CHAPTER-I

INTRODUCTION

Man by nature is a fighting animal, hence to think of a crimeless society is a myth. The concept of crime is essentially concerned with the social order. It is well known that man’s interest are best protected as a member of the community. Everyone owes certain duties to his fellowmen and at the same time has certain rights and privileges which he accepts others to ensure for him. This sense of mutual respect and trust for the rights of others regulates the conduct of members of society inters. Although most of the people believe in ‘Live and Let Live Policy’, yet there are a few who for some reasons or the other, deviate from this normal behavior pattern and associates themselves with anti-social elements. This obviously imposes an obligation on the state to maintain normalcy in the society. This arduous task of protecting the law abiding citizen and punishing the law breakers vests with the state which performs it through the instrumentality of law. It is for this reason that Salmond has defined law as a ‘rule of action which are prohibited by the existing law at a given time and place are known as Crimes or wrongful acts, whereas those which are permissible under the law are treated as lawful’.

It would be seen that the concept of crime is closely related to social policy of a given time. It has always depended on the force, vigour and the movement of public opinion and social sanctions, varying from country to country, and in the same country from time to time. That is to say, certain new crimes spring up whereas some existing crimes become obsolete and therefore they are deleted through adequate changes in the criminal law. It is for this reasons that the criminal law has often been considered as a barometer to gauge the moral turpitude of the society at a given time. A few illustrations
from Indian society will support this contention. The legislative measure to legalize abortion in certain cases stringent reflect the changing concept of morality in Indian Society. More recently the stringent anti-dowry laws enacted to prevent the incidence of dowry deaths and bride burning and deterrent legislation against the practice of Sati providing for death sentence and fine to those who abet this evil practice in any form, clearly indicates that the society is no longer going to tolerate atrocities against women and desires to assure them a dignified place in the community. Similarly what is regarded as crime under one social order may not be regarded as crime under another social order. For instance un-natural sexual relationship which is regarded as a heinous crime in India is not punishable in England.

Criminal behaviour is an integral part if the social behaviour, that can be understood only in relation to the personal social situation and the sequence of which it is a part. The personality experience growing out of interaction between the individual and the environmental situation plays a vital role in the social process leading to criminal behaviour.¹

1.1 Crime Defined

A precise definition of ‘Crime is by no means an easy task. Generally speaking, almost all societies have certain norms, beliefs, customs and traditions which are implicitly accepted by its members as conductive to their well-being and healthy all-around development, Infringement of these cherished norms and customs is condemned as anti-social behaviour. Thus, many writers have defined crime as an anti-social. Immoral or sinful behaviour. However according to legal definition ‘crime’ is any form of conduct, which is declared socially helpful in a state and as such forbidden by law under pain of some punishment.

Expressing his views on definition of crime, Rosco Pound commented that:

“A final definition of crime is impossible behaviour law is a living and changing thing, which may at one time be based on sovereign will and at another time or juristic science, which may at a time be uniform and at another time give much room for judiciary discretion, which may at one time be more specific in its persecution and at another time much more general.”

Cross and Jones define crime as a legal wrong the remedy for which is punishment of the offender at the instance of the state.

According to Stephen, the editor of Blackstone’s commentaries: “A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the communality at large.”

Halsbury define crime as an unlawful act which is an offence against the public and the perpetrator of that Act is liable to legal punishment from the forgoing definition, it may be said that a crime is a wrong to society involving the breach of a legal wrong which has criminal consequences attached to it i.e. prosecutions by the state in a criminal court and the possibility of punishment being imposed on the wrongdoer.

1.2 Characteristics of Crime

(i) External Consequences: Crime always have a harmful impact on society may it be social, personal, emotional or mental.

(ii) Act (Actus Reus): There should be an act or omission to constitute a crime. Intention or mensrea as means alone shall not constitute a crime unless it is followed by some external act. Generally, omitting to do something will not amount to Actus Reus of an offence. The Criminal law usually punishes individual for positive conduct and not for inaction. There are however some
notable exceptions. For example a police officer may have a duty to act to prevent an assault and if he does not, he will be liable to be punished under the law.

(iii) Mensrea or Guilty mind :- Mensrea is one of the essential ingredients of a crime. It may, however be direct or implied. The implied mensrea is otherwise termed as constructive mensrea. Mensrea implies that there must be a state of mind with respect to an Actus-Reus, that is an intention to act in the prescribed fashion. It is however, important to distinguish between mensrea and motive. Thus if a person steals away a few loaves of bread from someone’s kitchen to feed a child who is dying of hunger, the motive here may be honourable and understandable, nevertheless the mensrea being to commit the theft, the person would be convicted for theft. This motive however, may be taken into account in sentencing and he may be less severely punished because of his good motive.

(iv) Prohibited Act :- The Act should be prohibited or forbidden under the existing penal law. An act however immoral shall not be an offence unless it is prohibited by law of the land.

(v) Punishment :- The act in order to constitute a crime should not only be prohibited but should also be punishable by the State. The punishment it usually set put in terms of a maximum and the actual punishment in any particular case is left to the discretion of the Judge.

Ever since the dawn of human civilization crimes has been a baffling problem. There is hardly any society which is not beset with the problem of crime. Commenting on this aspect of crime problem Emile Durbhein in his treatise said ‘Crime as a normal phenomena’ “a society composed of persons with angelic qualities would not be free from violation of norms that society”.
In fact crime is a constant phenomenon changing with the social transformation. Different groups have different and often incompatible interest in the society which give rise to conflict which eventually result in the incidents of crime.

1.3 Justice

Everyone has an idea of what justice is the problem is that everyone have a slightly different definition of the term. It is in this lack of agreement on what justice really is that we find the beginnings of many of the controversial issues in criminal justice today.

Some conceptualize justice in terms of equality. That is, every one should have the same amount, regardless of what they produce. Others define justice in terms of quality. People should get benefits in proportion to what they contribute to producing them. That is more the people produce, the more they should get. The converse of this is also true according to this definition of justice. Punishments should be meted out in direct proportion to the harm done. This is the ideas of just deserts and is the basis for the ancient doctrine of ‘an eye for an eye’.

Another definition of justice focuses not on outcomes, but on process. The logic here is that justice is served if the process is fair or impartial. This is the conceptualization of justice that is most closely associated with the American legal system. This definition of justice is closely related to the legal concept of ‘Due process’. Due process essentially means equal treatment of all by the legal system. These differing ideas of justice create a continuing conflict within our criminal justice system. The basic theme is that everyone i.e. prosecuting agency, the accused, the victim and the courts and correctional institutions have different notions of justice. So this term is not easy to define.
1.4 System

Literally system means a set of things working together as a mechanism or network, an organized scheme or method, orderliness. In the present context the term means all the bodies which are delivering criminal justice so as to make a chain of events through which the accused passes.

In another sense it also means a network of laws which are orderly prescribed in imparting criminal justice.

In the first sense we have police, courts and correctional institution, through which the accused passes. Briefly when a person is accused of some offence police comes first into the picture for interrogation, investigation etc. When the police submits the police report under Sec. 173 Cr.P.C. then comes the turn of court. The court has to go through an organized procedure which is prescribed by Cr. P.C. and Evidence Act before reaching the final result.

If the person is convicted by court then comes into picture, the correctional institutions i.e. jail, remand home etc. So we can say that we have a network of institutional bodies through which the accused passes so as to be termed as a system.

Now in the second sense we have network or chain of laws. Offences are defined in the Indian Penal Code and other local and special penal law. Once a person is accused of some offence then the question is what to do next. This is prescribed by the criminal procedures Code of 1973. How to deal with the accused, how the investigation is to be conducted, how sentence can be imposed, provision for bail, appeals, reference, revision etc are all prescribed by the Cr. P.C.

The Evidence Act deals with the matters like, what can be given in evidence, what is relevant, irrelevant, how to prove a particular fact i.e. by oral submission or written proof. It deals with, what can be proved. So we see that
there is chain or network of laws which are interconnected, and which impart criminal justice.

Criminal justice, because of the criminal component must be differentiated from civil justice: Civil justice deals with the private rights of person. When people’s private rights are violated the wrong is called a Tort. When a person commits an act that violates the rights of all of society as recognized by the law, it is called a crime. The same action can be both a tort and a crime. Since crimes are thought to be against, everyone, society as a whole, prosecute criminal. Criminal prosecution is conducted in the name of the State, the commonwealth, the people and so forth, depending upon the tradition of each state. Putting all these ideas together, we can define criminal justice as a system designed to protect the society from crime by preventing crime and punishing criminals.

Thus, the criminal justice system refers to the system used by the government to maintain social control, enforce laws and administer justice. It has become a necessity in every society as an ally of the state in the maintenance of law and order, occupying the forefront of the enforcement of the rule of law. At the same time, however it also serves as protector of any person in conflict with the state and the law. In western context, it has been held that criminal trial:

“Overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the individual when he is an avowed opponent of the state, a dissenter, a radical, even a criminal”.

In other words, the criminal justice system performs the dual role of protecting both the state and the offender. With this idiosyncratic duality, theories regarding the purpose of a criminal justice system abound. Therefore,
CJS is viewed as a means of punishments, rehabilitation, deterrence, incapacitation, and reintegration. As a means of punishing the guilty, the criminal justice system is expected to be stringent and exacting, ensuring the conviction of the guilty and the meeting out of a commensurate penalty. As a mechanism of rehabilitation, the system is expected to reform offenders and make them law-abiding. As a strategy of deterrence, the system is looked upon as a foreboding presence that would discourage criminal intention. A manner of incapacitation, it is relied upon for protection of society from convicted criminals. As facilitator of reintegration, it is expected to provide ways for criminal to return to society and become productive citizen. These theories may multiply depending on a people’s view of criminal justice. Nevertheless, whatever the stated purpose or the dominant theory is, there appears to be a consensus on the essential attributes of a criminal justice system. These are efficiency, effectiveness, and fairness.

Efficiency refers to the utilization of the resources in a cost-effective manner to accomplish statutory goals and improve public safety. Effectiveness refers to the observance of equity, proportionality, constitutional protections to defendants and convicted offenders, and public safety in the administration of justice. Fairness entails objectively, impartiality and equal treatment of like offenders.

How these ideals are to be achieved, however will depend on the main players in the criminal justice system: the police, the prosecution service and the courts. Each of them has a particular role to play. The police is assigned the task of enforcing the law and investigating violations thereof. They serve as the gatekeeper of the criminal justice system in that they trigger the initial

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3 Performance measures for the Criminal Justice System v. 1993.
stage that brings into play the entire criminal justice system. The prosecution service acts on behalf of the state and pursues the case against the violator. The court conducts trial of the case and based on facts and legal issues presented makes a ruling. Thereafter, the police once again enter into picture to enforce the court’s judgment. Thus, the respective performances of and interaction among the police, prosecutors, and judges determine the kind of criminal justice system a particular jurisdiction will have.

The relationship between the police, the Prosecuting Agency, and the courts can either be that of co-operation or conflict depending upon the nuances in each jurisdiction, national history and culture, political and legal system, economic development and social structure, among others.

The legitimacy of the criminal justice system is based legally upon both its effectiveness and its fairness. Its effectiveness is judged by its ability to investigate and detect crime, identify offender and mete out the appropriate sanctions to those who have been convicted of offences. Its fairness is judged by its thoroughness and efforts it makes to redress the resources imbalance between the accused and the state at the investigatory pre-trial, trial and appellate stage. The system does thus by providing evidentiary protection and effective legal representation at all points.

Wrongful convictions undermine the legitimacy of the criminal justice system. If someone is wrongfully convicted, that person is punished for an offence he or she did not commit and the actual perpetrator of the crime goes free. As well, public confidence in the system declines when wrongful convictions are identified.

The criminal justice system is based on the fundamental legal value that an accused is legally presumed to be innocent, until adjudication after a trial,
this is in contradiction with the public expectation that most of those charges with criminal offences are and will be found to be, guilty. Wrongful convictions undermine both this fundamental legal value and this public expectation since they show that the presumption of innocence may be honoured in its breach and that the criminal justice system does not only deal with the guilty.

Here comes in picture the term ‘Confession’ confession in legal sense is admission of crime in totality. It is generally said that no person will speak against his own interest until it is true. Confession, no doubt is a good piece of evidence against the maker. But it is generally seen that some confession are tutored. They are obtained by torturing persons. Sometimes confessions are made under pressures because of fear, hope or due to some other pressures. Confession has to be admitted in evidence with great caution, because if an untrue and wrong confession is admitted, it will lead to miscarriage of justice and the faith of common man in the criminal justice system will be shaken. A confession has to be voluntary and true before it is admitted in evidence.

1.5 The Psychology of Confession

Confession is a very extraordinary problem. There are various facets of the psychological situation of a person who confess to an act. We are here concerned only with the situation of those who confess voluntarily not those who confess for a desire of prestige, status, recognition of notoriety. Then the question arises, firstly, why should confession occur?, and secondly does a person convict himself through a confession, when no confession will leave him at least as well off (and positively better off) from the point of view of the physical and social consequences of his act?
One clue comes from religious practice, for “confession is good for the soul.” But the confession in religious practice is not our problem to be discussed here. We are concerned here only to confession of acts or deeds, which if confessed constitute a danger to the well being of the person. So the answer to the first question why should confession occur is dependent of the social psychological conditions under which a person confesses.

An analysis of the cognitive and motivational and social conditions under which it occur will give us understanding of this behaviour.

1.6 The Social Psychological Conditions of Confessions

A confession to a crime can not be obtained (even if not committed) by duress. Although apparently there is no evidence that drugs exist, that can force a man to confess, if he does not wish. Torture, brutality or pressures can not produce confession. The contention is that such pressures need not be applied to produce confession if the culprit is guilty, and other psychological conditions obtain. It is at this juncture that we have to study the following conditions.

(a) Accusation

The accusation is the first condition, which may be stated or implied, or neither stated nor implied. The most important thing to be observed is the feeling of the person that he has been accused rightly or wrongly.

To understand the persons behaviour and feeling, it is must to understand that now he sees the world. There are two conditions that may result from the perception of accusation they are

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(1) The person’s space of free movement is curtailed\(^5\).

(2) The person is on the defensive for psychologically he is on unsure ground. These two conditions are contingent on the third namely.

(3) The person is confronted with authority.

The first two conditions results from the perception that an accusation has been made. For obtaining confession, the third is a necessary sub-condition.

(b) Evidence

For the production of confession, another important condition is the person’s perception that he is “caught with the goods”. It is not necessary that the objective evidence be presented, but it is necessary for confession that the person believes that others know intimately of his culpability. His psychological maneuverability and space of free movement is further reduced here.

It is true that accusation implies that some evidence is available but it may imply not more than suspicion based on the attribution of motive (under proper conditions specific people are seen to have motives that are congruent with the act)\(^6\).

However, if the person perceives that the accusations is backed by “real evidence”, the ratio of external forces to own forces is increased and thus the person’s psychological position becomes more precarious. In such situations

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\(^5\) Space for free movement is defined psychologically. As a first approximation it may be defined as psychological freedom. It is the extent to which the person feels able to do things that he wants to do or that he feels that he may want to do. Needless to say, the person’s subjective feeling need not correspond to physical or social reality. See Kurt Lewin: “Principles of Topological Psychology” (New York-Mc Graw-Hill, 42ff.) for an extended discussion of this concept.

the accused tends towards hostility, to counter accusation. The reduction of space far free movement leads to frustration.

(c) Guilt

The accused person feels his guilt is another important condition, which is most necessary, though not sufficient for confession. Those who are guilty, indeed this will obtain, as sometimes most innocent persons placed under cloud of accusation, feel anxiety and sometimes guilt. How-guilt[^7] operates to produce confession is not precisely clear but one possibility is that it tends towards self hostility. This is negative and accounts for the guilt.

It is clear that if a person does not feel guilt, he is not in his own mind guilty and will not confess to an act which he in fact considers correct. Even where all other conditions mentioned above may prevail, the confession in such case come only with duress.

(d) Path of Freedom

Why the path of freedom lies in confession is a very important psychological position of a person? Lewin has shown that a behaviour which is distasteful to the persons may readily be accepted under certain dynamic conditions. Indeed, it may be seen by the person as a salvation. Confession may be perceived as a means, i.e., a path, a region through which the person may go to get the region of freedom[^8].

[^7]: “In this emotional condition, the guilty person wants to confess his deed. This condition, however, last only a short time. The normal coolness of nerves soon returns. Thoughts of escape from the penal consequences by disputing guilt at the trial are suggested by friends and lawyers. No longer is the confessional impulse felt, the psychic moment has passed. -Wigmore’s Principles of Judicial Proofs. S. 225 See also the opinion of Mr. Justice Spencer in the Gazette of India of 7th, February, 1914, 169.

[^8]: At this point it is possible that the perception of confession as the “path to freedom” is more easily induced by creating a friendly and permissive atmosphere for the culprit. Milton Horowitz: “The Psychology of confession.” 47. Jour. of Cr. L. Crim. & P.S. 1956, 204.
According to Horney this “path of freedom removes him from a highly negative situation and also frees him from psychological pressure of confession.\(^9\)

The inability to speak freely is now succeeded by a pious desire to speak freely.

### 1.7 Contents of Confession

A confession consists of several parts which reveal one’s own involvement in the crime and also the following:

(i) Motive,
(ii) The preparation,
(iii) The opportunity,
(iv) The provocation,
(v) The weapons used,
(vi) The intention,
(vii) The concealment of the weapons, and
(viii) The subsequent conduct of the accused.

If the confession is tainted, the taint is attached to each part. In law, it is not permissible to separate one part and admit it in evidence as a non-confessional statement. Each part if taken together discloses some incriminating fact and suggests the inference that the accused has committed some offences but if each part is taken singly into consideration may not amount to a confession. Each of them being part of the confessional statement partakes of the character of a confession. If a statement contains admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession.\(^{10}\)

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A single sentence in a statement may not amount to an admission of an offence, but the statement read as a whole may amount to a confession. Each and every admission of incriminating fact contained in the confessional statement is part of the confession.\textsuperscript{11}

1.8 What are not Confession

The term ‘confession’, however, does not include three things namely:

(a) Guilty conduct,
(b) Exculpatory statements; or
(c) Acknowledgements of subordinates facts colourless with reference to actual guilty.\textsuperscript{12} What are these, a brief elaboration has been made below.

(a) Guilty Conduct

Conduct of a person is an important factor in assessing whether a person is guilty or not. It is clear that an accused’s guilty conduct e.g., fleeing from arrest, concealing the traces of crime, fabricating false evidence, suppressing testimony, and other behaviour indicative of guilty consciousness on the part of the accused do not amount to confession under section 24. The principle underlying section 24 rests on the theory that the trustworthiness of the accused’s verbal utterances is destroyed or weakened by circumstances supplying a motive for false assertion. That which is not an assertion, in some form or another, can therefore not be within the scope of such a principle, its probative use is not testimonial but circumstantial.\textsuperscript{13} To amount to a confession, the act or conduct must amount to an assertion. In \textit{Brij Narain v. E}, it was held that the making of a counterfeit coin by an accused person in the

\textsuperscript{11} Ibid.
\textsuperscript{12} Wigmore s. 821.
\textsuperscript{13} Ibid.
presence of the Police Officer, being neither an oral nor ‘documentary’
statement is not a confession.  

It can be appreciated that drawing inference of admission of guilt from
the conduct of the accused is not the same thing as his own categorical
assertion about the commission of the alleged act by him at the alleged time.
Drawing inference of confession does not meet the requirement that the
confession should be categorical and unending course, by the accused of the
past conduct and this can be done by the accused himself by words of mouth
or in documentary form. In hypothetical case of a dumb and illiterate accused,
we have not come across such a case so far. It may be moot point whether a
confession made by him through signs which are obviously to be inferred /
interpreted by the judge can be treated as the confession of the accused. It is
submitted that in such a situation if the judge finds no difficulty in interpreting
the signs of confession, it may be treated as a confession of the accused. It is
the judge alone who is to interpret the signs of the dumb accused. This
interpretation can not be produced by any other agency.

(b) Exculpatory Statement

This ought to be plain enough that exculpatory statements, denying
guilt cannot be confessions. A statement that contains self exculpatory matter
cannot amount to a confession, if the exculpatory statement is of some facts
which if true would negative the offence alleged to be confessed. Where the
accused admits witnessing the preparation of a crime but alleges that he
protested against it, or in which he puts forward an alibi, or when he states

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14 133 I.C. 154 ; 32 Cri. L.J. 1006. it is here submitted that such an act amounts to an
assertion, though such assertion does not amount to a confession of his having made the
counterfeit coin.


16 Q. E. v. Jagrup 17 A. 646.

17 Illahi Baksh v. E., 16. PR. 1886 Cr.
that articles belonging to the murdered man were given to him by another person,\(^\text{18}\) is not a confession. Such exculpatory statements are given by the prosecution as circumstantial evidence of guilt consciousness by showing them to be false.\(^\text{19}\) But there are also a series of decisions in which statement of exculpatory nature but containing damaging admission by the accused have been held to be confession coming within the rule of exclusion.\(^\text{20}\) A promise to restore stolen property is a confession.\(^\text{21}\) A statement by a person that he burned the clothes of the murdered man and would show the place where he did so is a confession.\(^\text{22}\)

As far as the case of recovery of stolen property from the accused is concerned, it may be treated as a confession of his being a thief or a recipient of the stolen property in terms of sections 114, illustration (b) of Indian Evidence Act, but the other case, where the accused shows the place where he has buried the clothes of the murdered man should have not been taken as confession of his guilt as murderer, because section 27 of the Act which allows the admissibility of such evidence confines it to the fact discovered and no more. The possibility of flaws in the above approach of inferring guilt even from exculpatory statement was clearly noted in \textit{Pakla Narain Swami v. Emperor Case},\(^\text{23}\) which has laid down the correct law on confessional statements.

But above cases in which statements of incriminating facts have been held to be confession, must in view of the Privy Council decision in \textit{Swami’s
case,\textsuperscript{24} be held to be decided wrongly in as much as when the court ruled that a statement in order to amount to a confession must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence. So it is not opened to the court to accept only the inculpatory part of the statement and reject the exculpatory part as inherently false.\textsuperscript{25}

It is some time seen that a person who repeatedly denies any of his earlier conduct or tries to exculpate himself from the allegation, tells lies, which on the other hand confirm his past guilty behaviour. But such indirect inference of guilt is not acceptable in law for the simple reason that such tests is not of universal nature nor is free from doubts or chances of error.

(c) Acknowledgement of Subordinate Facts

Similarly, acknowledgement of a subordinate fact, not directly involving guilt, or in other words, not essential to the crime charged, is not a confession because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment, and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admission, and all other admissions than those which directly touch the fact of the guilt are without the scope of the peculiar rules affecting the use of the confessions.\textsuperscript{26} Thus, admission of presence at the time and place of the crime is not a confession.\textsuperscript{27}

What are confessions and what are not confessions were explained by Wolverton, J. in \textit{State v. Porter}, where he said “we take it that the admission

\begin{flushleft}
\textsuperscript{24} Ibid.
\textsuperscript{26} Igmore S. 821.
\textsuperscript{27} Ibid. Also See \textit{Allahwarayo v. E}, 1940 s 53.
\end{flushleft}
of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denounced a confession, but not so with the admission of a particular act or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established.\(^{28}\) It is not necessary that there may be a declaration of an intent to admit guilt, it is sufficient that the facts admitted involve a crime and these import guilt.

1.9 Forms of Confessions

It is not necessary that the confession be in express\(^{29}\) words if not in writing. But the written confession may be accorded greater weight.\(^{30}\) Some Statute (as Texas – U.S.A.) required that confessions to be written,\(^{31}\) and when a confession is written it may be admissible even though unsigned\(^{32}\) by the accused. In India also confession to be in expressed words. But if the confession is written. Weight is attached to it, Supreme Court has held that the confessional statement made to a magistrate in the course of a police investigation becomes a matter required by law to be reduced to writing.\(^{33}\)

Again a written confession need not be in question and answer form. It is also not necessary to record literally the spoken words of the declarant if it represents correctly the substance of what he said.\(^{34}\) When the confession in

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\(^{28}\) 32 Cr. 135. Cited in Wigmore s. 821.
\(^{29}\) (a) A confession may be either express or implied--- \(\textit{State v. Branner}, 149 \text{N.C.} 559, 635 \text{E.} 169.\)
\(^{30}\) (b) A confession of crime may be oral or written--- G.D. Noaks: \textit{An Introduction to Evidence}. 1952, 245.
\(^{31}\) \textit{Thomas v. U.S. 15 F 2d. 958- Texas Statute requiring confession to be in writing and signed.}
\(^{32}\) \textit{People v. Reed. 333, 111, 397, 164. NE. 844.}
\(^{33}\) \textit{Nazir Ahmad v. King Emperor, 1936 P.C. 253.}
\(^{34}\) \textit{Dennison v. State, 259. Ala. 424, 66 So 2d 552.}
writing is lost or destroyed, secondary evidence of its contents may be given under the best evidence rule.  

A confession may be in the form of letter or several letters to different person, or may consist of detached conversations with many people or it may be a formal confessions, or all of these together.  

Confessions recorded orally on sound recording equipment are admissible when properly authenticated.  

Judicial Court. Generally insist on ascertaining the exact words of the oral confessional statement and unless exact words are clearly established, the courts are, by and large reluctant to base convictions thereon, for the witnesses to oral confession may even quite honestly misunderstood or miscomprehended the effect of oral words, and there is at times a real danger of their mistakenly asserting as to an oral confession. Evidence of oral confession of guilt ought to record with caution.  

1.10 Importance of Confession  

A true confession if voluntarily made can safely be regarded as the most authentic piece of evidence. By its very nature being against the interest of maker, it is more reliable than the statements of witnesses who may lie to settle some scores with the accused or for any other reason. A confession made in the court by an accused during trial either as a plea of guilty in response to

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35 See Chapter VI of B.W. Jones: Evidence for Best and Secondary Evidence s. 238. Also See. Cicero v. State. 54 Ga 156(1875) “When a confession has been reduced to writing, it is being the “best evidence.”  

36 Peo v. Giro, 197. N.Y. 152, 90 NE 432.  


39 Taylor s. 862.
the charge framed against him or at the time when the criminating evidence led by the prosecution is put to him to give him a chance to explain away the same would usually, straightway lead to his conviction. And justifiably so, since the confession in this case is made after understanding its implications and in most cases after (or despite) consultations with his lawyer. Such a confession would be voluntary and free from any undue influence. In the atmosphere of the court proceedings, there is no pressure on the accused to confess even if he has actually committed the crime, since he is not asked to disclose his defence till the prosecution has proved its case beyond reasonable doubts. There is no moral sanction either, because he is not even to be put an oath while making his plea to the charge or while explaining the prosecution evidence. The problem, however, arises when the confession is made outside the court which actually is before the beginning of the trial and is sought to be used in trial as evidence against him. It is his own statement which is sought to he proved by somebody else, mostly against his denial. This certainly is a species of hearsay evidence which is generally frowned upon in common law and as a rule, is inadmissible. Admissibility of a confession in evidence based on the premise that it would most probably be true, being against the interest of its author, is one of the well known expectations to the rule against hearsay evidence.

1.11 Confession : A Special Category of Hearsay

The main reason for excluding hearsay from evidence is that its veracity can not be vouched for sense the person who had made the statement would not be available in the court for cross-examination. The rule cannot be strictly invoked in case of confessions because here the maker of the statement is the accused himself who is a party to the proceedings. He obviously cannot cross-examine himself but can certainly, put forth a defence either denying
that he made such a statement or explaining away the same as having been
made under any pressure of influence. If in a criminal proceeding against C, A
deposes in the court that B told him that C committed a crime and if B is not
available to depose A’s statement is hearsay, pure and simple. However, if A
deposes that C himself told him that he committed the crime, the situation is
slightly different. Here C has a chance to deny the same. This statement if goes
unchallenged or is found to be true despite challenge, has much more, than
simple hearsay.

This is not to say that admission of confessions made prior to beginning
of the trial is totally free from danger of misuse. In fact the position is the
other way round. What is meant here is that it is certainly at a higher pedestal
that usual hearsay evidence. If it is to have been voluntarily made, it is
supposed to be admissible in evidence and then, if found true, can from the
sole basis of conviction of the accused.

1.12 Admissibility of Confessions

Whether confessions are considered to be exceptions to the rule against
hearsay or as not at all violative of the said rule (as by Wigmore), they are
generally considered admissible in evidence on the presumption that no person
will make a statement against his interest unless it be true. In the Indian
Evidence Act there is no separate provision specifically making them
admissible. However, they are relevant in criminal trials as a species of
Admission against the interest of the maker by virtue of Section 21 of the Act.
This rule of inclusion is a universally accepted one and therefore, poses no
difficulty.

1.13 The Rule of Exclusion

However, all confessions are not admissible. It is also now a
universally accepted principle that confessions induced by duress (involuntary
confessions) shall not be admitted in evidence. Thus all legal systems provide for certain rules to exclude confession made under certain circumstances. It is the width and amplitude of these ‘exclusionary rules’ which is different in different countries and is the subject matter of the present study.

Both in the United States of America and United Kingdom confession recorded by the Police (usually referred to as custodial confessions) are viewed with some suspicion. The stringency of exclusion of such confessions has however varied from time to time. The analysis made by Wigmore\textsuperscript{40} in this regard is quite remarkable. As per him there have been four distinct stages in the history of Law’s use of confessions. In the first stage up to the days of Tudars and Stuarts there was no restriction upon their inclusion. In the second half of eighteenth century it was recognized that some confession ought to be rejected as untrustworthy. In the third stage, i.e. in the nineteenth century that exclusionary rule was develop to absurd limits and exclusion became the rule and inclusion, an exception. In the last phase, a reaction has set in here and there are chances of present and law and practice undergoing some changes.

The time to watch here is the second half of the nineteenth century i.e. the third stage described by Wigmore. In the case of \textit{R. v. Baldry},\textsuperscript{41} it was held that in United Kingdom after 1852, the position changes from excluding confessions shown to be involuntary to that of excluding confessions which were not proved to be perfectly voluntary. The courts in U.K. at that time started disbelieving almost all confessions recorded by the police. The idea of deemed involuntariness due to police custody had been originated. Around the same lime, the U.S. courts were also stretching the exclusionary rule derived from the Vth amendment guarantee against compulsory self incrimination

\textsuperscript{40}Wigmore. A Treatise on the Anglo-American System of Evidence in Trials at Common Law : 3\textsuperscript{rd} Edition, 1940.

\textsuperscript{41}1852 2 Den 430.
coupled with the ‘Due Process’ clause provided by the XIV Amendment (added in 1868), quite far, in the case of *Bran v. U.S.* 42 it was held that the constitutional guarantee applied to pre-trial stages as well.

In India, this was the time when the law was first codified. The trend in U.K. of shutting off almost all confessions and the 1855 Indian Law Commission report 43 severely indicting the Indian Police ‘Darogah’ of committing brutality, in order to achieve quick results led the Indian legislatures to take the extreme step of totally excluding all confessions made by an accused to the police or to anybody whilst in the custody police (except in the presence of a magistrate). This strong distrust of the police by the legislatures found its manifestation in Sections 148 and 149 of the Code of Criminal Procedure of 1861. These prohibitions went for in excess of those available in England or USA. The ostensible reason for this was the need to check police brutality which the First Law Commission had rightly described as having grown to menacing proportions. Whether mere exclusion from evidence without a toted prohibition to record any confessions could effectively check police brutality is itself debatable. Even worse however was that the legislature itself gave to the police on a platter, a giant loophole which was sufficient to completely nullify the exclusion mandated by above mentioned provisions. This was Section 150 which made portions or confessions that led to discovery of any fact admissible in evidence. Section 148 to 150 of the Code of Criminal Procedure of 1861 now correspond to Sections 25 to 27 respectively or the Indian Evidence Act, 1872 and have survived one and a quarter century of social and legal development.

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42 168 US 542 (1897).
43 *Infra Ch. 8.*
1.14 Justification for the Rule of Exclusion

Though the rule of total exclusion of custodial confessions as adopted in India has its takers and bashers both there is no controversy on the basic principle that involuntary confessions should not be taken in evidence. If a confession is shown to confession recorded by exercise of such compulsion shall not be admitted in evidence against the said accused. However, the Doctrine of Exclusion of Involuntary confessions is slightly wider in one respect i.e. it shuts off not only confession recorded by using physical force or under threat of using physical force, but also those recorded by way of allurements or promise of some lenient sentence etc.

1.15 Probable Falsity of Involuntary Confessions

Wigmore specifically rejects the theory that exclusion of involuntary confessions has anything to do with the privilege against self-incrimination. As per him, “The sum and substance of the difference is that the confession rule aims to exclude self-criminating statements which are false while the privilege rule gives the option or excluding those which are true. The two are complimentary to each other in that respect and therefore cannot be coincident.”

He projected, ‘Untrustworthiness’ of an involuntary confession as the ‘Sole’ basis for its exclusion. The principle of exclusion he says has evolved out of judicial experience of human conduct that under certain stresses a person especially one of defective mentality or peculiar temperament may falsely acknowledge guilt. The principle as per him, is the same as on which statements based on memoranda or testimony given while intoxicated or testimony given upon suggestion or a leading question are treated as debatable
and may under circumstances be excluded. In criminal cases the higher degree of caution always exercised by law in favour of the accused prompts to a greater stickiness in excluding suspicious testimony and the degree or likelihood of its incorrectness (for it to be exclude) need be much less than in other instances yet the principle is the same.

It is the true today most of the custodial confessions are elicited by coercion, threat and torture and sometimes allurement rather than being the result of repentance of the accused. The investigating officers of the police being what they would rather than breaking their beads in going out and collecting evidence, coerce or induce somebody making him an escape goat into confession and receiving sentence. The dangers of coercing a person to falsely confess cannot be over emphasized. Not only an innocent man would be punished which is quite damaging to the fabric of any cultured society the real criminal shall be out in the open free to commit more crimes while mocking at the system.

However, falsity or trustworthiness as to its veracity cannot be the soel ground for excluding confession. The sanctity attached to individual liberty and the concern for the rule of law in democratic societies would not allow anyone to argue that the police is justified when it procures true confession by way of coercion and not when it procures false ones. Police torture and coercion and banned in civilized societies whether employed for extraction of truth or otherwise.

1.16 Voluntariness : The Chief Criterion

While truth or otherwise of a confessional statement concerns its probative value and has to be determined by weighing it along with other evidence on record so far as admissibility is concerned voluntariness is and
ought to be the chief criterion. It was held that as long back as in 1852 that, “The ground for not receiving ground evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that such a statement is false or that the law considers such statements cannot be relied upon: but such confessions are rejected because it is supposed that it would be dangerous to lead such evidence to the jury.”

In the U.S. also the IV amendment against illegal searches and seizures, V amendment against obtaining compelled testimony and the Due Process clause of the XIV amendment have been pressed into service several times to exclude confessions which were suspected to be involuntary irrespective of whether they were true or false.

1.17 Total Exclusion of Custodial Confessions in India

In India the salutary principle of exclusion confessions is found in Section 24 of the Evidence Act of involuntary, however, the legislature in India further carried the theory of deemed involuntariness due to police custody to such limits as to totally bar all confession made by an accused to the police or to anybody whilst in the custody of police. This has been provided in Section 25 and 26. That Section 27 which makes some portions or confession admissible in certain circumstances practically nullifies the effect or Sections 25 and 26 is another matter.

The reason for the extreme step was the ill-reputation of the Indian Police at that time as elaborately dealt with by the Law Commission of 1855. The police station in charge ‘Daroga’ as he uses to be called was notorious for his tyrannical ways or exercising governmental authority over the natives. It was the general practice for the investigators to work down from the suspect to the evidence rather than working up from evidence to the accused. Cases of
inhuman torture by the police of suspects in order to extort confessions true or false were found in abundance. It was to check this gross abuse of power that the Law Commission recommended a total exclusion of confessions recorded by the police.

The peculiarity of the situation however is that these provisions were enacted by the British ruler’s knowing fully well that the police force was constituted by them to function exactly the way it did. The stratification of the police force defining their respective powers and spheres of activity, the policies for their recruitment and training criteria for appraisals vast disparities between salaries of the subordinate ranks comprising Indians and those of superior ranks exclusively meant for European were all meant to serve one purpose i.e. suppression of Indians by the Indians. Anand Swarup Gupta points out that the Penal and Procedure Codes of 1860-61 also reflect that suppression of the people was the first priority in the functions of the police. In IPC, the description of offences begins with chapters in criminal conspiracy and offences against the state while the commonest preoccupation of the police everywhere is offences against person and property. Similarly, in the Criminal Procedure Code chapters on security for keeping peace and maintenance of public order including use of force by police take precedence over provisions for investigation and trial of offences.  

Yet the same legislators chose to indict the same police created by them and brand them untrustworthy, the stigma continues even today i.e. after fifty six years of independence and installation of democracy where the imperialistic mode of government has no role to play. The continuance of such a strong distrust of an important agency of the State is in the opinion of the

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present writer one of the stumbling blocks to the post-independence efforts to
make this agency more efficient, purposeful and above all more humane. As
Gupta has remarked, the law with regard to investigations and confession as
finally established by the British in India created a vicious circle of the law
itself not trusting its enforcement agent being compelled to take recourse to
improper activities to discharge his trust.”

It is quite evident that this rule of total exclusion of custodial
confessions from evidence that has failed to serve any useful purpose it has in
fact resulted in an anomalous situation in as much as on one hand. Subordinate
rank police officers have vast and unfettered powers to deal with personal
liberty of citizens during investigation of offence and on the other hand they
are looked at with great suspicion when they send up a suspect for trial in the
court of law. Neither the gross abuse of powers by them during the
investigation stage is effectively checked nor are they shown any respect when
they complete a good investigation.

Thus has arisen a need to take re-look the relevant provisions of the
Evidence Act and the Criminal Procedure Code and also at the administrative
set up of the Police with a view to restoring the morale of the people and
simultaneously ensuring that the rule of law reigns.

Relevance of the confession in the basic gist of the Evidence Act. Even
in U.S.A. and U.K. the confessions recorded by the police are viewed with
some suspicion. The stringency of exclusion of such confessions has, varied
from time to time. However, the relevance of confession in criminal trial as a
species of an admissions against the interest of the maker by virtue of Section
21 of the Evidence Act. The sum and substance of the difference is that the
confession rule aims to exclude self-criminality statements which are false,
while the privilege rule gives the opinion of excluding those which are true. The two or complimentary to each other in that respect and therefore cannot be coincident.

The main object of criminal jurisprudence is to punish the offender for the offence committed. For that purpose it is the duty of prosecution to prove that guilt beyond reasonable doubt. The benefit of the doubt goes to the accused. But if the guilt is admitted by the accused then there is no need to prove the case beyond reasonable doubt and sentence can be awarded according. But in the modern era, the punishment to the accused must be awarded keeping in the reformation and rehabilitation. In other words the rights of the accused are also given due importance. For that there is need to prevent the forcible confession. For that a comprehensive knowledge about the concept of confession is necessary. A critical study about the concept of confession has been made in this study.

1.18 Research Problem

The theoretical position is that the confessions are voluntarily made by the accused person to express out the real involvement of the accused person in the commission of the crime. Confession are very rarely made by the accused persons but these turn to be the extractions, true or false by the police offices. Since the confessions made before the police are no confessions at all only because of the obvious reasons that they are the extractions because of torture the extracted confessions are given the shape of the extra-judicial confessions made to the touts of the police. Many a time even the accused does not know as confession has been recorded in their name. What has been prohibited by law, the same is actually being practiced through the instrumentality of another provisions of the same statute. The accused in the
name of confession gives statement which is exculpatory in the nature due to various promises or unseats which they do not tell.

As the research problem covers some theoretical study and collection of primary date by way of empirical research the use of Library method case law method, empirical method of research and also the unstructured interview schedule will also be used for collection of data from the judicial officers, police officers and the advocates and some of the accused who have given confessions.

1.19 Importance of the Research

The research problem is of current and future importance for the entire Indian Society. As the confessions turn out to be the confessions during the investigation of the police and in almost all the cases the happen to be the end result of the police torture, the accused person, in this extra legal process are deprived of their constitutional rights which are enshrined in the constitution. This is also done by the hands of the state instrumentality and also human rights are violated and they are becoming more and more important now-a-days.

1.20 Hypothesis

For the research work the following hypothesis has been adopted. Confessions are in fact the confessions extracted by the police and are not in compliance with the law.

1.21 Research Methodology

The research study will be sorted out in an analytical manner and will comprise of the theoretical study of the statutory provisions in general and confessions in particular, analyse the confessions along with the fundamental rights of the accused person, identify the judicial guidelines on the requirement
of the confessions and then to the test of the case law of the judiciary. To understand the points of shift from the judicial guidelines and the spirit of legal provisions this study will be done in the way of interview method and to solicit their views on any deviation and compulsions which has motivated them for making the use of extra judicial confessions.

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