis Ara Begum vs State 4BLC 386

⁶⁶ See section 30 of the Evidence Act, 1872 and article 43 of the Qanun e Shahadat, 1984

“This section by itself does not need any corroboration but by using the rule of prudence it is now an accepted principle that there should be corroborative circumstances”⁶⁷

The rule of prudence that a non-confessing accused cannot be convicted solely on the basis of the confession of his co-accused without any corroborative evidence has been followed in numerous cases. The Privy Council held that “Confession of accused may be used against co-accused co-accused –Evidence valuable only when corroborated.” (Bhubani Saha PLD 1949 Privy Council Vs The King 2 DLR 39). Allahabad High Court said that Confession is not sufficient basis for conviction of the co-accused.⁶⁸ Lahore High Court also said that corroboration in material respect is required as a rule of prudence (1957 PLD (Lah) 956). The section merely provides that the court “may take into consideration”, such confessions as against the appellant, as well as against their makers. There ought to be other evidence whether direct or circumstantial linking such person with the crime, before a confession made by a co-accused could be adverted to, in adjudging the guilt of the person.⁶⁹ Confession made by a co-accused in a joint trial for the same offence affecting himself and other may be taken into consideration. The confession of such an accused may lend assurance to the other evidence on record.⁷⁰ Court may take into consideration the confessional statement of a co-accused under section 30 of the Act against the one who did not confess but an accomplice is unworthy of credit unless he is corroborated in material particulars.⁷¹

5.5 Admissibility and Evidentiary value of oral confession and confession by gesture

Although judicial confession is required by law to be recorded, extra-judicial confession need not be recorded or reduced to the form of document. So an extra-judicial confession can be either oral or documentary. If it is proved that an extra-judicial confession was made voluntarily by the accused it will be admissible in evidence irrespective of its form. Yet, conviction of the accused on the basis of an oral confession is very rare. Oral confession without any corroborative evidence cannot be the basis of conviction. Bangladesh Supreme Court provided that oral confession which does not show when, where and in what manner murder was committed and not supported by independent witness cannot be believed.⁷²

Although, confession has been defined as a statement, sometimes direct admission of guilt in the form of affirmative gestures, nods, or signs made in response to leading questions or to questions which assume the guilt of the person addressed may be considered as confession, since actions speak louder than words (Sarkar, 1999). This may happen when the maker of the confession is mute and illiterate. Acknowledgement of guilt by signs or gestures may strictly come within confession as they may be regarded as verbal statements.⁷³ However there is rule of law on admissibility of any confession made by gesture nor there is any rule on conviction on the basis of a confession by gesture. Moreover, all people do not convey the same idea by same sign or gesture. So there is always a danger of misinterpretation of sign and gesture and thereby admitting a confession by gesture is very dangerous and conviction should never be based on such confession without any independent evidence.

5.6 Admissibility and Evidentiary value of statements made to police amounting to confession

Section 27 of the Evidence Act, 1872 (Bangladesh and India) and article 40 of the Qanun-e-Shahadat, 1984 provides that although a confession made to any police is inadmissible, a statement, whether amounting to confession or not, which leads to discovery of any fact such as dead body, arms, stolen goods etc, the presumption of falsity attached to the excluded confessions disappears and that part of the statement which relates distinctly to the recovery of fact is held admissible by the theory of confirmation of subsequent facts. (M. Munir, 2002). But this is not the proof of guilt. In *Bakshis V State of Punjab*, AIR 1971 SC 2016 at p 2018 held that discovery of the dead body of the deceased on the information given by the accused when he was in police custody is not a conclusive circumstances though undoubtedly it raises a strong suspicion against the accused. For the same reason if the accused makes any confession in the First Information Report that confession will be inadmissible (*State vs. Ghandal* 13 DLR (WP) 62). The FIR in the nature of a confessional statement by the accused cannot be used against him. Exculpatory portion in such statement, however, can be used in favour of the accused.⁷⁴ If any statements is made to police officer by the accused that is not admissible in evidence except that part of the statement which leads to discovery of any incriminating material.⁷⁵ If the accused makes a statement to the police “I will produce a knife concealed in the roof of my house with which I stabbed B” the words “with which I stabbed B” is inadmissible since they do not relate to the discovery of the knife, in the house of the informant. Not only that, the part of the statement which leads to discovery of fact should be proved by independent evidence. In this respect the Supreme Court of Bangladesh held in *Zillur Rahman alias Zillur Vs State*⁷⁶

“If the alleged statements or confessions of the appellant made to police leading to the recovery of the pipegun in question is accepted as admissible under section 27 of the Evidence Act, it is to be determined whether the fact of recovery of the said gun by the police stands proved by the evidence of the police personnel (PWs 2 and 3) alone without being corroborated by any public witness. It is a rule of prudence that when a case, like the present one, hinges

⁶⁷ *Sheikh Ahmed vs State* 2 BSCD 87

⁶⁸ *Manohar Singh* AIR(33) 1946 Allahabad 15(BD)

⁶⁹ *Maqbool Hossain* 12 DLR (SC) 217

⁷⁰ *Babor Ali Molla Vs State* 44 DLR (AD)10

⁷¹ *Nazrul Islam and other Vs State* 45 DLR 142

⁷² *Sudhir vs. State* 1983 BLD 206(a)

⁷³ Sarkar citing *R v Abdullah*, 7 A 385 FB: Chandrashekhar v R. 1937 AC 220

⁷⁴ *State vs Ghandal*, PLD 1960 Pesh.137

⁷⁵ *Muhammad Siddiqur Rahman Vs. State* 1987 AD 93

⁷⁶ *Zillur Rahman @ Zillur Rahman V State* 6 BLC 254

on the testimony of police officials alone, it should not be ordinarily accepted without utmost scrutiny. In a proper case independent corroboration should be demanded and if the circumstances are such that such corroboration would be forthcoming, the bare testimony of the police officials should not be accepted as true.”

5.7 Evidentiary value of approver’s statement amounting to confession

Sometimes the court may, under section 337 of the Code of Criminal Procedure, 1898 in force in Pakistan and Bangladesh and section 306 of the Code of Criminal Procedure Code, 1973 in India, with a view to obtaining evidence of any person supposed to have directly or indirectly concerned in or privy to the specified offence, tender a pardon, to such person on condition that he would make a true and full disclosure of the whole of the circumstances, under which the offence is committed, within his knowledge. According to section 133 of the Evidence Act, 1872 (effective in Bangladesh and India) and article 16 of the Qanun-e-Shahadat, 1984 (effective in Pakistan) a conviction can be based on the uncorroborated testimony of the accomplice except in the case of offence punishable with *hadd* in Pakistan. But if the accomplice does not comply with the conditions of pardon he will be tried. In such cases the statement made by the accused, whether amounting to confession or not, may be given in evidence against him. Lahore High Court held that approver’s statement admissible under section 339(2) CrPC against him at his own trial after forfeiture of pardon.⁷⁷ Similar view was taken in Ibrahim Bhak vs. Crown (1955) that confessional statement by approver before tender of pardon, recorded under section 164 Cr.P.C. Section 24 not applicable to such statement.⁷⁸

5.8 Evidentiary value of confession made before media

Now-a-days, it is a common practice of the law enforcing agencies that whenever they arrest any person they call a press conference. Then the arrestee is produced in the press conference and the latter makes a confession before media which is telecast on different TV channels. So before any trial the arrestee is convicted by millions of people. In December 2012 a senior assistant judge of Bangladesh was arrested for smuggling 342 bottles of contraband Phensydyl and produced before the electronic media with the banned drugs. The Court of Session Judge of Dhaka ordered withdrawal of five police official for producing the judge before media.⁷⁹ Later, on 11th December of that year a writ petition was filed in High Court Division of Bangladesh challenging the production of arrestees before media to make confession which is yet to be decided.⁸⁰

Conclusion

Confession is the strongest evidence against the maker of it. Once admitted in evidence, it leads to conviction of the accused even without any other evidence in some cases. The court should always be cautious enough before convicting an accused based only on his confession. The Courts of the Indian Sub Continent has formulated some rules of prudence and rules of caution so that an accused is not convicted only on the basis of his statement to ensure that no innocent be punished. These rules have, by practice over the years, become as much enforceable as rules of law. The trial court has to decide depending on the facts and circumstances of each case before it. For more clarity and uniformity of decisions the accepted rules of prudence may be recognised by statutes. Besides section 24 of the Evidence Act may be amended to include the terms ‘torture’, ‘coersion’, ‘cruelty’, ‘inhuman treatment’ along with ‘threat’, ‘inducement’, ‘promise’ to reject all involuntary confessions. Section 25 of the Evidence Act, 1872 may be amended to include all law enforcing and security agencies with police or alternatively the term ‘police’ and ‘voluntary’ may be defined for more clarity. Provisions should be made regulating admissibility and evidentiary value of confession by gesture. Section 30 of the Evidence Act, 1972 may be amended to clearly state, like section 34 of the said act which states that entries in books of account are relevant but shall not alone be sufficient evidence to charge any person with liability, that confession of a co-accused shall not sufficient evidence to convict a non-confessing accused. Similar provision may be made on conviction on the basis of an extrajudicial oral confession.

References

1. Books

- Chowdhury, Obaidul Huq J (2004), *the Evidence Act*, 4th Edition, DLR Publication
Collin Tappar (2010), *Cross and Tapper on Evidence*, 12th Edition, Oxford University Press
Haque, Mohammad Hamidul J (2011), *Trial of Civil Suits and Criminal Cases*, 2nd Edition, p. 364
Monir, M CJ, *Law of Evidence*, 6th Ed., p. 158
Ranchhoddas, Ratanlal and Thakore Keshavlal Dhirajlal (2004), *the Law of Evidence*, 19th Edition, Wadhwa and Company 1997 (21st Reprint)
Ranchhoddas, Ratanlal and Thakore Keshavlal Dhirajlal (2004), *The Code of Criminal procedure*, 17th Edition, Wadhwa and Company 2004 (Reprint 2005) Sarkar, M.C.; Sarkar, S.C. and Sarkar, Prabhas C., *Law of Evidence*, 15th Edition, Wadhwa and Company 1999 (Reprint 2004); p. 218

2. Statutes

Bangladesh

- The Code of Criminal Procedure, 1898
The Constitution of the Peoples’ Republic of Bangladesh, 1972

⁷⁷ 1955 PLD (Lah.) 375

⁷⁸ Ibrahim Bhak vs. Crown 7 DLR (FC) 123

⁷⁹ <http://bdnews24.com/bangladesh/2013/01/08/bhola-judge-refused-bail>

⁸⁰ <http://www.risingbd.com/english/404.html>

The Evidence Act, 1872

India

The Code of Criminal Procedure, 1973

The Constitution of India, 1949

The Indian Evidence Act, 1872

Pakistan:

The Code of Criminal Procedure, 1898

The Constitution of the People's Republic of Pakistan, 1973

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

The Qanun-e-Shahadat, 1984