

THE USE AND ABUSE OF THE LAWS OF CONFESSION IN BANGLADESH

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INTRODUCTION

On paper, Bangladesh seems to be an excellent example of what a country must do in order to take care of its citizen's security and establish 'justice for all'. It has laws of all kinds - both good and controversial. The basic civil and criminal laws are from the British Colonial period and many have been enacted more recently, which are specially attuned to look after the welfare of women and children, who are seen as the 'most oppressed'. In fact, one may comment that the country has enough laws to satisfy its needs.

Despite this, the rate of violence in the country is high and 'justice for all' is not the case at all. Justice is mainly for those who can afford legal support and for those who can 'pay' for it. Impunity by law enforcing agencies is high and corruption in those quarters is an open matter.² All this leads to a lack of proper and effective implementation of the excellent laws that the country has.

One of the many laws that are abused by some quarters of the justice system is the law pertaining to confessions. The general practice is that if a person confesses, it makes the work of the investigators easier. The quicker he confesses, the better, and if he does not confess, he is made to. This paper deals with, among other things, the laws dealing with confessions and attempts to highlight the reasons why many criminal cases are concluded based solely on the basis of confessions of the accused. The paper elaborates on various judicial interpretations of a confession and related legal provisions in detail. Attempts have also been made, through interviewing several lawyers, Magistrates and human rights activists, to find

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² For more information see Asian Legal Resource Centre publication *Article 2 on Lawless Law-enforcement: The Parody of Judiciary in Bangladesh*. Vol. 5 No. 4 (August 2006) ISSN 1811-7023. See also Odhikar : Investigation, Research and Publication of Human Rights Violations. (2003 – 2005). Published by Odhikar. See also country specific reports published by Amnesty International (<http://web.amnesty.org/library/print/ENGASA130122003>), Human Rights Watch regarding abuse by law enforcement agencies in Bangladesh.

out the methods used by police and the magistrates in order to extract a confession and what improvements can be made to the laws in order to safeguard the rights of the accused person.

DEFINING A CONFESSION

In law, there is no definition of the term ‘confession’, but the term could be defined as: A statement made ‘voluntarily by a person charged with a crime, stating or suggesting an inference that he committed the crime. It is a very special type of admission made by an accused only.’³ In the matter of *State Vs. Lahu Mia*⁴, the honourable Judge explained the meaning of a ‘confession’ as being:

...a species of admission....a confession or admission is evidence against its maker, unless its admissibility is excluded by provisions embodied in the Evidence Act⁵.

In the matter of *State Vs. Md. Ali Kibria*,⁶ it was held:

‘The law requires that the confession should not only be voluntary but must also be true. For the purpose of establishing its truth, examination of the confession and its comparison with remaining evidence of the prosecution and probability of the case would be relevant.’⁷

Thus, in order to amount to a confession, the statement made by the accused person must be a voluntary and true admission to the fact that he committed the crime. It must also be made before the commencement of the trial.

Confessions are of two kinds – Judicial and extra-judicial. A judicial confession is made to the Magistrate, as per the provisions mandated in section 164 of the Code of Criminal Procedure, 1898. However, there is no clear definition of an extra judicial confession in any law, and thus there was the need to look at judgements and explore opinions for a clear understanding.

According to Dr. Rafiqur Rahman, in his book ‘Law of Evidence’⁸, an extra judicial confession is one that is ‘made not to a Magistrate but to any other person except a police officer’. On the other hand, there are several judgements that have termed the statement of guilt made by the accused to

³ Rahman. Dr. Rafiqur : *Law of Evidence* (1993 Ed.) pp 65. See also 25 (1963) DLR (DB) 41, 16 (1986) BLD (HCD) 390 (DB)

⁴ 39 (1987) DLR (AD) 117

⁵ Ibid at para 67 pp 145. See same paragraph for more definitions.

⁶ 43 (1991)DLR (HCD) pp. 512

⁷ Ibid at para 11 pp 515

⁸ Supra note 3 pp. 70.

the police officer as an ‘extra judicial confession’, which leads to the recovery of material evidence as well. According to popular practice, therefore, statements of guilt made by the accused person to a police officer, wherein he mentions ways to recover material evidence (like a murder weapon, etc.) is recognised as an extra judicial confession. However, only the fact that the accused led the police to recover evidence will be relevant in the court, while the confession of guilt made to police or/and others except a Magistrate will not be receivable as evidence⁹.

CONSTITUTIONAL RIGHTS AND CONFESSIONS

The Constitution of any country is the highest law of the land and, according to at least the Constitution of the People’s Republic of Bangladesh, ‘all other laws that are inconsistent with the Constitution shall, to the extent of the inconsistency, be void’¹⁰. Article 35 (4) of the Constitution talks about self-incrimination. The Article states: ‘no person accused of any offence shall be compelled to be a witness against himself’.

The main objective of Article 35(4) is to protect an accused person from any compulsion to make self-incriminating statements, including confession. Here, Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information¹¹. According to the law, no one can be forced to do this. Thus, the operative word here is ‘compulsion’, which may be translated to mean ‘duress’. What is this ‘duress’? According to Shamsul Huda,

The compulsion in ‘duress’ is a physical objective act and not the state of mind of the person making the statement, except where the mind is so conditioned by some extraneous process as to render the making of the statement involuntary and therefore extorted.¹²

Thus, in order to gain the protection of Article 35 (4) of the Constitution against testimonial compulsion, it must be proved that the accused person made his statement under compulsion and that it was not voluntarily given. This rule is also reflected in the laws that govern the making and recording of confessions – the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. These laws make it mandatory that the confessional statement must be freely given without any duress or threat or compulsion. According to Mahmudul Islam,

⁹ Section 25 of the Evidence Act.

¹⁰ Article 7 (2)

¹¹ *BombayVs. Kathi Kalu*. AIR 1961 SC 1808

¹² Huda. A.K.M. Shamsul: *The Constitution of Bangladesh*. Vol 1. Signet Press Ltd. 1997.

The protection [under Article 35 (4) of the Constitution] being against any compulsion, Art. 35 (4) is not attracted in the case of a confession which must be voluntary and without any inducement. But the number of confessions has increased manifold in criminal prosecution creating doubt as to whether those confessions are at all voluntary.¹³

THE LAWS GOVERNING CONFESSIONS

The Code of Criminal Procedure, 1898 and the Evidence Act, 1872 contain the laws pertaining to confessional statements.

The Code of Criminal Procedure, 1898

Section 164 of the Code of Criminal Procedure, 1898 contains the requirements necessary in this regard, under the heading 'Power to Record Statements and Confessions'. The section lays down the following requirements: (1) Any Metropolitan Magistrate, any Magistrate of the first class and any Magistrate of the second class empowered by the Government to do so, may record any statement or confession made to him in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial. (2) The statements are recorded and signed in the manner provided in Section 364 of the Code of Criminal Procedure, 1898, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired or tried. (3) Before recording the confession, a Magistrate has to 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. Furthermore, he must question the person making it and determine whether it was made voluntarily before he records it.

At the end of the record, the Magistrate makes a memorandum at its end stating *inter alia*:

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. (Signed:...)

Section 364 of the Code of Criminal Procedure, 1898 deals with the ways in which the statements made by the accused person must be recorded by the Magistrate or Judge. The section makes it obligatory that the Judge or Magistrate read out the statement made by the accused in his

¹³ Islam. Mahmudul. *Constitutional Law of Bangladesh* (second edition) Published by Mullick Brothers. February 2002. Para 2.153, p 220.

hearing and make sure that he confirms it to be true. The confession also has to be signed by the accused. The section is only applicable when the person examined is the accused. In the matter of *Mosammat Amena Khatun Vs. State*¹⁴, it was held that:

When a confessional statement has been recorded by a Magistrate after complying with the provisions of section 164 and 364 Cr.P.C. the said confessional statement can be admitted into evidence by the trial court under section 80 of the Evidence Act even without examining the recording Magistrate¹⁵.

The Code of 1898 provides that a confession 'shall not be made to a police officer' and that 'it must be made to a Magistrate.' It also lays down that 'the Magistrate must record it in the prescribed format and only when so recorded does it become relevant and admissible in evidence'.¹⁶ There are many instances where this provision has been upheld in the courts of law. In *Abul Hossain Vs. The State*¹⁷ it was held:

Provisions under Section 164 and 364 of the Criminal Procedure Code are mandatory and required to be strictly followed to make a confession voluntary and true and fit for reliance for convicting the accused on his confession¹⁸.

Again, in the case of *Hafizuddin v State*¹⁹ the Magistrate did not give warnings before recording the confession and time for reflection. The Magistrate also failed to inform the accused that they would not be sent to police custody after making the confessional statements. It was held that 'the confessional statements, in such facts and circumstances, are neither voluntary nor true'.²⁰

The form used to record the confessional statement by the Magistrate is itself a small law booklet. The left margin of the form contains the rules that should be followed. The form states *inter alia*:

Magistrates should clearly understand the great importance of giving their closest attention to the procedures 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

¹⁴ 14 (1994) BLD (HCD) 332

¹⁵ Ibid. Para 9 pp 333

¹⁶ Huq. Zahirul. *Law and Practice of Criminal Procedure*. Tenth Edition. Bangladesh Law Book Company 2006. Pg. 258.

¹⁷ 46 (1994) DLR (HCD) 77

¹⁸ Ibid at para 7 pp 79

¹⁹ 42 (1990) DLR (HCD) (DB) 397

²⁰ Ibid at para 15b pp 402

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.²¹

The Evidence Act, 1872

Sections 24 to 30 of the Evidence Act, 1872, discuss 'confessional statements', and the provisions can be divided into the following categories:

The Confession has to be voluntary.

Section 24 of the Evidence Act, 1872 states that in a criminal proceeding, a confession would not be accepted and 'deemed irrelevant, if the court deems that the confession was:

Caused by any inducement, threat or promise having reference to the charge against the accused person; proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused personal grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

For example, in the case of *Nazrul Islam Vs. The State*²², it was held that

When an accused is under threat of being sent back to police remand he is likely to make a confession out of fear. His statement in such position should not be considered as voluntary.²³

Again in the case of *State v Mizanul Islam @ Dablu and others*,²⁴ the condemned prisoner was kept under the charge of a police personnel when he was given time for reflection (by the Magistrate). It was held by the learned judges that:

Gross illegality was committed by the Magistrate while recording confessional statements, which stands vitiated by illegality²⁵.

²¹ Form No. (M) 84: Form for recording confessions or statements under Section 164 of the Code of Criminal Procedure, 1898.

²² 45 (1993) DLR (HCD) 142

²³ Ibid at para 19 pp 145

²⁴ 8 (1988) BLD (HCD) (DB) 317

²⁵ Ibid at para 40 pp 328

Statements of guilt made to a police officer are not legally recognised as confessions

Section 25 of the Act of 1872 states that no confession to a police officer ‘shall be proved as against a person accused of any offence’. That is, if an accused person makes a statement admitting his guilt to a police officer – that is, an extra judicial confession- it will not be legally recognised as a confession. In the case of *State v Gbandal*²⁶ it was held that:

Confessional statement of an accused incorporated in the F.I.R lodged by him is hit by the provision of Section 25 of the Evidence Act and as such not admissible against him.²⁷

Thus, the Evidence Act, 1872 fully recognises the danger that if such a statement made to the police officer was given the legal status of a confession, this may lead the police to use all sorts of force or other methods to extract confessions – which may also lead the accused to falsely implicate himself.

Confessions to police leading to discovery of material evidence

The law is not blind to the fact that to prove a crime, a statement from the accused is not enough. Therefore, Section 27 of the Evidence Act, 1872 states that if an accused person makes a statement to a police officer, when there is no Magistrate present, and if, based on that statement, the police recover material evidence, the part of the accused statement relating to the recovery of such material evidence will be receivable in the court.

However, this provision was enacted a century before the coming into force of the Constitution, which prohibits self-incriminatory evidence. Whether an accused person’s statement leading to the discovery of evidence and incriminating material, such as a murder weapon or concealed arms, is violative of the constitutional prohibition does not seem to have been litigated in our courts.

Whether an accused person, by helping police to recover self-incriminatory material, helps in the process of investigation (against him) and, therefore, should be entitled to a reduced sentence, that is, when such assistance is a mitigating factor in determining the sentence – if he is subsequently found guilty – is usually part of the sentencing guideline. However, our criminal justice system does not yet have any sentencing guideline in place.²⁸

²⁶ 13 (1961) DLR (WP) 62

²⁷ Ibid at para 7 pp 64

²⁸ Interview with Dr. Shahdeen Malik. Advocate, Supreme Court.

Confessions made under promise of secrecy or when accused was intoxicated

Section 29 of the Evidence Act, 1872 comes across as a grey area in the realm of confessional statements. Even though relevant provisions of the law makes it clear that confessions are inadmissible if they are made:

1. under threat,
2. inducement or
3. promise by a person in authority with reference to the charge,²⁹

Section 29 of the Evidence Act, 1872 states that admissions are admissible by the courts as evidence if made by a person:

1. under a promise of secrecy or
2. in consequence of a deception practised on the accused person for the purpose of obtaining it, or
3. when the accused was intoxicated or drunk, or
4. because it was made in answer to question which he need not have answered, whatever may have been the form of those question, or
5. because he was not warned that he was bound to make such confession, and that the evidence of it might be given against him.

Such confessions will be seen as freely made statements of guilt.

This section draws a very thin line between which confessions are admissible in court and which ones cannot be admitted. It also gives rise to the question whether confessions made under such circumstances can truly be seen as being made ‘voluntarily’. However, admissibility of a statement made by any of the means mentioned in Section 29, depends on the discretion of the judge. Regarding this section, the honourable Judge in the case of *Kuruma Vs. The Queen*³⁰ has put down a test as to how one can decide admissibility:

Where the question is whether evidence is admissible, the test to be applied is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained....no doubt in a criminal case, the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. If, for instance, some admission of some pieces of evidence had been obtained from a defendant by a trick, the judge might properly rule it out.³¹

²⁹ Section 24 of the Evidence Act, 1872.

³⁰ 9 (1957) DLR (PC) 336

³¹ Ibid at para 5 pp 338

Therefore, whether a confessional statement extracted by means of trickery, false promise or by inducing the maker with alcohol is admissible or not, depends on the discretion of the Magistrate or Judge.

Confessions of a co-accused

So far, we have established that if an accused person makes a statement declaring his guilt, it is a confession that he has committed the crime – but what if he is a co-accused who is willing to make such a statement? According to section 30 of the Evidence Act, 1872, if a co-accused in a crime makes a confession and implicates others with him, his confession may be considered against the other accused persons as well. However, even though this section of the law makes the confession of one accused person receivable against his co-offenders, this does depend on the discretion of the court. For example, in the case of *Nazrul Islam Vs. The State*³², it was held that

The court may take into consideration the confessional statement of a co-accused under section 30 of the Evidence Act against one who did not confess, but an accomplice is unworthy of credit unless he is corroborated in material particulars³³.

The necessity of having material evidence to back up the statement of a co-accused has also been reflected in the matter of *State Vs. Mir Hossain@ Mira and Others*³⁴, where it was held that

Under section 30 of the Evidence Act confession of a co-accused can be taken into consideration and on the strength of that confession another co-accused can be convicted provided the said confession is corroborated by any other evidence, either direct or circumstantial³⁵.

Again, in the case of *State Vs. Lieutenant Colonel Syed Farook Rahman and 14 Others*³⁶ it was held:

The conviction cannot be based solely on the basis of confessional statement of a co-accused unless it is corroborated by some other independent evidence³⁷.

³² 45 (1993) DLR (HCD) 143

³³ Ibid at para 20 pp 146

³⁴ 56 (2004) DLR (HCD) 124

³⁵ Ibid at para 34 pp 130

³⁶ 53 (2001) DLR (HCD) 287

³⁷ Ibid at para 88 pp 305

Thus, the court may feel the need to examine material evidence before deciding that the silent co-accused was actually an accomplice to the crime. This is not to say that the confessional statement by a co-accused has no value at all. If there is corroborative evidence and if the statement was made voluntarily, then it plays a role in further convictions. In the matter of *The State Vs. Sadek Matbar and Others*³⁸ the learned Judge commented:

A confessional statement of an accused in so far as it implicates a co-accused is of very little value, but it would not be correct to say that it is of no value whatsoever.³⁹

In the matter of *Bhuboni Sabu Vs. The King*⁴⁰, the learned Privy Counsel explains the dangers of relying on the confession of an accomplice:

Section 30 [of the Evidence Act] seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type....it is not required to be given on oath nor in the presence of the accused...section 30 however provided that the court may take the confession into consideration and thereby, no doubt, make it evidence on which the court might act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence....the courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused.....The danger of acting upon accomplices' evidence is not merely that an accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue⁴¹.

THE PRACTICE OF TAKING JUDICIAL AND EXTRA JUDICIAL CONFESSIONS

This section of the paper relies mainly on the experience of members of the judiciary and lawyers practicing criminal law, who were interviewed as part of the research, for a better understanding of the practices regarding the recording of confessional statements, etc. Among those interviewed are a former Chief Justice, a Secretary of the Ministry of Law, Justice and

³⁸ 13 (1961)DLR (HCD) (DB) 591

³⁹ Ibid at para 47 pp 604

⁴⁰ 2 (1950) DLR (PC) 39

⁴¹ Ibid at pp 40

Parliamentary Affairs, a former Attorney General for Bangladesh, three Advocates of the Supreme Court and six Magistrates. Reported case studies spanning from 1949 to 2005 have also been included to highlight practical experiences in the taking of confessions.

Extra Judicial Confessions

Extra judicial confessions are deemed to consist of mainly those confessions that are made to the police after the arrest of the accused. Such confessions lead to discovery of vital evidence and it is only that part of the statement made by the accused that can be used in court. Statements admitting guilt made to persons who are neither police nor the Magistrate are also considered extra-judicial confessions.

Even though extra judicial confessions are not admissible in court and can be used only in terms of proving the presence of discovered evidence⁴², there have been instances where such a confession is enough to convict its maker. In the matter of *Nausber Ali Sardar and Others Vs. The State*⁴³ it was held that ‘an extra judicial confession can form a basis for conviction if found to be voluntary and true’. Thus, even in this case, it is paramount that the confessional statement was given voluntarily and without any kind of intimidation or coercion. In the case of *State Vs. Badsha Molla*⁴⁴, it was held:

Evidence of an extra judicial confession depends on the veracity of witnesses to whom it was made and it requires material corroboration by evidence of impeachable character⁴⁵.

Without independent evidence of corroboration, it is not possible to accept the extra judicial confessions as true beyond dispute. The status of persons to whom confessions were made is not any guarantee of their truth⁴⁶.

When an accused person makes a statement admitting his guilt to the arresting or investigating police officer, the current practice is that his statement is recorded on a blank piece of paper and, after it is read to him, he signs it. The police officer counter signs this document. There is no format as the one followed by the Magistrate under section 164 of the Code of Criminal Procedure, 1898 nor is a lawyer present as a witness to the making of the statement.

As early as in 1913, Charles Richmond Henderson wrote: “The ‘third degree’ is said to be familiar in India.”⁴⁷ He goes on to quote Henry W. Nevinson:

⁴² See sections 25 and 27 of the Evidence Act, 1872.

⁴³ 39 (1987) DLR (AD) 194

⁴⁴ 9 (1989) BLD (HCD) 257

⁴⁵ Ibid at para 21 pp 264

⁴⁶ Ibid at para 29 pp 268

Wherever I went in India I heard the same complaint of the unscrupulousness and corruption of the police⁴⁸.

The law-enforcing agency in Bangladesh has not changed much since. It is notorious for its harassment of arrestees – both in physical and mental terms. The physical torture of detained persons in order to extract information and confessions is extremely common. Methods of torture include electric shocks, pulling out nails, pouring water mixed with red chilli powder up noses and into wounds, beating with metal rods and heavy sticks, kicks, slaps, keeping the arrestee awake all night, deprivation of food and water, etc⁴⁹.

One example of this kind of torture resulted in the death of 35-year-old Shafi Uddin. On 30 November 2005, Shafi Uddin was arrested on suspicion of involvement in a theft. On 01 December he was produced before the magistrate and taken into remand for 3 days. After that the police allegedly assaulted him with hockey sticks. He was injured so badly, he died on his way to the hospital. According to the police, Shafi confessed to theft and they went to recover the stolen goods from a specific house, but on the way, Shafi fell sick and they rushed him to the hospital, but it was too late. Eyewitnesses at the hospital morgue stated that they saw serious injuries on Shafi's body and said that the police coerced staff at the morgue to alter the contents of the autopsy report.⁵⁰

In the matter of *Brig. (Retd) A.H.M. Abdullah Vs. Government of Bangladesh and Others*⁵¹, Justice Zubayer Rahman Chowdhury made the following comment on police harassment:

The police as the law enforcing agency of the State are to ensure that the law of the land is obeyed and followed by the general public. It is therefore not only a matter of utmost regret but also of grave concern when such acts of violation are committed by the police themselves. It is also a sad reality that although police excesses occur regularly, such incidents are rarely challenged in a court of law.⁵²

Whether a confession is given voluntarily or not really depends on how the accused was treated by the police prior to being brought before the Magistrate. According to the U.S. Department of State's Human Rights Report of 2001, in 1998, the Deputy Commissioner of the Dhaka Police detective branch 'publicly

⁴⁷ Henderson. Charles Richmond: "Control of Crime in India". *Journal of the American Institute of Criminal Law and Criminology*, (Vol.4, no.3 September 1913). Pp 378-401

⁴⁸ Ibid. Quoted from Henry W. Nevinson: *The New Spirit in India (1908)*

⁴⁹ Supra note 2. See also *Article 2*. (August 2006 Vol. 5, No 4). pp 15

⁵⁰ Ibid pp 78

⁵¹ 25 (2005) BLD (HCD) 384

⁵² Ibid at para 31 pp 391

defended the use of physical coercion against suspects, saying that the practice was necessary in order to obtain information.⁵³

A large majority of cases of retraction of confessions are based on the claim by the applicant that the confession was a result of police torture, after arrest or in remand⁵⁴.

Police induced false confessions arise when a suspects resistance to confession is broken down as a result of poor police practice, over zealousness, criminal misconduct and/or misdirected training. Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest. Sometimes police become so certain of the suspects guilt that they refuse to even-handedly evaluate new evidence or to consider the possibility that a suspect may be innocentOnce a confession is obtained, investigation often ceases, and convicting the defendant becomes the only goal of both investigators and prosecutors.⁵⁵

The above extract regards police in the United States of America. Things are not much different – if not worse – in Bangladesh. Once a person is in police custody, the police have a range of ways to proceed in making his life so miserable that he is bound to confess – even if he did not commit the crime.

If threats and negotiations with an accused do not yield anything lucrative, police will turn to what is euphemistically known as the Third Degree Method: torture. The third degree starts out light and is gradually increased in intensity as the interrogation continues.⁵⁶

In the matter of *Zahangir Alam @ Khokon Vs. The State*⁵⁷, a case of murder under section 302 of the Penal Code, 1860 the appellant, Zahangir Alam was not named in the First Information Report, there was no eyewitness to the occurrence and the prosecution witnesses did not name him as an accused. Furthermore, Zahangir Alam disclosed that:

⁵³ U.S. Department of State: *Country Reports on Human Rights Practices 2001. Bangladesh*. Released by the Bureau of Democracy, Human Rights and Labour, (March 4, 2002).

⁵⁴ See section 167 of the Code of Criminal Procedure, 1898. The issue of remand is discussed in the section on Judicial Confessions later on.

⁵⁵ Leo, Richard A. and Ofshe, Richard J. “The Consequences of False Confessions: Deprivations of Liberty and Miscarriage of Justice in the Age of Psychological Interrogation”. *The Journal of Criminal Law and Criminology* (1973). Vol 88, Mo. 2 (Winter 1998) pp 429 - 496.

⁵⁶ *Article 2*: (August 2006). Vol 5, No 4), p15.

⁵⁷ Judgement given on 27 May 2007. Unreported.

He was arrested from Jhinaidah and was bound to give statement under section 164 of the Code of Criminal Procedure by heavy torture. His confessional statement was neither voluntary nor true.⁵⁸

He also disclosed that he gave his confessional statement in manner in which the police told him to⁵⁹. Zahangir Alam's case is just one of many such incidents.

On 7 June 2001, Maulana Akbar was arrested by police under suspicion that he was involved in a bombing incident that killed 10 persons on 14 April 2001. Detectives later issued a press release that Maulana Akbar had confessed his involvement in the bombing. On June 28, Akbar retracted his confession in a written statement to the court claiming that police had tortured him in an effort to extract a confession. Akbar stated that the detective branch repeatedly subjected him to electric shock, poured hot water mixed with powdered chillies into his nose, and threatened to kill him if he did not confess.⁶⁰

The fact that the law states that an arrested person must be produced before a Magistrate within 24 hours of his arrest⁶¹ is occasionally overlooked by the arresting police, thus casting serious doubts on any confession he may later make to the Magistrate. In the matter of *Shabarul Islam @ Green Vs. State*⁶², the accused person was arrested on 4 March 1990 at 0400 hours in the morning and produced before the magistrate to make his confession on 6 March 1990 at 10 in the morning. The learned court held

The accused was kept in custody for 54 and a half hours after arrest without remand by a Magistrate and no explanation was given for such custody and as such the prolonged police custody immediately preceding the making of the confession is sufficient to treat it as involuntary.⁶³

⁵⁸ Extract taken from Criminal Appeal No. 2826 of 1998. *Zahangir Alam @ Khokon Vs. The State*. Judgement passed on 27 May 2007. Unreported.

⁵⁹ *Ibid.*

⁶⁰ *Supra* note 53.

⁶¹ Section 61 of the Code of Criminal Procedure, 1898: No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

⁶² 1 BLC (HCD) 524

⁶³ See also *Nil Ratan Biswas and Others Vs. State* 3 BLC 35,

Once an accused person has confessed (extra judicial) to committing a crime – regardless of how his statement was taken from him - the police do not find the need to carry out any further investigation to corroborate his statement. If the confession leads to discovery of evidence, it and the confessional statement are enough to convict the accused person. If there is no discovery, but the confession made to the Magistrate, a sentence is still passed, but there is the risk that there will be an application to retract the confession on the grounds that it was made under duress. In the words of Sir E. C. Cox,

In my opinion, it would be advisable to make all confessions made previous to trial once and for all irrelevant. One effect of this would be to put the police upon their mettle to obtain extraneous evidence and not rest satisfied with this miserable confession, which is more likely than not to be withdrawn, and leave them stranded at the last moment.⁶⁴

Judicial Confessions:

The fact that Magistrates do not always adhere to the formalities laid out in section 164 of the Code of Criminal Procedure, 1898, was a common thread among the legal experts interviewed. Basic information such as informing the accused that he was not bound to make a confession, that what he said could be used as evidence against him, ensuring that the police were not present in the courtroom, giving the accused time to reflect before he makes his statement and making sure that the confession is voluntarily given are a not supposedly followed by all Magistrates.

Time for Reflection

In actual practice, there is no hard and fast rule regarding the time that must be given to the accused person by the Magistrate before the former makes his confessional statement. However, the form that is used to record confessions states that an accused must be given ‘at least three hours for reflection, during which period he shall not be in contact with any police officer and shall not be able to converse with any person’.⁶⁵

A Magistrate can give anything from two to 24 hours to an accused person before he is prepared to make his statement⁶⁶. Apparently, it

⁶⁴ Cox. Sir. Edmund C.: “Police and Crime in India”. Quoted in. Henderson. Charles Richmond: “Control of Crime in India” *Journal of the American Institute of Criminal Law and Criminology*, (Vol.4, no.3 September 1913). Pp 378-401

⁶⁵ Rule 23 (3) of Form number (M) 84 used to record Confessional statements under section 164 of the Code of Criminal Procedure.

⁶⁶ In 19 (1968) DLR (Dac) 573, three hours was given; in 20 (1969) DLR (DB) 526, more than an hour was given; and in 40 (1988) DLR (HCD) (DB) 186 three hours was given to the accused to reflect.

depends on the frame of mind of the accused person, the discretion of the Magistrate and the circumstances of the case. In the matter of *State v Jatindra Kumar*⁶⁷, it was held that:

There is no rule of law which gives precisely the time that the Magistrate must allow for such purpose. This 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 for such reflection⁶⁸.

Police presence in courtroom

As regards the presence of police in the courtroom, it was agreed by all those interviewed that even though in some instances the police were present, they were made to stand some distance away from the accused person and that most Magistrates made sure that they were not present in the court room.

These practices had led to several conflicting decisions. For example, in the matter of *Abul Kashem v State*⁶⁹, the confession of the accused was made in the courtroom at a time when the police officers were present near the prisoner. It was held that such confession was admissible in evidence under Section 26 of Evidence Act, 1872. Again, in *Dipok Kumar Sarkar v The State*⁷⁰, the Magistrate, before recording the confession, did not inform the accused person that he would not be remanded to the police custody even if he did not make any confession. It was held that there is no requirement under the law to inform the accused as above.

Of course, if a Magistrate has any reason to believe that the accused is apprehensive of the police or that the police might have tortured or prevailed upon him during custody, he may assure him by telling him as aforesaid. But that is not to say that if it were not said the voluntariness of the confession would be in doubt⁷¹.

However, in *Zabeda Bewa v State*⁷² it was held that:

Section 164 [of] Cr.P.C is a section conferring the powers of a Magistrate and delimiting them. No doubt a Magistrate acting u/ss 164 and 364 [of] Cr.P.C is not acting as a court, yet he is a judicial officer and both as a matter of construction and good sense where a power is given to do a certain thing in a

⁶⁷ 20 (1969) DLR 526

⁶⁸ Ibid at para 20 pp 533

⁶⁹ 22 (1971) DLR (HCD) 279

⁷⁰ 1988 BLD (HCD)109

⁷¹ Ibid at para 13 pp 122

⁷² 37 (1985) DLR (HCD) (DB) 66

certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. It is a settled principle of law that the requirement of the adherence to the provision of Section 164(3) Cr. P.C is not a mere matter of form, but one of the substances. Incurable defects in the confession cannot be cured by subsequent examination of the Magistrate who recorded the confession.⁷³

In the matter of *Hafizuddin v State*⁷⁴, where the Magistrate did not give warnings before recording the confession nor gave the accused time for reflection and also failed to inform the accused that they would not be sent to police custody after making the confessional statements, it was held that 'the confessional statements, in such facts and circumstances, were neither voluntary nor true'⁷⁵. Similarly in *State v Ali Kibria*⁷⁶ The Magistrate admitted in his cross-examination that he did not give assurance to the accused before recording confession that the accused would not be sent back to the police custody. The Magistrate further admitted that after recording confessional statement the prisoner was send back to the police custody. It was held by the learned Judges that:

Such a confession is to be treated as not voluntarily made. The law requires that the confession should not only be voluntary but it also must be true. For the purpose of establishing its truth, examination of the confession and its comparison with remaining evidence of the prosecution and the probability of the case would be relevant.⁷⁷

The reported judgements, thus, do not indicate a uniform practice. Deviations from both the minimum time for reflection and giving assurance that the accused would not be sent back to police custody, etc. have been found in some cases and strict adherence has been found in others. Confessions given in derogation of the formal requirements have been discarded by the High Court Division. However, there are also some judgements that did not find these derogations significant enough to disallow the confessional statement.

⁷³ Ibid at para 12 pp 69

⁷⁴ 42 (1990) DLR (HCD)(DB) 397

⁷⁵ Supra note 19 at para 12 pp 69

⁷⁶ 43 (1991) DLR (HCD)(DB) 512

⁷⁷ Ibid at para 11 pp 515 See also *State v Lutfor Fakir* 24 (1973) DLR (HCD) (DB) 218, *State Vs. Raisuddin and Others* 48 (1996) DLR (HCD) 517, *Salauddin Vs. State* 32 (1980) DLR (HCD) 227, *The State Vs. Billal Hossain* 2000 BLD (HCD) 45, *State v Mizanul Islam @ Bablu and others* 1988 BLD (HCD) (DB) 317.

Determination of ‘voluntary nature’ of the statement

Whether a confessional statement was made voluntarily or not is the most important factor to determine whether it can be admissible or must be rejected. Almost all the applications for retraction of confessional statements are based on the claim that the confessions were the outcome of police torture. When asked about how they came to a conclusion that the confession was voluntary, four of the 6 Magistrates interviewed stated that they went on gut feeling and by observing the attitude of the accused – did he look scare or worried or ill, did he have bruises or any signs of physical torture, etc. In the matter of *Md. Azad Shaikh @ Azad Vs. The State*⁷⁸ it was held by the learned Judge that:

In order to be admissible an admission must be voluntary. If it proceeds from remorse and a desire to make reparation for the crime it is admissible. If it follows from hope, or fear, excited by persons in authority it is inadmissible.⁷⁹

Thus, it is paramount that a confessional statement is made voluntarily, without coercion or threat. However, cases have shown that testing the voluntary nature of the confession is sometimes ignored by the Magistrate and those statements that have been made after prolonged police custody have been accepted as admissible.

There are several cases that show that the Magistrate had not taken due care in ascertaining whether the confession was given voluntarily or not. In the matter of *Md. Azad Shaikh @ Azad Vs. The State*⁸⁰ it was held:

When a Magistrate has not questioned the accused to know whether he is making the confession voluntarily, it has been held in many cases that it is not a curable defect and the confession deserves to be rejected. Section 164 (30) [of the Code of Criminal Procedure, 1898] is a mandatory provision of law. The requirement of adherence to the provisions of section 164 (3) is not a mere matter of form, but of substance that has to be complied with.⁸¹

In this case, the Magistrate had failed to fill in many of the important paragraphs in the form prescribed for recording confessional statements. Nor did the Magistrate ‘make any genuine effort to find out the real character of the confession which he recorded. and the manner in which the confession was recorded casts serious doubts as to the voluntary character of the statement’.⁸²

⁷⁸ 41 (1989) DLR (HCD) (DB) 62

⁷⁹ Ibid at para 10 pp 65

⁸⁰ Ibid

⁸¹ Supra note 79

⁸² Supra note 78 at para 9 pp 64

Magistrates have accepted confessional statements from accused persons after they have been in prolonged police custody and even after they have complained of police torture. There have also been cases where Magistrates have sent accused persons to police remand and then recorded their confessions. Remand in police custody, under the Code of Criminal Procedure, 1898, is when the police seek more time (from the Magistrate) to keep the accused person in their custody, for further questioning. Section 167 of the Code of Criminal Procedure, 1898 states that at the stage of investigation of an offence, a Magistrate cannot award more than 15 days of remand in police or jail custody.

A police officer makes a prayer to the Magistrate that the accused is involved in a cognisable offence and that for the purpose of interrogation he needs to be taken into remand. In Bangladesh, police remand is synonymous with police torture and more often than not, the accused and his relatives offer money to the police to prevent remand. In many instances, the police themselves ask for the money.⁸³ Any statement made to a Magistrate by the accused after the latter has been through a period of remand in police custody ought not to be recognised as a voluntary statement by the Magistrate. However, in some cases this has happened. In the matter of *State Vs. Lahu Mia and Another*⁸⁴, when the Magistrate neglected to take into account that the accused had been in police custody for six days, the honourable Court held:

From the evidence of the Magistrate, none of these requirements [under section 164] are found to have been fulfilled as he simply recorded the statement of the accused ignoring the broad fact that the accused was in police custody for six days, besides the complaint by him of torture. A confession of this nature can hardly be accepted as a voluntary one.⁸⁵

Since the accused had refused to make a confession statement previously, the police has asked for the weeklong remand 'for getting further information', which the Magistrate had granted.⁸⁶ Again, the Rules attached to the format for recording a confession clearly state that:

Applications, if ever made, for the remand to police custody of a prisoner who has failed to make an expected confession or statement, should not be granted'⁸⁷

⁸³ Supra note 2

⁸⁴ 39 (1987) DLR (AD) 117

⁸⁵ Ibid at para 37 pp 134. See also para 84 pp 150.

⁸⁶ Ibid.

⁸⁷ Supra note 21. Rule 24 (4)

The Magistrate has even sent the accused to police remand even after he made a statement confessing his crime, which is in total contravention of the law. For example, in the matter of *Shah Alam and Others Vs. State*⁸⁸, it was held that:

Giving of remand of the confessing accused after recording his confessional statement is against the principle of law and as such the prosecution cannot get any benefit out of the confessional statements⁸⁹

Again, in the case of *State Vs. Abdul Hashem*⁹⁰ the Magistrate had previously granted the police remand of the accused and then, after recording the confession of the accused, sent him back to police custody. It was held by the learned judges:

Therefore, we find that the Magistrate had no idea or acumen that it was his legal duty to remove the inducement and influence of the police completely from the mind of the accused before recording their confession. So, therefore, we hold that the confession made by the accused cannot be considered either against the maker or against the co-accused⁹¹

In addition to the illegal action of the Magistrate, this finding of the court clearly recognises the recourse to torture by police in remand. Unfortunately, such recognition as proof of torture has not led to judicial order to investigate allegations of torture by police or even a direction upon the police authorities to ensure that police in course of investigation do not become violators of the law.

Judicial Decisions Affecting the Confession-Maker.

It is not only the Magistrate who lapses in following the procedures for taking confessions. Retraction applications—made to the Court of Sessions—are based largely on accusations of police torture or made by persons who were implicated by the confession of a co-accused. A study of such cases show that this issue of whether to allow the confession to stand or not, seems to be based, in a large part, upon the discretion of the Judge. For example, in the matter of *Mojibar Vs. the State*⁹² Abdus Sattar made a confessional statement under Section 164 of the Code of Criminal Procedure, 1898 implicating himself in a dacoity along with Mojibar and others. The former stated that the latter had been the leader and the crime was committed at his insistence. The

⁸⁸ 52 (2000) DLR (HCD) 566

⁸⁹ Ibid at para 18 pp 570. See also *Safar Ali and Others Vs. State* 1983 BLD (HCD) 325, *Hasmat Ali Vs. State* 53 DLR (HCD) 169, *Faruque Mahajan Vs State* 49 DLR (HCD) 47.

⁹⁰ 50 (1998) DLR (HCD) 17

⁹¹ Ibid at para 11 pp 19

⁹² 20 (2000) BLD (HCD) 273

learned Assistant Sessions Judge, on the basis of this evidence, convicted Mojibar, even though there was no other corroborative evidence against him. The High Court Division held that:

The learned Judge, the trial court acted wrongly in treating the confessional statement as substantive evidence against the accused appellant....Since the confessional statement is not required to be taken on oath...it cannot be considered as substantive evidence....We find that the learned Assistant Sessions Judge erred in law in admitting the confessional statement of a co-accused as substantive evidence against the accused appellant.⁹³

The case of *Abu Sayed Vs. The State*⁹⁴ was one of a man accused of killing his father, who was convicted based on the confessions of two other persons. An application for retraction had been made to the Court. The High Court Division held:

It is the primary duty of the court first to consider and decide whether the confession is proved to be true and voluntary or not on the evidence on record and in the facts and circumstance of the case. The question of retraction is also to be considered the same way⁹⁵.

Not finding any evidence from the witness statements or the confessional statements of the two others, that implicated the accused with the offence, the Court further commented 'all the confessions, if closely considered, do not inspire any confidence in the judicial mind. So, it is a clear case of no evidence'. The learned judges of the High Court also expressed their displeasure at the Sessions Judge in a statement that I find must be quoted in detail:

We cannot but record our torment and shock at the ignorance of the Sessions Judge about the elementary principles regarding confession. For his judgement and order of conviction, the appellant is rotting in jail since 31. 03. 1990 for the killing of his father, of which he is innocent...it is hard to believe that the Sessions Judge is not aware of the elementary principles regarding trial of a capital sentence case based on confession. It struck us most where there is no direct evidence nor any strong circumstances why, even a grain of doubt did not strike his judicial mind about the innocence of the appellant or the weakness of the prosecution case.... There is therefore no escape from the conclusion that it is the Sessions Judge who is responsible for the wrong done to the appellant⁹⁶.

⁹³ Ibid at para 5 pp 275

⁹⁴ 21 (2001) BLD (HCD) 449

⁹⁵ Ibid at para 15 pp 452

⁹⁶ As stated by Md. Abdur Rashid, J.

It is as if the confessional statement is enough to convict an accused person. The fact that the confession must be corroborated with material evidence, witness statements, etc seems to be immaterial or overlooked. If the accused has confessed to the crime, what more needs to be done? He has made the task of the prosecutor and the court much easier. However, as the learned Judge has commented in the matter of *Abu Sayed Vs. The State*, 'One cannot base a conviction solely on a confession, especially in a criminal offence'. Again, in the case of *Belal alias Bellal and 2 others vs. State*⁹⁷, a dacoity case, it was held by the learned judges that:

In a criminal trial prosecution is obliged to establish by evidence that the crime charged has been committed before seeking to prove that the accused on trial committed the crime. Monir in his *Law of Evidence* (Compact edition by HS Urscker page 13) has stated under the heading, 'Special rules of proof in criminal trial' that, among other things there must be clear and unequivocal proof of *corpus delicti*. Which means that in a case of dacoity the prosecution is required to prove by evidence that there was, in fact, a dacoity committed as alleged in the first information report or consider other evidence showing participation of the accused in the said offence. Consideration of an alleged confession without there being any independent evidence of any offence having been committed amounts to putting the cart before the horse which obviously cannot move⁹⁸.

Since the confession made in this case was recorded by the Magistrate without all the necessary requirements of section 164 of the Code of Criminal Procedure, 1898, being made, the learned court decided that :

...we think it sufficient to point out that the alleged confessions cannot be legally looked into, for even the identity of the appellants as makers of the alleged confession has not been established by any evidence. Neither the police officer who took them to the Magistrate or forwarded them for recording confession nor the Magistrate himself was examined to prove that these were the persons who made the confessions before a Magistrate (which were on record). We must, therefore, hold that in the facts of the case there was no legal evidence before the Court on the basis of which the appellants could be lawfully convicted for the offence alleged⁹⁹.

⁹⁷ 54 (2002) DLR (HCD) 80

⁹⁸ Ibid at para 25 pp 86

⁹⁹ Ibid. Para 25 pp 86. See also *Babul @ Abdul Majid Khan and Others Vs. State*. 42 DLR (AD) 186

Thus, we often find that Magistrates and Judges do not strictly follow the relevant legal provisions regarding confessions and sometimes base conviction on inadmissible or improper confessions.¹⁰⁰

Section 533 of the Code of Criminal Procedure, 1898

The redeeming feature for Magistrates, who have failed to correctly record confessional statements, lies in section 533 of the Code of Criminal Procedure, 1898. This section states:

If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take into evidence that such person duly made the statement recorded and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

The provisions of this section apply to Courts of Appeal, Reference and Revision. Again, this is a pre- Constitutional legal provision and whether it could stand up to constitutional scrutiny remains to be seen.

A study of Dhaka Law Reports and other similar case reports showed that cases regarding section 533 of the Code of Criminal Procedure, 1898 were few. Two cases were found in the 1968 volume of the Dhaka Law Reports. In the case of *Ghulam Abbas Vs. The State*¹⁰¹ the learned judges stated that:

If a confession is recorded without the observance of the formalities of S 164, it need not be ruled out completely on that score. There is the curative provision of S 533 of the Code allowing evidence to be taken of such a confessional statement having been made, making it admissible if the error of non-compliance with the provisions of S 164 and 364 of the Code has not injured the accused as to his defence on the merits¹⁰².

However, in the later case of *Nurul Haque and Others Vs. The State*¹⁰³, where it was argued that the Magistrate violated the mandatory provisions

¹⁰⁰ See also *Mojibur Vs. The State* 20 BLD (HCD) 273, *Abu Sayed Vs. The State* 21 BLD (HCD) 449, *The State Vs. Entaj Ali Sheikh* 12 BLT (HCD) 306, *Amir Hossain Howlader and Others Vs. The State* 37 DLR (AD)139, *Maqbool Hussain Vs. The State* 12 DLR (SC) 217.

¹⁰¹ 20 (1968) DLR (WP) (Lahore) 48

¹⁰² Ibid. Para 5 pp 62

¹⁰³ 20 (1968) DLR (HCD) (DB) 780

of section 164 (3) of the Code of Criminal Procedure, 1898, the following was held:

It is a mandatory provision of law that it must be explained to the accused by the Magistrate before recording the confession that he is not bound to make a confession and if he makes a confession it may be used as evidence against him and that no Magistrate should record any confession unless upon putting questions to the accused he has reason to believe that the confession was made voluntarily. Any defect arising out of any violation of any mandatory provision of law is not curable under section 533 of the Criminal Procedure Code.¹⁰⁴

All the provisions contained in section 164 of the Code of Criminal Procedure, 1898 are important and must be followed in order for the Magistrate to ascertain as to whether the statement was given voluntarily and to reassure the accused and give him time to reflect so as to make his confession more accurate and effective. Other case studies mentioned in this paper establish that all the formalities of Section 164 have to be followed and given utmost importance. Regarding the two judgements above and given the large amount of cases where it was shown that the Magistrates and Judges of the lower courts have allowed confessions that they should not have, it seems as if the application of section 533 of the Code of Criminal Procedure, 1898 is an accepted matter among members of the lower judiciary and thus cases challenging its abuse are few.

SUMMARY OF FINDINGS

To summarise the findings from all the above discussions, we need to divide them into four sections, viz., the laws, and practices of the Magistrates, decisions of the lower Judiciary and the effect of the confession on its maker.

1. There is no specific definition of a 'confession' or an extra judicial confession' in the Code of Criminal Procedure, 1898.
2. There is no legal provision for a lawyer to be present when an accused makes a statement to the arresting police officers.
3. Section 29 of the Evidence Act 1872 casts doubts on how voluntary a confessional statement is if given under false promises of secrecy or by other such means.
4. Section 533 of the Code of Criminal Procedure allows Magistrates to disregard the proper recording of confessions, causing conflicting judgements regarding the admissibility of confessional statements.

¹⁰⁴ Ibid. Para 11 pp 783. See also *Md. Azad Shaikh @ Azad Vs The State*. 41(1989) DLR (HCD) (DB) 62

5. There is no specific format or form used for writing down the statement of the accused person who confesses to a crime.
6. Acts of impunity by the arresting police officers, including physical torture and not presenting the accused person before a Magistrate within 24 hours of his arrest, cast serious doubts on the voluntary nature of the confession.
7. The practice of taking the accused into remand for extraction of information leads to the physical torture of the latter, compelling him to make a confession.
8. The major flaw that a Magistrate may have when getting ready to record a confessional statement is his disregard of the factors that could possibly shed a negative light on the voluntary nature of the statement.
9. Magistrates do not always follow the format laid down in section 164 of the Code of Criminal Procedure, 1898, and thus reassuring the accused and ensuring that the confession is being given voluntarily by him is not always done.
10. There are cases where the Magistrate has first sent the accused to police remand and then accepted his confession as 'voluntarily given'.
11. There are cases where the Magistrate has sent the accused person back into police custody after his confession was recorded, in total contravention of the law¹⁰⁵.
12. While carrying out archival research, a case was discovered where the Magistrate, before recording the confession, made the accused take an oath, in contravention with the laws of confession, where the accused cannot be compelled to make such a statement.¹⁰⁶
13. There are instances where the Magistrate has failed to take into account the fact that the accused was not brought before him within 24 hours of his arrest and has recorded the latter's confessional statement nevertheless.
14. Magistrates have also made convictions based on the confession of a co-accused, without considering any material or corroborative evidence.
15. With regard to the law on confessions, there seems to be a lack of professional knowledge and ineptness in addressing the subject on the part of the lower judiciary, often leading to serious acts of injustice.
16. In cases of retraction applications, the Magistrate who recorded the confession is not always introduced as a witness in the proceedings in the Sessions Court and thus cannot opine or verify whether a confession was given voluntarily or not.

¹⁰⁵ For example in *State Vs. Abdul Hashem* 3 (1998) MLR (HCD) 30

¹⁰⁶ *Muhammad Baksh Vs. State (S.C.)* 9 DLR (1957) 11: If a person at the time he makes his statement is an accused person, it is illegal for the court to put him on oath or affirmation. The administration of an oath to an accused person is an express statutory illegality. (Para 6)

17. The accused is sometimes not told that he does not need to make a confession, by the Magistrate, or that his confession may be used against him during trial;
18. It is common for the accused to give a confession at the end of a period of remand, under duress by the police;
19. A co-accused is under the misconception that if he confesses against another co-accused, his sentence will be lighter;
20. An accused sometimes sent back to police custody for a second time after his confessional statement has been recorded by the Magistrate;
21. He is sometimes convicted solely on the basis of his confessional statement or on the confessional statement of a co-accused;
22. Police torture during remand may lead to the death of the accused. A bitter price to pay to get a statement of admission, whereas it is also necessary for the police to carry out an investigation for material evidence as well.

Convictions based solely on confessions seems to be a common incident in some courts, and it is the quick conclusion of a case that is making this a common practice. A confession means that the police need not carry out further investigation for supporting evidence, that they can close a case quickly. It means that they need not ascertain whether the accused is telling the truth or whether he confesses in order to stop the inhuman torture being inflicted upon him. This overzealousness of the police is contagious and the Magistrates have picked it up. It is only when a few of the cases reach the High Court Division of the Supreme Court for appeal for retraction that we are sure that something is seriously wrong. However, not all such cases reach the high echelons of the judiciary. A large number of persons who have been convicted based on confessions come from the poorer strata of society, who are unable to afford a lawyer and do not know that they can appeal. When NGO's and other legal aid organisations hear of their plight, only then are the properly represented.

RECOMMENDATIONS

Something needs to be done to prevent the courts from depending solely on the confession of the accused or co-accused, and to ensure that confessions are always made voluntarily. The following recommendations might help to change the present scenario:

1. The definition of a confession needs to be made clear in the Code of Criminal Procedure, 1898 including what constitutes extra judicial confessions
2. The law could be amended to ensure that a lawyer is present as a witness when an accused person wants to make an extra judicial confession in the police station. The police should not be present even then.

3. No person in remand should be interrogated by the police without being represented by a lawyer of his own choice.
4. There needs to be a specific format to be used by the lawyer when taking statements from accused persons in the police station.
5. The necessity to follow all the formalities in Sections 164 and 364 of the Code of Criminal Procedure, 1898, could be made mandatory
6. Section 533 of the Code of Criminal Procedure, 1898, could be amended so as it does not cover the provisions of sections 164 and 364 of the Code.
7. Sections 24 and 28 of the Evidence Act 1872 could be amended to include the terms 'coercion', 'torture' and 'violence' as well the terms 'inducement, threat or promise' as conditions that make a confession irrelevant and thus inadmissible.
8. If a person confesses to his crime, and the confessional statement can be proved voluntary and true, it should be the judicial practice to reduce his sentence.
9. A monitoring system in the lower courts could be installed to monitor the sentencing practices of Magistrates and members of the lower judiciary.

CONCLUSION

'It is a fundamental principle of common law criminal jurisprudence that the prosecution has to prove its case and the accused cannot be compelled to make any statement against his will. The principle emanates from the apprehension that without protection against self incrimination, an accused would be exposed to coercion and torture.'¹⁰⁷

'No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment.'¹⁰⁸

A confessional statement cannot be the overwhelming reason to convict an accused person. Case studies have shown that the examination of supporting evidence – both material and verbal – is vital as well, in order to ascertain the actual intention of the accused person. Furthermore, given the practice of police coercion, especially when the accused is in remand, there are serious doubts as to the frame of mind of the accused when he made his confessional statement. 'Voluntary statements of guilt' is a vital pre requisite for the admissibility of a confessional statement.

Given the trouble it takes to extract a confessional statement from the accused by the police, and that serious acts of human rights violations fall upon the former in order to 'prepare' him to make a confession, the question

¹⁰⁷ *Supra* note 13 at para 2.152 p 218.

¹⁰⁸ Article 35 (5) of the Constitution of the People's Republic of Bangladesh.

that arises is: why must we even have a law dealing with this topic? Why not do away with the practice of recording confessions altogether. It would certainly improve the activities of the investigation wing of the police. The fact is that, if an accused person is morally compelled to make a confession, out of pure feelings of remorse, he should be allowed to unburden himself to a competent Magistrate. If he does not want to do so – and the law states that he does not have to – the investigating police must follow other legally prescribed methods of collecting evidence in order to ascertain his guilt or innocence. It is the task of the prosecution to prove the case against the accused, not the task of the accused to confess and thus make the system easier. The Constitution makes it clear that no one must be compelled to be a witness against himself and that no one must be subject to cruel, degrading and inhuman treatment. What is now necessary is the proper and effective implementation of these laws, and if necessary, their amendment, in order to ensure that a person on trial is innocent until it can be proven that he is guilty.

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