CHAPTER-II

LAW RELATING TO CONFESSIONS : HISTORY AND DEVELOPMENT

2.1 Introduction

By the time of abolition of the court of the Star chamber in the later half of the Seventeenth Century, the principles that an accused should be put on Oath and that no evidence should be taken from him had got established in England. The rule of the passage of time developed into a privilege of a witness against self-incrimination. The principle got carried into the American Legal System and became part of her common Law.

2.2 Development in United States of America

The right against self-incrimination was incorporated in the V amendment to the U.S. constitution w.e.f December 15, 1791. The relevant portion runs as under: “No person shall be compelled in any criminal case to be a witness against himself……”

The V amendment carried the privilege beyond the accused person and extended the same to witness also. The protection was further held to be available not only during the proceeding of a criminal case but also to testimony in any proceeding when such testimony can be used in a later criminal prosecution against the accused.¹ This naturally includes statements made during investigation of a criminal case it was however, in 1897 that the U.S. Supreme Court first invoked amendment to exclude confessions. The Court ruled in the case Bram v. United States,² that in criminal trials in the Courts of the United States whenever a question arises whether a confession is

² 168 US 542 (1897).
incompetent because not voluntary, the issue is controlled by that portion of the V Amendment commanding that no person shall be compelled in any criminal case to a witness against himself.

Later in the case *Lisenba v. California*,\(^3\) the court held that clubbing the ‘due process clause’ of the fourteenth amendment with the criteria of voluntariness for admitting confession in evidence.

The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false.

### 2.2.1 Condition of Inadmissibility

Beginning with the voluntariness – involuntariness test, the U.S. Supreme Court has in succeeding decisions, added to the list of circumstances that would prohibit a confession obtained by the police from being admitted into evidence. The process started in 1936 with the decision in the first of the so called torture case,\(^4\) and reached its peak with 1966 in the decision of *Miranda v. Arizona*.\(^5\) Some of the circumstances that would render a confession inadmissible are:\(^6\)

1. Delay in arrangement.\(^7\)
2. Prolonged questioning.\(^8\)
3. Threats and promises\(^9\)
4. Condition of the suspect, such as Youth or mental weakness.\(^10\)
5. Failure to understand the language.

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3 314 U.S. 219 (1914).
4 297 U.S. 278 (1936).
6. Coercion by lack of food or sleep or by fear.\textsuperscript{11}

7. Failure to inform the suspect that he has the right to remain silent and that anything he says can and will be used against him.\textsuperscript{12}

8. Failure to clearly inform the suspect that he has the right to consult a lawyer and to have a lawyer present during police interrogation.\textsuperscript{13}

9. Failure to warn him that he has not only the right to consult with attorney but also that if he is indigent, a lawyer well be appointed to represent him.


\textbf{2.2.2 Hearing to Bar Exclusion}

By the theme of decision the judges of the Supreme Court started getting aware that what the court was heading for was a total bar to admission of confession in a criminal trial Mr. Justice White remarked:

“The decision is thus another major step in the direction of the goal which the Court seemingly has in mind to bar from evidence all admissions obtained from an individual suspected of Crime whether involuntary or not….”

The ruling almost achieves this apparent goal. The gist or the judgment is summarized in the words of Mr. Chief Justice Warren thus:

“Our holding will be spell out with some specificity in the pages which follow but briefly stated it is this : The prosecution may not use statements whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any

\begin{footnotes}
\textsuperscript{12} People v. Dorado 42 Cal. Rptr. 169 (1965).
\textsuperscript{13} Escabado v. Illinois 378 U.S. 495 (1964).
\end{footnotes}
Significant way. As for the procedural safeguards to be employed unless other fully effective means are devised to inform accused persons of right to silence and to assure a continuous opportunity to exercise it. The following measures are required:

Prior to any questioning, the person must be warned that he has a right to remain silent that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney either retained or appointed. The defendant may waive effectuation of these rights provided the waiver is made voluntarily knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated the police may not interrogate him. The mere fact that he may have answered some statements on his own does not deprive him of the right to refrain from answering any further inquiring until he has consulted an attorney and thereafter consents to be questioned.

Thus after Miranda, very rarely a confession will stand the test of admissibility. The list of prohibitive circumstances being long, every confession recorded during investigation is viewed with great suspicion and once it stumbles on any of these tests, that is the end of its journey towards being admitted evidence.

2.2.3 Other Risks in Admitting Confessions

Then, another trend in the U.S. judgments makes it even more perilous for the prosecution to rely upon custodial confession. Once a confession is admitted in a trial court along with other independent evidence and a conviction is returned, on the Supreme Court holding that the confession was improperly admitted, the conviction is set aside notwithstanding that the other
independent evidences might undoubtedly point towards guilt of the accused. The reasoning is found in the judgment of the case *Dayne v. Arkansas*,\(^\text{14}\) in the following words:

“Respondent suggests that apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this court has uniformly held that even though there may have been sufficient evidence apart from the coerced confession to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the ‘Due Process clause’ of the Fourteenth Amendment.”

It was observed that, “Indeed in many of the cases in which the command of the ‘Due Processes clause’ has compelled us to reverse state convictions involving the use of confessions obtained by the impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of Constitutionally impermissible methods in their inducement.”\(^\text{15}\)

### 2.2.4 No Exception to the Rule

Yet another characteristic of the Laws of the Untied States of America on custodial confessions is that the prohibition admits of no such exceptions with regard to confessions as might have led to discovery of any facts or incriminating material as are accepted in India and in England. In a confession by another person leading to recovery of Narcotics from the possession of the


accused was held inadmissible in *Lynumn v. Illinois*,\(^{16}\) by the court. As a result the accused was acquitted even thought Narcotics were actually recovered from her possession.

### 2.2.5 Illegal Search and Seizures

Further any incriminating article recovered during a search conducted in a manner not fully consistent with law is inadmissible in evidence. The basic rule that evidence obtain as a result of an illegal search or seizure is inadmissible in any federal court was evolved in case of *Weeks v. United States*.\(^{17}\) This position is in sharp contrast to the position in India where it has been consistently held in a number of judgment that illegality of the search or seizure does not affect admissibility of the incriminating evidence so discovered or seized.

It was held in *Wolf v. Colorado*,\(^{18}\) that the fourteenth amendment did not require a State or a federal, court to prohibit the introduction of relevant evidence obtained by “illegal search.” The decision was overruled in the case *Mappy v. Ohio*.\(^{19}\) In the said case, Miss Mapp’s conviction based on seizure of obscene material from her house by illegally breaking into the house was reversed. The court’s opinion was expressed in the following words:

“We hold that all evidence obtain by searches and seizers in violation of the Constitution is by that same authority inadmissible in a State Court.”

This has, however, been done on the basis of the IV amendment which specifically provides an immunity against unreasonable searches and seizures and with the aid of the ‘due process clause’ of the fourteenth amendment.

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\(^{16}\) 372 U.S. 528 (1963).
\(^{17}\) 232 U.S. 383 (1941).
\(^{18}\) 338 U.S. 25 (1949).
\(^{19}\) 367 U.S. 643 (1961).
2.2.6 Present Trends in United States of America

After reaching a point of almost total exclusion, there has apparently been some easing on the subject in the U.S. The cost to the public due to acquittals caused by the exclusion or reliable real evidence has led to some judicial concern. While balancing the society’s need to curb crime against the rights and interests of the individual the pendulum has obviously swung to one extreme i.e. towards the individual’s rights. There can be no denying of the fact that this trend has posed serious impediments to effective investigation of the police as Leonard reports a New York Supreme Court Justice Michael Kern had before him a man who had admitted slaying his five children and his wife. The man had signed a full confession after being arrested. However, after the Miranda decision was announced he decided to retract the confession and plead not guilty. With no other evidence than the inadmissible confession justice Kern had to acquit him. In freeing this man, Justice Kern observed to those in the courtroom: “This is a very sad thing. It is so repulsive that it makes one’s blood run cold and any decent human beings’ stomach overturn to let a thing like this out on the street.”

The rule relating to admission of confessions and evidence illegally obtained has been diluted to some extent in the following:

In United States v. Learn, the court held that no exclusion if the constable acts in good faith upon basis of an apparently valid warrant.

In Segura v. United States, the court held that no exclusion when link between illegality and discovery so attenuated as to dissipative any taint.

In Immigration and Naturalisotein Service v. Lopez Mendora, the court held that no application to deportation proceedings.

In one another case\textsuperscript{23} the court said that confession obtained during custody even if inadmissible in evidence to prove the guilty of the accused can be used to impeach his credibility if he testifies otherwise in the court.

\textbf{2.3 Development in England}

The principle against compelled self-incrimination was developed in England largely due to the spirit of consideration for the accused persons during the later half of the 1700s and the first part of the nineteenth century. As per Wigmore,\textsuperscript{24} there have been four distinct stages in the History of law’s 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 the eighteenth century, it was recognized that some confessions ought to be rejected as untrustworthy. In the third stage i.e. in the nineteenth century the exclusionary rule was developed 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 the present law and practice undergoing some change.

After the abolition of the Star Chamber in 1941 the attitude of the Judiciary became softer towards the accused and confessions suspected to be involuntary started being excluded from evidence. However, the origin of the true exclusionary rule is to be found more than a century later.\textsuperscript{25}

“A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilty that no credit ought to be given to it and therefore it is rejected.”

\textsuperscript{23} 40 I. U.S. 222 (1966).
\textsuperscript{24} Wigmore J.H. – A treatise on the Anglo American system of Evidence in Trials at Common Law.
\textsuperscript{25} R. v. Warickshell (1783)1 Leach Ce 263.
By the middle of the nineteenth century the rule of exclusion was so firmly established that only rarely any confession were read, in evidence. In the words of Baren Parke: "By the Law of England and in order to render a confession admissible in evidence, it must be perfectly voluntary and there is no doubt that any inducement in the nature of a promise or threat held out by a person in authority vitiates a confession."\textsuperscript{26}

Wigmore criticises the trend of over protection of the accused and says that it had gone to absurd limits, symbolizing a weak sentimentalism towards criminals. He gives three possible explanations for this development. First is the social status of the accused persons brought before the courts. The accused were generally from the lower class of the society. He cites from Stephen’s History of Criminal Law I, 442 that most persons accused of crime are poor, stupid and helpless and argues that persons from that strata of the society had an attitude of subordination, a submission half respectful and half stupid towards these authority. It was easy for these persons to be forced into making a confession by threats or by paltry inducements. This was one reason why the judge, moved by a motive of decency and humanity in criminal law refused to attach any great weight to the utterances of such persons made under the influence of authority. Secondly the absence of a right to appeal in criminal cases also influenced the judges to play safe and not to admit any questionable evidence. The third reason according to Wigmore was the extraordinary handicap placed upon the accused the common law in the shape of his inability either to testify for himself or to have counsel to defend him, the judge therefore tried to restore the balance by excluding confessions on every available pretext.

\textsuperscript{26} \textit{R. v. Baldry} (1852)2 Den. 430.
After the middle of the nineteenth century the development of the rule remained relatively stable. The basic principle was that involuntary confession were to be shut out. ‘Involuntary’ meant confession caused by threats or inducements by a person in authority. It was observed that it has long been established as a positive rule of English Criminal Law in Abriham v. King,{{27}} it was held by the privy council that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

2.3.1 The Real Test for Admissibility

The real test was whether a confession was made voluntarily or involuntarily irrespective of whether it was true or false. The policy of the rule was explained thus, “The ground for not receiving such evidence is that it would not be safe to receive a statement made under influence or fear. There is no presumption of law that it is false or that the law considers such statements cannot be relied upon but such confession are rejected because it is supposed that it would be dangerous to lead such evidence to the jury.”

Similar was the view of Privy Council. The view that testimonial untrustworthy was at the root the confession was rejected.

The English Courts drew a distinction between temporal fear and a moral exhortation in Reg. v. Jarvis.{{28}} Confessions obtained by the former were rejected while those obtained by the later mode were included. Thus where an employer advised his suspected employees to tell the truth. “So that you committed a fault, you may not add to it by stating what is untrue,” a

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{{27}} AIR 1914, PC 155.

{{28}} 1867 Law Reporters 1 CCR 96.
confession made by the employee on this was admitted in evidence and so was a statement made by a 13 years old boy charged with murder in response to a command. “Now knee down, I am going to ask you a very serious question and hope that you will tell me the truth in the presence of the Almighty.”29

2.3.2 The Background for Judges Rules

Till this stage, the exclusion remained confined to judicially determined cases of threats or false promise etc. The other illegalities committed by the Police with an intent to extort confessions or which otherwise led to the confessions were not expressly prohibited. For this purpose rules of practice were formulated by the judges. Reference of ‘oppression’ as a mode of extorting confessions which would be excluded from evidence was first made by Lord Parker C.J. in Callis v. Gunn.30 Then came the New Judges Rules of 1964.

Judges rules were framed so that some judicial control could be exercised over police activities during investigation of an offence. The rules did not have the force of law but were meant to be practice directions. The observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice.

2.3.3 The Judges Rules, 1964

The rules while recognizing the duty of every citizen to help a police officer to discover and apprehend offenders but laid down certain privileges for the person apprehended by the police. They had a right to consult privately with a solicitor. Any answers given or any statements made by such a person during investigation could be admitted in evidence only if it had not been obtained by fear or prejudice or hope of advantage exercised or held out by a

29 Rex (1935)1 Modd C.C. 452.
30 (1964)1 QB 495.
person in authority or by oppression. This principle was stated to be overriding and applicable in all cases. To achieve this end procedure for recording such statements was laid down. A police officer could interrogate anyone whether or not in custody and whether or not he was the suspect. Once evidence is collected for a reasonable suspicion that a particular person was guilty, the person had to be cautioned that he had a right to silence but if he chose to answer, the answer would be recorded and given in evidence against him. The text of the caution required to be administered in different circumstances was clearly laid down. The format in which the answer or statement was to be recorded was also prescribed. Prompting or cross questioning the suspect while he was making the statement was prohibited. Time and place or beginning and end of the interrogation was to be recorded.

It was stipulated that non-conformity with the rules may render the answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

2.3.4 Discretion of the Courts

From the beginning of the twentieth century the almost total exclusion policy adoptee by the English Courts (severely criticized by Wigmore) started giving way to a policy or discretion being vested in the courts. A strict exclusionary rule was decisively rejected in the case the King v. Best. This led to a certain amount of inconsistency in decisions on the point. The judges rules laid down elaborate procedures, the violation of which would more often make the confession inadmissible. However, it appears to be a policy consciously adopted to still leave a discretion with the trial judge in this regard since the rules did not have a force of law and stipulated merely that violations thereof may render a confession inadmissible.

31 Emphasis supplied.
32 (1909)1 KB, 692 (CCA).
The House of Lords explained in *D.P.P. v. Pinglin*, that the question of exclusion was essentially one of fact, especially one of causation to be construed on a common sense basis and necessarily depended upon the particular circumstances in which the particular suspect was placed to.

### 2.3.5 Statutory Provisions

In 1984 the Police and Criminal Evidence Act has been enacted, giving statutory force to the principles adopted in the Judges Rules. Section 82(1) of the Act defines a confession to include any statement wholly or partly adverse to the person who made it whether made to a person in authority or not and whether made in words or otherwise a very wide definition indeed. Section 76 makes a confession admissible in evidence if the same has not been obtained by ‘oppression’ or in circumstances which could render the same unreliable. On prosecution lies the onus of proving the absence of such circumstances beyond reasonable doubts, actual truth of the confession is no criteria for its admissibility. However, in case confession even though not admissible, has led to discovery of some fact, the same can be admitted in evidence provided has been led to show how the said fact was discovered.

Thus the current petition in England is neither total exclusion, nor or blind inclusion. The attitude of near total exclusion adopted in the second half of the nineteenth century has gradually changed to discretion being exercised within well defined statutory bounds. The principles that involuntary confessions shall not be admitted remains but the tests of involuntariness have come to acquire define shapes. The Judges rules appear to be still invokable to see if proper procedures have been followed in order to test the validity of a custodial confession on the anvil of the substantive principle of voluntariness.
2.4 Development in India

In India, law was codified for the first time in the second half of the nineteenth century. Before that people in presidency towns and those in Moffusils were governed mainly by their respective local laws with the courts established by the Royal charter selectively introducing some principles of the English law. However, the entire English law on any subject was never made applicable to India by any statute. So far as the Law of Evidence is concerned between 1835 and 1853 a number of Acts were passed by the Indian Legislature introducing some reforms many of which were advocated by Bentham and introduced in England by Lords Brougham and Denman. The Criminal Procedure Regulation of 1817 and the Code enacted in 1861 also contained some rules of Evidence. However, it was not until 1872 that the present Evidence Act as drafted by Sir James F. Stephen was enacted.

It may be recalled that this was the time when in England the principle of exclusion of confession from evidence had reached its peak. The courts were too readily throwing out custodial confession and relied upon other independent evidence whenever they handed down convictions. However, there was no statutory bar to their inclusion. In the U.S. this was the time when the view that the guarantee against self incrimination as laid down in the V amendment applied to the pre-trial stages as well was gaining ground, though the almost total exclusion stage was reached a century later.

Apparently influenced by the thinking in U.K. with an added factor of the eroding credibility of the police, especially, the level of the police at which investigation of offences were carried out, the Indian legislators took the extreme step of statutorily shutting out all confessions made to the police whether true or false, voluntary or involuntary, not torture, not oppression, threat or inducement but the mere of presence of a police officer or even that
the accused was in police custody was considered sufficient to raise a presumption and that too an unrebuttable presumption of involuntariness.

2.4.1 Code of Criminal Procedure, 1861

The relevant provisions can be traced to the Code or Criminal Procedure of 1861, Section 146 of the Act debarred a police officer or any other person from offering any inducement by threat or promise or otherwise to any accused person to make any disclosure or confession. Section 147 prohibited any police officer from recording any statement or any admission or confession which might be made before him by a person accused of any offence except for his own information or guidance. These two sections were purely administrative prohibitions applicable to police officers. However, Section 148 laid down in clear terms that ‘no confession or admission of guilty made to a police officer could be used as evidence against a person accused of any offence. Section 149 further expanded the ambit of the rule by debarring all confessions or admissions of guilt made by an accused to anyone whilst he was in the custody of police except when made in the immediate presence of a Magistrate from being admitted in evidence. However, Section 150 carved out an exception to both these rules in cases where any fact is shown to be discovered by the police in consequence of an information received from the accused in such cases such part of the information as distinctly related to the facts discovered was made admissible whether it amounted to confession or admission of guilt or not.

Thus the basic rule was that all confession made to the police or whilst in police custody were inadmissible. A confession directly leading to discovery of a relevant fact was however made admissible, only to the extent it related to the discovery presumably because the discovery itself proves its veracity. However, before any fact being discovered on the basis of a
confession, the confession would have to be recorded. In case of a discovery
being actually made the confession so recorded would be reproduced in the
court and give in evidence. It is difficult to reconcile this provision with
Section 147 which prohibited recording of confession by police officers. The
only practical way out can be to record all confession under the garb of the
‘for his own information and guidance clause’ and later to give it in evidence.
It was admissible under Section 150. Section 150, therefore, made such parts
of a confession admissible in evidence as had been verified to be true.
However, this provision did not create any exception to Section 146 which
debarred a police officer from offering any inducement to make such
confession or statement. The principle of voluntariness was still supreme. It
was held that a confession obtained by a police officer from a prisoner by
persuasion and promises of immunity in contravention of Section 146 of the
1861 Code was not admissible in evidence even if it led to discovery of facts.34

2.4.2 The Evidence Act, 1872

The first uniform legislation on Evidence was drafted by the Indian
Law Commission in 1868. The Bill was however, dropped as it was felt not
sufficiently elementary in as much as it pre-supposed some knowledge of the
English rules and practice and as such would not be suitable in India. J.F.
Stephen then drafted a new bill which came to he be passed as the present The
Indian Evidence Act, 1872.

The total exclusion of custodial confessions from evidence as well as
the exception made in case of confessions leading to discovery of any fact was
carried over to the present Act with Section 25, 26 and 27 corresponding to
Sections 148, 149 and 150 of the Code of 1861 respectively. The Act being for
the purpose of laying down the rules relating to evidence only the general

34 Bishoo Maryee 9 W.R. 16 (Cr. R) Call.
provisions of procedure relating to criminal investigation including Sections 146 and 147 of the Code of 1861 did not find a place in the Act. However, Section 24 made all confession made by an accused under inducement by threat or promise from any person in authority irrelevant in criminal proceedings. The bar extends irrespective of whether the person holding out such threat or promise is a police officer or not and whether or not the accused was in police custody at the time confession was made.

2.4.3 New Criminal Procedure Code of 1898

In 1898, the Code of Criminal Procedure was thoroughly revised. Sections 146 of the old Act of 1861 was adopted in Section 163 of the 1898 Act as sub clause (1). However the bar to police officers recording any confessions, as laid down section 147 or the 1861 Act did not find mention in the new Act. On the contrary, Section 163(2) laid down that no person including a police officer shall prevent any person from making a statement of his own free will. The only restriction imposed in Section 162 is the manner that the statement made by any person during the course of any investigation shall not be signed by him and cannot be used for any purpose save to contradict such person when his testimony in the court is contradictory to any part of the same. By virtue of sub-clause (2), the provision was made inapplicable inter-alia to statements recorded under Section 27 of the Evidence Act.

Though Section 162 of the Cr. P.C. relates to statements made by any person, sub-clause (2) makes it clear that ‘any person’ includes an accused person in relation to the offence being investigation. Thus the effect of this provision vis-à-vis a confession made to a police officer by an accused person during investigation is the same as that of Section 25 and Section 27 of the Evidence Act. Section 26 creates a further bar to admissibility of a confession
made to any person while the accused is in police custody except in the immediate presence of a magistrate. Thus a confession made before a magistrate even during the investigation of the case and even when the accused is in custody is provable against the accused in trial. The power of a magistrate to record such confession and the procedure therefore is provided in Section 164 of the Code. The chief requirement is that the accused is to be cautioned that he is not bound to make a confession and if he still does so voluntarily, the same can be used as evidence against him at trial and that a declaration that the accused was so cautioned has to be appended to the statement recorded by the magistrate. This is what has always been the procedural requirement for recording of a confession even by police officers in both U.K. and U.S.A.

The combined effect of Sections 24 to 27 of the Evidence Act and Section 162 of the Cr. P.C. was lucidly explained by the Supreme Court as follows:

“On all analysis of sections 24 to 27 of the Indian Evidence Act and Section 162 of the Code of Criminal Procedure the following material propositions emerge:

a) Whether person is in custody or outside, a confession made by him to a police officer the making of which is procured by inducement threat or promise, having reference to the charge against him and proceeding from a person in authority is not provable against him in any proceeding in which he is charged with the commission of an offence.

b) A confession made by a person whilst he is in the custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.
c) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise which distinctly relates to the fact thereby discovered but no more is provable in proceeding in which he is charged with the commission of an offence.

d) A statement whether it amounts to a confession or not made by a person when he is not in custody to another person not being a police officer may be proved if it is otherwise relevant.

e) It was held in the case State of UP v. Deomani Upadhaya,\(^\text{35}\) by the court that a statement made by a person to a police officer in the course of an investigation of an offence under chapter 14 of the Criminal Procedure Code cannot except to the extent permitted by Section 27 of the Indian Evidence Act be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.

2.4.4 Present Position

The law as enacted a century ago by the representative of the British Government has remained totally static. The Code of Criminal Procedure as once again thoroughly revised in 1973 has not made any changes in sections affecting custodial confessions. The very few amendments made in the Evidence Act have also not touched Sections 24 to 27. No judgment of the Supreme Court or of any of the High Courts in half a century after the Constitution coming into force appears to have questioned the propriety of the total exclusion clause.

The Law Commission of India recommended an exception that confessions made before higher officials of the police namely of the rank of

\(^{35}\) AIR 1960 SC 1125.
Superintendent of Police and above in certain cases of grave offences. If recorded following a certain procedure be made admissible.\textsuperscript{36} The recommendations were partly accepted in case of a special Act namely the Terrorists and Disruptive Activities Act. 1985\textsuperscript{37} (hereinafter referred to as TADA). However, the Act has since lapsed and has not been replaced by another legislation on the subject. But the general exclusion created by Section 25 and Section 26 has never been suggested to be removed. Such a distrust of one section of the society i.e. the police perpetrated by foreign rulers has never been considered reviewable in independent India.

The disadvantages of the near-total exclusion rule are being felt in the United States of America. United Kingdom has come out of the total exclusion policy of the courts as prevailed in the nineteenth century. Why has the police in India still remained untrustworthy? Can something be done to improve their credibility so that an important agency of the State can restore its morale? Has the exclusionary clause served the purpose it was meant for namely protection the citizens from torture and oppression at the hands of the police? These questions are proposed to be examined in this work. For the purpose of the present chapter on history and development of the law. It is sufficient to observe that the law relating to admissibility of custodial confession in India has undergone no change in the last one hundred and forty years.

2.5 Position of Law of Confession in England and India

(i) \textbf{Section 25 and 26 Different from English Law} :- Section 25, 26 and 27 differ widely from the law of England, and were inserted in the Act of 1861, in order to prevent the practice of torture by the police for the purpose of extracting confession from the persons in their custody.\textsuperscript{38} Sections 25 and 26 of Evidence Act are apparently peculiar to this country and the safeguards in

\textsuperscript{36} Law Commission of India, 14\textsuperscript{th} Report, 1958.
\textsuperscript{37} Section 15 TADA Act, 1985.
\textsuperscript{38} Stephen’s Introduction, p. 140.
India, in favour of accused are, in some cases more pronounced than in England.\textsuperscript{39} On this subject of the exclusion or admissibility of confessions made to a police officer, nothing can be more unreasonable than the hard and fast line that is often attempted to be drawn in this country.\textsuperscript{40}

(ii) Practice in England :- The English law of Evidence consists mostly of negative rules declaring what is not evidence. It is almost wholly judge – made law formed by degrees, to meet the exigencies of particular cases and comparatively of very modern date, to which have been added the glosses which successive text book writers have put upon the decisions of the judges.

(a) Taylor on Evidence :- The Evidence Act was drawn up chiefly from Taylor on Evidence, and he based his treatise largely on the work of former authors. Section 27 was an attempt to apply the English law on Evidence about information unduly obtained from a prisoner to information given by an accused while in custody of police officer and is merely a paraphrase of Taylors para 902 (see the 11\textsuperscript{th} Ed., p. 1641). The words “relates distinctly” are taken directly from the source.

(b) Phipson’s Interpretation :- Phipson\textsuperscript{41} states that facts disclosed in consequence of inadmissible confessions are receivable as relevant and where property has been discovered or delivered up in this way so much of the confession as “strictly relates” thereto will be admissible, for these portions at least cannot be untrue. But independent statements not qualifying or explaining the fact though made at the same time will be rejected. It will be observed that his statement of the rule is much narrow than that of Taylor, being restricted to property which has been discovered or delivered up, nor does he use Taylor’s word “distinctly”

\textsuperscript{39} 2 C.W.N. 702 per Maclean : C.J.
\textsuperscript{40} Union of India v. Pancham, All 1988, p. 203.
\textsuperscript{41} Evidence, 6\textsuperscript{th} Ed., p. 270.
but the word “strictly” which is word used in the reporter’s note of the case of *R. v. Butcher*,\(^{42}\) Tried at Maidstone Summer Assizes in 1798, which is the main authority relied upon the both Taylor and Phipson.

(iii) **Indian and English law – Distinction Between**: In English law, the statement of an accused person to the police could be tendered in evidence provided he had been cautioned and the exact words of the accused are deposed to.\(^{43}\)

The Indian law on the subject was enacted in 1861. Commentators of Indian law of Evidence have held that two departures were made from the English law and that they were: (1) That no statement made to a police officer by any person was provable at trial which included the accused person; and (2) that no caution was to be given to a person making the statement. The words of this section were taken away bodily from an English authority of 1785 in *R. v. Rockhart*.\(^{44}\)

The scope of Section 27 has been the subject-matter of so much of judicial comment that it will be useless to reproduce the dicta of the different High Courts. However, it would be useful to refer to one or two important authorities on the subject.

In *Pulkuri Kottaya v. Emperor*,\(^{45}\) it was held:

“It is fallacious to treat the fact discovered within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to the fact. Information as to past

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\(^{42}\) (1783)1 Leach, C.C.

\(^{43}\) See Sir Howard Vincent’s Police Officer wherein Lord Brampton has been quoted in this behalf.

\(^{44}\) (1785)1 Leac, p. 388.

\(^{45}\) AIR 1947 P.C. 67.
user, or the history of the object produced is not related to its discovery in the setting in which it is discovered.”

(iv) Burden of Proof :- The burden of proving a voluntary or involuntary character of a confession under the English law, lies on the prosecution. It is for the prosecution to establish that the prisoner’s statement was free and voluntary and upon the accused to negative the voluntariness of the confession (Care J.).

Both in England and in India a voluntary and unsuspected confession is clearly sufficient to warrant conviction. Wherever there is independent proof that by some in a criminal act has been omitted.

Formerly, it was contended that confession alone is a sufficient ground for conviction without such evidence, but the cases adduced in support of this doctrine are not decisive, as in all of them there appears to have been outside the confession, some evidence—though slight of confirmatory circumstances, and the contrary view may now be accepted as settled law.

2.6 Conflicting Views

With regard to the degree of credit which a jury ought to attach to a confession much different or opinion has existing. By some it has been considered as forming the highest guilt and more satisfactory evidence, as it was stated by the court in Warickshall’s case.

On the other hand, it is said by Foster, J. (Discourses, 243) that “hasty confession made to persons having no authority to examine, are the weakest and most suspicious of all evidence.” The opinion has also been adopted by Sir W. Blackstone. It has been said that it is not to be conceived that a man

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47 Corpus delicti is often used as an equivalent to this phrase.
48 (1783) 1 Leach, 263.
49 4 COM 357.
would be were not true. It cannot be doubted, however that instances have occasionally occurred, in which innocent persons have confessed themselves guilty of crimes of the gravest nature. Other sources of distrust are “the zeal which generally prevails to detect offenders and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight sufficient proof together with the character of the witnesses who are sometimes necessarily called in cases of secret and atrocious crime.50

In Principles and Digest of the Law of Evidence, Vol. I, New Edn. By Chief Justice M. Monir, after noticing conflicting views and discussing authorities, the learned author summarized the position as follows:

“The rule may therefore, be stated to be that whereas the evidence is proof of a confession having been made is always to be suspected, the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the law.”

Thus a confession is relevant as an admission unless it is not made:

1. to a person in authority in consequence of some inducement threat or promise held out by him in reference to the charge against the accused;
2. to a police officer; or
3. to any one at a time when the accused is in the custody of a police officer and no magistrate is present.

Thus a statement made by an accused person if it is an admission, is admissible in evidence. The confession is an evidence only against maker and against another person who is being jointly tried with him for an offence. A confession is an admission made by a person charged with a crime, stating or suggesting the inference that he committed that crime.51

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50 Roscoe’s criminal evidence, pp. 35-6.
2.7 Difference in Practice Between English and Continental Courts

At least according to the humane provisions of the law of England, for on this point the practice is widely different between the English and continental courts. There, where the civil law is followed, till lately a confession was deemed of so high a character, that proof was not even admitted to contradict it, from this same reason prevailed the old practice of the “question” with all its terrors”; and even at the present day obtains the practice of the judge submitting the accused to searching personal interrogation. In England the maxim “nemo tenetur seipsum prodere” has always obtained, and it is a proud boast the judicial torture has never legally obtained in England, however, it may in ruder times have been occasionally practiced by virtue of some imaginary prerogative of the crown.

The remarks of Mr. Best in summing up the arguments for and against the practice of England and the continental nations are instructive. These remarks, it is conceived, are conclusive in favour of the England practice. A statement in order to amount to a “confession” must either admit in terms the offence, or at any rate substantially all facts which constitute the offence. An admission of an in criminating fact, however, grave, is not by itself a confession. A statement which contains an exculpatory ascertain of some fact which is true, would negative the offence alleged, cannot amount to confession.

2.8 Miranda Exclusionary Rule

*Miranda v. Arizona,* mantle of exclusion extends the right against self-incrimination to police examination and custodial interrogation and takes

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52 Best, Secs 537-39.
in suspects as much as regular accused persons. Under the Indian Evidence Act, the Miranda exclusionary rule that custodial interrogations are inherently coercive finds expression (Section 26).

2.9 Review

No person shall be compelled in any criminal case, to be a witness against himself. The rule by the passage of time developed into a privilege of a witness against self-incrimination. The principle got carried into the American Legal System and became part of her common law. The Code of Criminal Procedure as once against thoroughly revised in 1973 has not made any changes in sections affecting custodial confessions. The very few amendments made in the Evidence Act have also not touched sections 24 to 27 of Evidence Act. The first uniform legislation on Evidence Act was drafted by the Indian Law Commission in 1868. The total exclusion of custodial confessions from evidence as well as the exception made in case of confession leading to discovery of any new fact which was carried over to the present Act with sections 25, 26 and 27 corresponding to Sections 148, 149 and 150 of the Code of Criminal Procedure, 1861 respectively.

2.10 Critical Appraisal

With the above it seems that the confession can be made the sole basis for the conviction of the accused provided it is made voluntary and free from coercion. If the conviction is made on the basis of the involuntary confession or the consent was sought under the fear, the conviction will be bad in the eyes of law. The Historical development of Law relating to confession indicates that the concept has evolved gradually in various countries. The courts are adopting a very cautious approach while considering the relevancy and admissibility of confession.