

## Confessions under Malaysian and Islamic Law: A Comparative Evaluation

Mohd Akram Shair Mohammed

Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia.

---

**Abstract:** A valid confession is the most valuable and reliable evidence in the possession of the prosecution. This is especially where the available circumstantial evidence is not cogent and compelling in such a way as to link the accused to with the commission of the crime. Consequently, the law enforcement agents usually try to get a confession of the accused to prove their cases. Many methods are thus used to retrieve such evidence including but not limited to coercion. However, what amounts to confessions is not that an easy task. The court plays an important such in the admissibility of confessions. Based on this, the makes a comparative evaluation of confessions under the Malaysian and Islamic law perspectives. It uses many case laws, verses of the Qur'an and *Sunnah* of the Prophet (s.a.w.) and opinions of scholars to make the legal evaluation. It finds that though both systems have different approaches to confessions, the hallmark of admissibility of confessions in the two systems is its voluntariness.

**Key words:**

---

### INTRODUCTION

By way of brief historical conspectus, as early as the 18<sup>th</sup> century, it was recognised that the rationale for tendering confessions would only be justified if they were made voluntarily and the acceptance of involuntary confessions in evidence was potentially dangerous because they could be unreliable. There was a year that people could be deceived, bribed, tricked or threatened into making admissions. These risks prompted the courts to gradually build safeguards to arrest this occurring. By mid -1700s, Chief Baron Gilbert confidently said that confessions 'must be voluntary and without compulsion' to be admitted, if only for the pragmatic reason that extorted confessions are not to be depended on (Gilbert, 1976).

By early 18<sup>th</sup> century, a precise principle of prohibiting the admission of involuntary confessions had clearly emerged. For example, the confession of a defendant tried at the Kent Assizes in 1774 was admitted only after the prosecution witnesses had been thoroughly questioned as to whether it was made freely, read over to him before he signed it, and subject to any threats or promises. Confessions obtained in breach of such prerequisites were often excluded (King, 1820). The leading case of *R v Warwickshall* is worth noting because it crystallised such approach, which had by then already become a prevalent and long established practice in subsequent years. In numerous cases, confession were excluded in criminal cases on the same principle as adumbrated in *Warwickshall*, i.e. that they were induced by promise of advantage or by a fear of threat and an absence of such factors were endorsed and adopted by leading treatise authors as indicative of voluntariness (Penny, 1998).

The high water mark was reached in the seminar case of *Ibrahim v R* (1914) where Lord penned these celebrated words that: "it has long been established... 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 excited or held out by a person in authority." In the 20<sup>th</sup> century, these two grounds exclusionary reasons were extended to include confessions that were extracted by 'oppression'. At common law, this was defined as: "something which tends to sap and has sapped that free will which must exist before a confession is voluntary (*R v Priestly*).

In the modern day, confessions where properly and legally made seems to be the most valuable source of evidence to the prosecution. Because of this, situations do occur where the law enforcement agents seek to retrieve evidence from the accused through confessions. This is common in cases where there is no direct evidence to link the accused with the commission of the crime. The circumstantial evidence, which exists may not be so cogent and compelling in such a way as to nail the accused person. Consequently, in many situations, the law enforcement agents resort to having confessional statements from the accused. In doing this, so many methods are employed including but not limited to coercion and duress.

Against the above backdrop, the paper makes an overview of confessions from the Malaysian and Islamic law perspectives. In doing this, it analyses from the Malaysian (being of common law origin) law perspectives: the status of confession evidence, the rationale for admitting confessions and the reason for the exclusion of improperly obtained confessions. From there, the paper analyses the substantive laws relating to confessions. The paper also discusses confessions from Islamic perspective. It analyses the major legal principles on confessions. It first considers whether confessions is in itself legal in Islamic law and examines the element that

---

**Corresponding Author:** Mohd Akram Shair Mohammed, Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia.

E-Mail: akram@iium.edu.my

can affect the validity or vitiate confessions. It also examines whether confessions are binding on persons other than the accused. Further, the paper discusses the issue of giving benefit of doubt to the accused after a confession is made. Lastly, it discusses whether the right of retraction of confessions is available to the accused and the Islamic legal principles, which govern such retractions. Although a person may confess to a civil wrong (which in any way is regarded as admission), the paper focuses on when a person confesses to the commission of a crime.

***The Status of Confession Evidence:***

Interrogation is an effective investigative tool. Compared to other forms of acquiring evidence, it is cheap and the outcome, a confession is evidence that is seen by the judge piece of facts as reliable and convincing. Despite the right of silence and the privilege against self-incrimination, most suspects talk to the police may make complete or partial verbal or written admission of guilt (Uglov, 2002).

Clearly, the admission of guilt by the defendant is crucial evidence. However, the law would consider it as hearsay when the admission is repeated in the court by a police officer or other witnesses. Usually, neither the prosecution nor the defence can rely on hearsay i.e. a witness repeating an out-of-court oral or written statement in order that the court should rely on the truth of that statement. The classic judicial statement of the rule was formulated by the Privy Council in *Subramaniam v PP* (1956) thus:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement...’

In *Ratten v R* (1962), Lord Wilberforce observed: “ the mere fact that evidence of a witness includes evidence of words spoken by another person who is not called is no objection to its admissibility...A question of hearsay arises when the words spoken are relied on as ‘testimonial’, that is, as establishing some facts narrated by the words.” When a police or similar officer repeats a defendant’s confession, this is hearsay. But there are numerous exceptions to hearsay rule which allow evidence to be admitted –confessions– i.e. statement by a party to a case which are against the party’s interest has always been one of those exceptions. They do not have to be made to the police, though usually are in facts all statements made by the suspect to the police are admissible into evidence. Once admitted, such statements are deeply prejudicial, since the trial judge (trier of facts) will often not border to look for other independent evidence that supports the confession.

***Rationale for Admitting Evidence of Confession:***

The traditional rationale for receiving confessions, was that such statements, unlike other forms of hearsay, were inherently reliable because it was unlikely that a suspect ‘would confess to any crime he had not committed that it was safe to rely upon the truth of what he said (*R v Sharp*). Indeed, a confession even if unsupported by any other evidence, can found a conviction on its own though this happens comparatively rarely in practice. In this, Malaysia differs from some other jurisdictions including India where there is a corroboration requirement, and Scotland such a requirement is a loose one.

***Reasons for Excluding Improperly Obtained Confessions:***

There are two principle reasons underlying the rule that a confession obtained in dubious circumstances should not be admitted in evidence. One reason, which has long been stated by the judges, is that a confession in such dubious circumstances may well be unreliable, because a confession may have been given, not with the intention of telling the truth but the desire to escape the oppression imposed on, or the harm threatened to the suspect. A further reason stated in more recent years, is that in a civilised society, a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to ill-treatment or improper pressure in order to extract a confession (*R v Mushtaq*).

Although the potential unreliability of a confession that has been obtained in suspicious circumstances remains an important reason for having a special regime for such evidence, society has also moved on its understanding of the risks of untruthful confessions since the 1980s, let alone 1700s. the seminar works of psychologists had made the judiciary much more aware than previously that false confessions can be obtained from suspects with psychological vulnerabilities, even where interview is conducted in circumstances which are not overtly malign-there situation where a suspect is highly suggestible (Gudjonson, 2002).

It appears useful to add that excluding a confession illegally obtained will tame the power of the police since it will not be admitted in evidence. The reason is that torture for the purposes of obtaining confessions by the police is not alien to most countries of today. The ideal situation is that the interest of justice will be better protected if the prosecution is allowed to prove its case against the accused. This should be done relying on his own independent power of investigation rather than relying on statement of the accused incriminating himself. This is especially the situation when this is carried out in the police custody and pressure. More so, there is the risk that a frightened man may implicate himself even though he may be innocent. The confession rule is not without reason. It should be noted that confession is decisive of the guilt of the accused. In such a case, the law

needs to be strict so that the innocent will not be punished. Besides, it is the duty of the police to follow the law while implementing the law.

***The Substantive Law Relating to Confessions:***

The substantive law relating to relevancy and admissibility of confessions in Malaysia is to be found in sections 24 to 30 of the Evidence Act 1950 (Revised 1971). The Act defines an admission and a confession in section 17(1) and (2) respectively, a confession being included under the general definition of admissions.

***Definition of an Admission:***

Section 17(1) (Evidence Act, 1950) states that “an admission is a statement oral or documentary which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons and under the circumstances hereinafter mentioned; while s 17(2) defines a confession as “an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.”

In construing section 17(2) of the Evidence Act, Indian authorities are of no use (Indian Evidence Act, 1872) the Indian Evidence Act of 1872 upon which Malaysian Evidence Act is based upon does not contain the definition of confession. English authorities are not helpful when a confession is made to the police in view of sections 25 and 26 of the Malaysian Evidence Act (1950). However, the definition given by Stephen has a statutory force in Malaysia, Singapore and Sri Lanka.

***Difference between an Admission and a Confession:***

In *R v Wong Ah Khin & Ors* (1935), Burton Ag CJ observed that:

The Evidence Ordinance defines an admission and a confession, a confession being included under a general definition of admissions. And then under s 21 it makes admissions relevant and can be proved unless they are excluded by some other section of the Ordinance or by some other rule of law not perhaps contained in the Ordinance.

The term ‘admission’ is the genus of which ‘confession’ is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed the offence. Sections 17 to 31 of the Evidence Act (1950) are to be found under the heading ‘Admissions.’ Confession is a species of admissions and is dealt with in sections 24 to 30. A confession or an admission is evidence against the maker of it unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats, or promises.

Therefore, all confessions are admissions and relevant under section 21. But not all admissions are confessions. A confession is only a species of admission. Every statement, oral or documentary, which suggests any inference as to any fact or issue or relevant fact made by an accused is an admission under sections 17, 18 and 19, and such an admission can be proved by the maker under section 21, unless it is rendered inadmissible under some other provisions of the Evidence Act or law not contained in the Evidence Act (1950).

Subject to the provisions of sections 27 to 29, under sections 24 to 26, statements made by accused persons are declared to be inadmissible when such statements are confessions. The later trilogy of sections set out the circumstances under which confessions are excluded. If a person accused of an offence makes a statement or statements in any of the above circumstances, whether or not the statement is admissible will turn upon the question whether or not the statement is a confession within the meaning of section 17(2). If it is so, the confession will not be admissible under section 24. Such a confession will also be inadmissible under sections 25 and 26 which are imperative unless express provisions of other laws allow it in.

Therefore, in dealing with the question of admissibility or otherwise of a confession, the first problem that has to be resolved is whether or not the statement is a confession within the meaning of section 17(2).

***Meaning of Confession:***

Section 17(2) (Evidence Act, 1950) states that:

A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

The definition can be divided into two parts. It means that a confession is an admission made at any time by a person accused of an offence:

- (a) Stating that he committed that offence, or
- (b) Suggesting the inference that he committed that offence.

In so far as (a) is concerned, there is no difficulty. If a person accused of an offence states expressly that he committed the offence of which he is charged, clearly it is a confession. In so far as (b) is concerned, Indian authorities do not seem to accept it. The Privy Council in *Pakala Narayana Swami v Emperor* (1939) did not accept the (b) part of the definition. It said at p. 52 that:

Moreover, a confession must either admit in terms of the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g. an admission that an accused is the owner of and was in recent possession of the knife or the revolver which caused a death with no explanation of any other man's possession.

However, a doubt about the inferential aspect of the statement constituting a confession in the "(b)" part of the definition was laid to rest by the Privy Council in the Sri Lankan case of *Anandagoda v The Queen*, (1962) on the construction of the section. The appellant with two others were tried together with conspiracy to murder and with the murder of the deceased, one Adeline, by running her over with a car. The appellant was found guilty of murder.

The facts as deposed were that:

Late at night on March 14 1959, the dead body of a woman was discovered lying at Timbiriwewa near the 27<sup>th</sup> mile-post on the road between Puttalam and Anuradhapura. A post-mortem examination conducted on March 16, 1959, revealed that the woman was between 20 and 25 years of age, that she had been about seven months advanced in pregnancy, and that her body bore numerous injuries consistent with her having been run over by a motorcar.

The case for the prosecution was that the dead body was that of Adeline Vitharana, that her death had been caused by a motorcar being deliberately driven over her body at least twice, that the consequent injuries were the cause of her death, and that death had occurred between 11.00 p.m. and midnight on March 14, 1959. It was not contended on appeal that it was in any way unjustifiable for the jury to decide upon the evidence either that the identity of the dead woman had been proved, or that she had been killed in the manner and the time and place asserted by the prosecution.

Besides what appeared to be strong evidence that the prosecution adduced by a police officer who said that the appellant made certain admissions to him while in his charge at the police station on March 22 1959 as follows:

Q: And at about 10.10 a.m. on March 22, the first accused (i.e., the appellant) made a statement to you?

A. Yes.

Q. Did the first accused person tell you his relationship with Adeline Vitharana?

A. Yes, he told me that Adeline Vitharana was his mistress for two or three years and she has a child by him.

Q. Did he tell you anything about any request made to him by Adeline Vitharana?

A. Yes. He said that Adeline was insisting that he should get married to her but he was putting it off.

Q. Did he tell you what Adeline Vitharana's attitude to him after that was?

A. He said the Adeline Vitharana was disgracing him and that she was unbearable nuisance to him.

Q. Did he tell you anything of what happened on March 2, 1959?

A. He said Adeline Vitharana came and saw him at Kalutara on March 2, and that he took her to kaluwella on that day and left her in the house of Podisingho. No. I am sorry. He said he left her at a place at Kalawellawa.

Q. Did he tell you where he was on March 14, 1959?

A. He told me that on March 14 he started in his car with Adeline Vitharana, the second accused, Podisingho for Anuradhapura via Puttalam. They reached a Muslim hotel at Puttalam between 8.00 and 9.00 p.m.

Q. Did he tell you what he did on March 15?

A. Yes. He said he got a red Vanguard from Avis Motors and came to Anuradhapura via Puttalam with his watcher, Sirisena.

Q. Did he tell you where he was about 3.00 or 3.30 p.m. on March 15?

A. Yes. He said he passed the scene of murder.

Q. That is the place where the body was?

A. Yes.

Q. Please refresh your memory?

A. he said that he passed the body of Adeline Vitharana and that he slowed down and noticed people and police officers there.

Clearly, the adduction of these admissions by the prosecution which the appellant made to the police would have persuaded the jury to believe that:

1. the appellant had a strong motive for desiring the deceased's death was pregnant with his child;
2. he was in her company where she was last seen alive by witnesses in the case and had an opportunity to be with her at the time when her death was caused;
3. he had planned to use hired car, not his own car, for a trip with the deceased on the day of her death; and
4. that his subsequent conduct tended to show that he may have had knowledge that her body lay at a place where it was ultimately found.

On appeal, the appellant submitted that the above statements were wrongly admitted in evidence because they had given rise to an inference or inferences which prejudicial to the appellant, or suggested that he committed the offence of which he was found guilty; and they therefore constituted a confession within the meaning of sections 17(1) and (2), and 25 of the Ceylon Evidence Ordinance (which are in *pari materia* with the Malaysian Evidence Act).

Rejecting this contention, Fernando J for the Sri Lankan Criminal Appeal Court opined that:

An admission by an accused of facts which can establish motive or opportunity, or knowledge of a death does not suggest an inference that an offence was committed by him; the inference which such a fact suggests is only that he may have had reason or an opportunity for, or knowledge as to the commission of the offence.

***Meaning of Confession- The Anandagoda Objective Test:***

The Privy Council through Lord Guest (1962) (after noting the definition of confession as contained in section 17(2)) opined:

The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or whether taken together in their context, they inferentially admit guilt.

Lord Guest endorsed the test enunciated by Graetiaen J in *Seyadu v King* (1951) that:

Whether an admission amounts to a confession within the meaning of s 17(2) of the Evidence Ordinance must be decided by reference solely to its own intrinsic terms.

The test whether the statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and must be considered on its own terms without reference to extrinsic facts. It is not permissible in judging whether a statement is a confession to look at other facts which may not be known or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together, suggest the inference that the accused is guilty of the offence, then it is nonetheless a confession although the accused at the same time protests his innocence.

Lord Guest further (1962) emphasised that it is not permissible in judging whether the statement was a confession to look at other facts which might not be known at the time or which emerge in evidence at the trial. But equally, it is irrelevant to consider the accused intended to make the confession. If the facts in the statements added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even though the accused at the same time protests his innocence.

Their Lordships of the Privy Council found no grounds to criticise the test which the Criminal Appeal Court had applied in examining the appellant's statements:

If the statements are considered by themselves they do not ... amount to a confession of guilt within the meaning of s 17(2). There is no admission that the appellant was driving the car at the time of the offence or that if he was driving the car at the time of the offence in running over the deceased the appellant was acting deliberately, both of which elements would be necessary to constitute the crime of murder.

The evidence, their lordships opined was rightly admitted.

***Reception of the Anandagoda Objective test by the Malaysian Federal Court:***

The Federal Court in *Lemanit* (1965) readily received the law enunciated in *Anandagoda v Queen* (1962) when Wee Chong J in CJ after quoting Lord Guest's judgement from *Anandagoda* said (at p 29):

Applying this [*Anandagoda* objective] test to the statement made by the appellant in the case before us, it appears to us that although it contains protestations of innocence in some respects, it does contain, taken as a whole without reference to extrinsic facts, an admission suggesting the inference that he committed the offence for which he has been arrested and on which he was subsequently charged.

The *Anandagoda* objective test was again followed recently by Zaleha Zahari JC (as she then was) in *Abdul Khalid bin Abdul Hamid* (1995). After referring to the meaning attributed to a 'confession' under section 17(2) as enunciated in *Anandagoda*, Zaleha Zahari JC said at p 703:

A reasonable person reading the statement would conclude that, far from admitting guilt, Das (Paramadas) is denying liability of any wrongdoing whilst admitting that he did receive the money, he was saying that he was only a collecting agent in respect of which he would receive some payment for the service that he rendered.

Applying the test referred to above (in *Anandagoda*), I am of the opinion it cannot be concluded that the statement made by Paramadas amounted to a statement that Paramadas committed the offence or which suggests the inference that he committed the offence and falling within the meaning of the word "confession."

A series of Singapore cases which have a similar provision as the Malaysian provision i.e. section 17(2) of the Evidence Act, further confirmed this test. In *Suradet & Ors v PP*, (1993) the court held that the words "suggesting the inference that he committed the offence" in section 17(2) of the Singaporean Evidence Act

clearly demands a wider interpretation than that placed by the Indian Supreme Court in *Pakala Narayana Swami v Emperor* (1939) on the Indian counterpart legislation which does not have these words ... "what s 17(2) purports to import and what the *Anandagoda* purports to signify is that a confession need not be an unqualified admission of guilt" per Rubin JC (as he then was) in *PP v Abdul Rashid & Ors* (1993). This view was endorsed on appeal *Abdul Rashid v PP* (1994) where at p 129 it was stressed that:

The correct interpretation of s 17(2) has been settled by two recent decisions of this court, namely, *Suradet & Ors v PP* (1993) and *Tan Chee Hwee & Anor v PP. (1993)* Essentially we take the view that the Indian decisions are not helpful in this regard as the Indian counterpart legislation does not bear the words "suggesting the inference that he committed the offence." The correct interpretation is to be found in *Anandagoda's* case which dealt with the Ceylon Evidence Ordinance which is in *para materia* with our s 17(2).

...For a statement to amount to a confession, it need not be of a plenary or unqualified nature, and can also be in a non-plenary nature, so long as the statement connects in some way with the offence.

In the appeal before it, the Singapore Criminal Court of Appeal as *per* the judicial exegesis of section 17(2), the admission by the first appellant in his statements that he was in possession of the package containing the drugs unequivocally connected him with the offence and his three statements therefore amounted to confessions.

The fact that confessional statement need not be of a plenary or unqualified nature in the *Pakala Narayana Swami* sense, and it may be of a non plenary nature, so long as it connects the accused in some way with the offence, was again endorsed by a recent Singapore case of *Teng Chee Kong v PP* (1998) where the *Anandagoda* test was affirmed. In the Singapore case of *Abdul Rashid & Anor v PP, (1994)* Yong Pung How CJ observed at p 129:

Turning first to the definition of a confession, s 17(2) of the Evidence Act reads:

"A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence."

In his grounds, after referring to and approving the *Anandagoda v R*, the learned judge concluded:

In my views, what s 17(2) purports to import and what *Anandagoda* purports to signify is that a confession need not be an unqualified expression of guilt. Under our law, it is no more than a person's statement admitting to involvement in the offence charged in any manner or form. Be it minor or major, direct or indirect, explicit or inferential and whether in exculpation or in earnest, irrespective of its object, so long as the statement connects the accused in some way with the offence charged it would be deemed to be a confession under s 17(2).

The correct interpretation of section 17(2) has been settled by two recent decisions of this court, namely, *Suradet & Ors v PP* [1993] 3 SLR 265 and *Tan Chee Hwee & Anor v PP* [1993] 2 SLR 657. Essentially, we take the view that Indian decisions are not helpful in this regard as the Indian counterpart legislation does not bear the words "suggesting the inference that he committed the offence." The correct interpretation is to be found in *Anandagoda's* case, which dealt with the Ceylon Evidence Ordinance, which is in *para materia* with our s 17(2). The relevant passage of Lord Guest's judgment in *Anandagoda's* case reads as follows:

The test whether the statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and must be considered on its own terms without reference to extrinsic facts.

The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt.

Again in *Chin Seow Noi & Ors v PP* (1994) Yong Pung How CJ in commenting on the meaning of confession under section 17(2) of the Singapore Evidence Act- which is in *pari material* with our s 17(2) of the Evidence Act, 1950, said at pp 148:

It will be logical to deal first, with the later contention since it concerns a precondition to the operation of s 30 itself. (Counsel had submitted that statements of the two of the three appellants did not amount to confessions because the statements included exculpatory matter). In putting forward the above proposition counsel relied on a series of Indian cases represented mainly by *Palvinder Kaur v State of Punjab* (1953) and *Pakala Narayana Swami v R. (1939)* In *Palvinder Kaur*, for example, the Indian Supreme Court held at p 357:

"A statement that contains self-exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. A statement which, when read as a whole, is of an exculpatory character, in which the prisoner denies his guilt, is not a confession and cannot be used in evidence to prove his guilt."

We are of the opinion that on this line of authority was misplaced. The cases cited were decided within the specific context of the Indian Evidence Act if (1872), which contains no definition whatsoever of a confession. This is a crucial difference from our own Evidence Act, in which section 17 clearly provides that:

A confession is an admission made at any time by a person accused of an offence, stating or suggesting an inference that he committed that offence.

***Direct as Well as Inferential Admission of Guilt:***

Clearly, the term confession in section 17(2) of the Evidence Act includes not only the actual terms of an admission acknowledging or suggesting guilt but also evidence which, if accepted, would lead to the inference that the accused made such an admission.

***Exculpatory Statement:***

To constitute a confession within the meaning of section 17(2), the statement must be inculpatory. If it is entirely exculpatory in effect, judged objectively or if true, it will negative the offence of which the accused is charged with, the statement will not be a confession. In *Pakala Narayana Swami v Emperor* (1939), Lord Atkin said that:

[N]o statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which if true would negative the offence alleged to have been committed.

The Federal Court in *Herchun Singh v PP* (1969) accepted this statement of the law at pp 209-210. The facts were that the three appellants together with two others were charged with gang robbery. On appeal against their conviction *inter alia* that the confession of one of the accused, Ramasamy was not a confession and therefore should not have been considered against the other appellants (under section 30), Ong Hock Thye J (at 209) said:

We think the most convenient and logical way to deal with these appeals is to start with the confession of Ramasamy. A confession as defined in s 17(2) of the Evidence Ordinance “*is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence.*” The learned trial judge held quite rightly that a statement by Ramasamy was a confession. It told of a robbery and of his own participation therein. More than that, he merely attempted to palliate his own offence by alleging that he acted under coercion. Of him, the judge said, “*He may not have been the villain of the piece but he did take part in the robbery.*” It follows that so far as self-exculpatory statements were concerned, the judge interpreted them as in no way negating facts, which constituted the offence. This is our judgement, it cannot be regarded as inconsistent with pronouncement of Lord Atkin in *Pakala Narayana Swami v Emperor*. The allegation of coercion even if true (which was plainly held not to be) was no defence: see s 94 of the Penal Code. In the instance case, the offence was a robbery, nothing in the statement negative the commission of such offence or the deponents’ participation therein, including his receipt of part of proceeds of the crime. Consequently, we hold that the statement was in the fullest sense a confession.

In *Yap Chai Chai & Anor v PP*, (1973) the two appellants were convicted of murder in the course of an attempted robbery. The judge had admitted a confession recorded by a magistrate in accordance with section 115 of the Criminal Procedure Code, and after the statement was subjected to *voir dire*, concluded that it was made voluntarily. It was argued on appeal that the confession being self-explanatory did not amount to a confession, and therefore was wrongly admitted. Ong CJ, rejecting this contention said (at p 222):

In the first place, it was a clear admission of participation in the attempted robbery and consequently it was statement having reference to the charge against him-which was murder committed in the course of a robbery wherein there was evidence of common intention to use deadly weapons.

A leading Indian Supreme Court case that is often cited to illustrate this area of law is *Palvinder Kaur v State of Punjab* (1953). Palvinder Kaur was convicted of the murder of her husband by administering potassium cyanide poison. In her confessional statement, she stated that “*my husband was fond of hunting as well as photography. Some materials for washing photos (obviously potassium cyanide) was purchased and kept in the almirah. My husband developed abdominal trouble. He sent for medicine. I placed that medicine in the same almirah. By mistake, my husband took the liquid which was meant for washing photos. He fell down and died.*”

The Supreme Court held that the statement negative the offence of which the wife was charged; therefore it was not a confession following the statement by Lord Atkin in *Pakala Narayana Swami’s* case. Two Sri Lankan cases illustrate the point clearly. In the *King v Attygale*, (1934) the accused was charged with having performed an illegal operation on a woman. He had made a statement to a police officer to the effect that he had treated her for threatened abortion and had advised that she be hospitalised. Akbar J said:

The statement when read by itself as it should be is clearly exculpatory and I cannot see how anyone can deduce from it any inference of guilt on the part of the accused.

He accordingly held the statement not to be a confession. Likewise in *King v MS Perera*, (1953) a statement made by one of the accused persons that he had been invited by the other accused to join them in a conspiracy to commit robbery, but that he had declined the invitation was held by Gunasekera J to be an exculpatory statement and not a confession. Thus, authorities clearly show that an exculpatory statement cannot be considered a confession.

***Rules Relating to Admissibility of Confession:***

Our rule on admissibility of confession is taken from English law (*Dato’ Mokhtar Hashim v PP*). No statement by an accused is admissible against him unless it is shown by the prosecution to have been a voluntary

statement (*Ibrahim v R* (1914) per Lord Sumner) and this test was accepted by the House of Lords as the correct approach in *DPP v Ping Lin* (1975) where it was said that it was not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement is shown to be voluntary rather than one brought about in one of the ways referred to. It appears from the decision of Ping Lin, ante that the classic test of the admissibility of an accused's confession is that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained by fear of prejudice or hope of advantage created by a person in authority, or by oppression should be applied in manner which is part objective and part subjective (*Dato' Mokhtar Hashim v PP*).

In the leading case of *Hasibullah bin Mohd Ghazali v PP*, (1993) Edgar Joseph Jr SCJ reiterated that:

Secondly, it is also a fundamental principle of our criminal law, that in deciding whether or not a statement made by an accused was obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, the cardinal point, is not so much of the state of mind of the police officer.

In holding that the appellant "must show that he was put in that fear in order that the statement should result" and "that Hasi (the appellant) was not in the sort of fear the law requires to exclude his statement," the judge excluded from his consideration, the state of mind of the appellant with all its foibles and fortitudes, which was most material and instead, confined his attention, to the intention of Giam.

In *Md Desa bin Hashim v PP*, (1996) the Federal Court through Gopal Sri Ram JCA clearly stated:

The meaning of these sections (ss 24 to 27) has been fairly worked in the numerous decided cases and we consider the following propositions to be well settled.

First, the burden of proving, beyond reasonable doubt, that a confession is voluntary lies throughout upon the prosecution: *Dato' Mokhtar Hashim bin Hashim & Anor v PP* (1983); *PP v Chong Boo See* (1988).

Thirdly, the test to be applied in determining whether a confession was born of a free mind and will, untainted by any pressure, oppression or other vitiating element is partly objective and partly subjective. Very slight inducement is sufficient to render a confession inadmissible: *Selvadurai v PP* (1948).

Again, in *Juraimi Husin v PP*, (1998) Gopal Sri Ram JCA gave a reminder of the relevant principles governing this area of law.

It is trite law that the burden of proving the voluntariness of a statement made by an accused under s 113 of the CPC lies upon the prosecution. The standard upon which that burden falls to be discharged is beyond reasonable doubt; the test that is to be applied being partly objective and partly subjective (See *Director of Public Prosecutions v Ping Lin*). It is equally trite that the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that statement was made involuntarily. As Sharma J, observed in *Public Prosecutor v Law Say Seck* (1971) when dealing with the inadmissibility of a confession under section 24 of the Evidence Act 1950:

I have been told that the use of the word 'appears' in s 24 is very significant and the word 'proved' has purposely not been used by the legislature. I quite agree. A confession can, of course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case, I think there is sufficient evidence on which I can safely base a reasonable well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances, which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is sufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

A confession may also be held to be inadmissible if it was obtained through oppression as defined by Sachs J in *R v Priestley* (1965). See also *R v Prager* (1972).

The *locus classicus* of the common law on the rule relating to involuntary confessions is found in the celebrated words of Lord Sumner in *Ibrahim v R*. (1914) where his lordship said:

It has long been established as a positive rule of English criminal law that no statement by an accused is admissible unless it is shown by the prosecution to have been a voluntary statement, in the sense that it had been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The substance of the Lord Sumner's formulation is found in section 24 of the Evidence Act which reads that:

A confession made by an accused person is irrelevant in criminal proceedings if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused persons ground which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid an evil of a temporal nature in reference to the proceedings against him.

In *PP v Raman I & Ramon II* (1940), McElwaine CJ said section 24 is not exhaustive. The reason why torture and the irregularities specified in section 24 render a statement or confession inadmissible is because these matters may cause a person to accuse himself falsely. What the court wants is the truth, and it cannot



accept as a true confession or statement obtained by torture or infraction of section 24 of the Evidence Act. That is the kind of thing that renders a confession involuntary.

**Rules Relating to Admission of Confessions:  
Accused's Statement Must Be Voluntary:**

In the celebrated case of *Dato Mokhtar Hashim & Anor v PP*, (1963) Abdoolcader FJ said that:

No statement by an accused is admissible in evidence unless it is shown by the prosecution to have been a voluntary statement (*Ibrahim v R* [1914] Ac 99, 609 per lord Sunner) and this test was accepted by the House of Lords as the approach in *DPP v ping Lin* in which it was said that it is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of the ways referred to. It appears from the decision in *Ping Lin* (ante) that the classic test of admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained either by fear of prejudice or hope of advantage created by a person in authority or by oppression should be applied in a manner which is part objective and part subjective.

His lordship then cited the New Zealand Court of Appeal case of *R v Wilson*, (1981) where it was held that the confession obtained by overbearing the will of the person in custody by tactics amounting to compulsion should be excluded from evidence, and that whether a case is of that kind is a question of fact and degree. Thus endorsed the idea contained in section 24 itself that whether the confession was a result of an inducement like fear of prejudice or hope of advantage is a question which depends on the actual state of the accused's mind. Further it affirmed the view that the voluntariness test does not depend on the subjective intention to extract a confession or on the need to employ actual impropriety. Abdoolcader FJ also accepted oppression as one of the factors, through this is a question of fact, rendering a consequent confession involuntary within the section 24 rule.

Sharma J, in the useful case of *PP v Law Say Seck & Ors* (1971) put the law in its proper perspective.

If it appears to the court that the statement was caused by an inducement, threat or promise, it must be clear that such a statement is relevant under section 24 of the Evidence Ordinance. In order that an actor omission may amount to an inducement, threat or promise, three must be satisfied.

- 1) One should be able to say that without it the person would not have made a statement.
- 2) It should be such as would make the person suppose that the advantage to be gained or evil to be avoided would be of a temporal nature.
- 3) It should be sufficient in the opinion of the court to make the accused suppose that he would get the advantage.

It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged, rather than that of the person in the authority. In scrutinizing a case of this kind the court has to perform a threefold function: it has to clothe itself with the mentality of the accused to see whether the grounds will appear to the accused reasonable for a supposition mentioned in section 24 of the evidence ordinance; lastly it has to judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise.

In *Md Desa bin Hashim v PP*, (1966) Gopal Sri Ram JCA said:

Secondly, the phrase "appears to the court" contained in s 24 refers to a set of circumstances, adduced in evidence, which point to a well-grounded suspicion that the confession was involuntary.

In *Aziz Muhamad Din v PP*, (1997) Augustine Paul JC said:

Thus, what is important is the effect that the inducement, threat or promise had on the accused. In this respect Brennan J in speaking for the federal court of Australia in *Collins v R* (1980) 31 ALR 257 said at p 307: so the admissibility of the confession as a matter of law (as distinguished from discretion, latter to be discussed) is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of the police before and during an interrogation fashions the circumstances in which the confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard; it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused.

It is therefore clear that the inducement, threat or promise must have "caused" the person to make the statement. In the Indian Supreme Court case of *Payare Lal v State of Rajasthan* AIR (1963) SC 1094 Subba Rao J said that to determine involuntariness the mere existence of the threat inducement or promise is not enough. As

Sharma J said in *PP v Law Say Seek & Ors* [1971] 1 MLJ 199 one should be able to say that without it the person would not have made a statement. It follows that an inducement, threat or promise per se is insufficient to render the confession inadmissible. As PK Mc Williams QC said in his book entitled *Canadian criminal evidence*, 1988, 3<sup>rd</sup> edn, at pp 15-32, the defence should recognise that it has an evidential burden to elicit facts, which bear on the subjective vulnerability of its client. This burden may be discharged by cross-examining the prosecution witnesses or by the accused leading evidence on the issues involved. In this respect Rigby J said *PP v The Lye Tong* [1958] 3 MC at p 214:

It is important to observe that the word were ruled as inadmissible solely on the submission of defending counsel. There was no evidence before the learned president that the word “ what tolong “ had operated on the of the accused as an inducement so as to give him ground which would appear to him reasonable for supposing that by admitting he had opium he would gain any advantage or avoid any evil of a temporal nature. There was at that stage no charge whatsoever against him nor, indeed, could there be any charge against him at that stage since the opium had not yet been found. I have said that, in my view, in the absence of the further explanation or clarification , the word “ what *tolong*” were incapable of constituting an inducement within the meaning of s 24 of the Evidence Ordinance. But if they were so capable of such a meaning, then I think the learned president, following the practice adhered to as regards writing confession, should have heard further evidence, including that of any other prosecution witnesses who where present and hard the word spoken and off course, that of the accused himself, restricted to the issue as to whether the admission made by the accused appeared to have been caused by any inducement held out to him by the revenue officer or officers. It seems to me that it was very difficult to decide this issue solely on the words spoken by the revenue officer and on the objection taken by defending counsel, *without having heard from the accused as to whether those words affected his mind in causing him to make any statement.* (Emphasis added)

In the light of the foregoing, an accused is obliged to testify in the trial within a trial in order to effectively challenge the admissibility of his cautioned statement. In this regards, I refer to *Wong Kam-Ming v R* [1979] 1 All ER 939 Where lord Edmund-Davies in delivering the advice of the Privy Council said at p 945:

As has already been observed, an accused seeking to challenge the admissibility of a confession may for all practical purposes be obliged to testify in the *voir dire* if his challenge is to have any chance of succeeding...

And to the speech of Lord Fraser in the House of Lords in *R v Brophy* [1981] 2 ALL ER 705 where his lordship said at p 709:

It is of the first importance for the administration of the justice that an accused person should feel completely free to give evidence at the *voir dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence in the *voir dire*...

Once the accused has discharged the evidential burden on him, then it becomes the function of the court to determine the issue of voluntariness. In this regard, reference may be made to *PP v Law Saw Seek & Ors* [1971] 12MLJ 199 where Sharma J said at p 200:

It is to the court entirely to form its own opinion as to whether an inducement, threat or promise held out any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the judgment has to be judge rather than that of the person in authority. In scrutinising a case of this kind the court has to perform a threefold function: it has to determine the sufficiency of the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in section 24 of the Evidence ordinance, lastly it has to judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise.

It is now necessary to analyse the ingredients of section 24 in order to determine the question of admissibility of confessions.

#### ***Essentials of the Rule of Exclusion under Section 24:***

Section 24 is an exception to the general rule that a confession is admissible as an admission against its maker.

The onus of showing that a particular statement is within the purview of section 24 is on the accused. To bring the statement within the rule, it must be shown that:

1. The statement in question constitutes a confession within the meaning of s 17(2);
2. It was made b him at a time when his position was that of an accused person;
3. The statement was caused by some inducement treat , promise or oppression ;
4. The inducement, threat promise or oppression was made by a person in the authority;
5. The inducement threat promise or oppression must in the opinion of the court be sufficient to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

***The Statement Must Be A Confession:***

The statement must be such that by the *Anandagoda* objective test, it must show that the accused admits the offence of which he is charged, directly or inferentially.

***A Statement Not Constituting A Confession May be an Admission and Admissible as Such:***

It was clearly stated by Burton Ag CJ in *R v Wong Ah Khin & Ors* (1935) that the term “admission is the genus of which the “confession” is species. In a useful Ceylonese case of the *King v Cooray*, (1926) Garvin ACJ said that:

The term “admission “is a genus of which “confession” is a species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggest not any inference, but the inference that he committed the offence.

***“An Accused Person”:***

Section 24 makes a confession of “an accused person” irrelevant. This expression includes any person who subsequently becomes an accused person, provided that at the time of making the statement criminal proceedings were in prospect. Section 24 activated even if the person who confessed was not an accused person then. It suffices if he ultimately becomes an accused person with reference to charge concerning which he is said to have made the statement constituting the confession (*Emperor v Cunna*).

So if a person makes a confession before a complaint is made and an investigation begins it is a confession within the purview of section 24.

In state utter *Pradesh v Deoman Upadhyaya*, (1960) the Indian Supreme Court observed that the expression “accused person”, in section 24 of the Evidence act and the expression “accused of any offence” bear the same meaning and describe the person against whom evidence is sought to be led in a criminal proceeding and does not predicate the condition of that person at the time of making that statement. in the leading case of *A Nagesia v State of Bihar*, (1966) the Supreme Court reiterated this view through Bachawat J that “ the expression ‘accused of any offence’ covers a person accused of an offence at the trial whether or not he was accused of it when he made the confession.”

The statement of the law enunciated in *Cunna* and confirmed by later Indian Supreme Court cases were accepted as correct and applied in the leading early local case of *Selvadurai v PP* (1948-49) which held that although at the time when the accused made the statement he had not been accused, it was sufficient to cause the operation of section 24 if the ultimate outcome was the charge based upon the inculpatory statement.

Selvadurai was convicted of forgery. The facts were that a meeting was held consequent on a petition by some employees alleging underpayment. The basic issue was the signature on the receipt –p5 which was purported to have been signed by the 4<sup>th</sup> prosecution witnesses, one Singaram. The latter, however, denied signing the receipts as well as receiving any money stated therein.

The evidence against the accused was an inculpatory statement he had made to the manager of an estate, who was the 1<sup>st</sup> prosecution witness (pwt1)

The manner in which this statement was made was best stated by callow J at p 43. pW1 said:

I said to Singram. “*Did you sign this receipt?*” The answer was “*I can neither read nor write*”. I asked accused “*Did u hear that*” He said “*yes*” I said, “*who signed it?*” He said “*I did*”. On this question of this receipt, “*who signed it*” I did not say anything in the nature of a threat.

The appellant’s counsel urged that this statement if it constitutes a confession should have been excluded because at the time he made the statement he was not accused of an offence.

Callow J further said:

It is clear from the case of the *Emperor v Cunna* that although at the time the appellant had not been accused it is sufficient for the operation of s 24 of the Evidence ordinance if the ultimate outcome is a charge based upon the inculpatory statement. Indeed in this case the facts seem even closer. According to PW1 in cross-examination the inquiry was to find out if the allegations against the accused were well founded or not. It would seem that suspicion had been attached to him, and looking form the evidence from the angle, it is clearly a confession which was tendered.

In *Emperor v Cunna*, the accused with three other persons were charged with murder on January 4 and 5. The accused was arrested, and he made a confession on January 11 to the recording magistrate, implicating the three co-accused, and admitted being present at the scene of the crime which was being committed by the three persons. Shah J holding that the confession was inadmissible under s 24 of the evidence act because it was made while the accused was still under the influence of the investigating officer, further opined (at 274) that:

The section [24] does not refer in terms to any particular time when the confession, in order to be within the scope of the section must be made. It is quite enough that the confession is subject to the infirmities, which are laid down in that section, and if it is made by an accused person either at the time when he was an accused or before he came to be accused, s 24 apply.

***Circumstances Invalidating A Confession: Inducement, Threat, Promise or Oppression Held out by A Person in Authority:***

The law that can be distilled from *Dato Mokhtar Hashimv Anor v PP* (1983) which accepted the *rationes decidendi* of *Ibrahim v R* (1914) and *DPP v Ping Lin* (1976) is that a confession obtained as a result of inducement, threat, promise or as a result of oppressive conduct when a person's will had crumbled will not be admissible because such a confession is not voluntary. The hope of advantage or fear of prejudice renders the resultant confession involuntary. A confession given under inducement etc. may be given willingly but still under section 24 it is involuntary because it was not given spontaneously.

As one learned writer (Heydon) comments that "inducement" is usually defined as the double form: fear of prejudice or hope of advantage", nothing ought to turn on this dichotomy between threats and promise. The two links are really the same because in any way given case the inducement can be regarded either way. An accused person has always two alternatives, pleasant if he confess, painfully if he does not. Sometimes the carrying out of the threat or promise involves a change in the status quo (the beginning of the beating; see for example the glaring local case *PP v bin Raspani* (1988), e.g. continuation of a beating). So the accused in confession has made a choice, he has consciously uttered certain words and his conducts is voluntary.

***Inducement: Not Defined –Depends Upon Circumstances:***

The existence act has not defined "inducement." Therefore no inflexible rule can be laid down. Whether there was inducement or not depends on the fact of the case.

An inducement may be direct or indirect (*Mohamed Yusuf v PP*). In general, the phrase "inducement" covers two main threats: threats of bodily harm to the accused (or another person): *R v Middleton* (1975); e.g. continued detention or violence, or absence from his family; secondly, threats of non-physical harm to the accused or those he loves e.g. public rather than secret trial: *Sparks v R*, (1964) prosecution rather than non-prosecution, lenient rather than harsh treatment. The local case of *PP v Kamde bin Raspani*, (1988) illustrates the first form of inducement clearly. The motive of the person inducing is immaterial. What is relevant is what construction the accused is likely to give to the words, acts or conduct of the person in authority under the circumstance. An innocent conduct may under the circumstances induce a fear in an accused to confess. It all boils down to the actual words used, the circumstances in which they were used and the effect on the mind of the accused in those circumstances. So for example, in *R v Mansfield*, (1881) cited with approval by Callow J in *Selvadurai v PP*, (1948-49) the prisoner said to his mistress, "if you forgive me I will tell you the truth." The mistress without cautioning him said, "And did you do it." Thereupon he made a confession. The confession was rejected because the exhortation preceded by silence imported an inducement.

Therefore, to constitute inducement, the language used must reasonably imply that an advantage or disadvantage will accrue to the accused according to whether he confesses or not. It is the language of an inducement by way of a benefit or threat that vitiates a confession i.e. a statement like "I must know about."

"Now is the time for you to take the stolen property back to the prosecutrix" (*R v Jones*) has been held not to constitute an inducement. A mere moral exhortation to tell the truth obviously does not constitute a confession.

In *R v Garner*, it was said whether particular words would amount to inducement or not turns upon the fact whether the words used were such as to convey to the mind of the person addressed, an intimidation that it will be better for him to confess that he committed the crime and worse for him if he does not. In *Garner*, supra a surgeon told the prisoner in the presence of her master and mistress that it was better for her to speak the truth. The statement made thereafter was held to be inadmissible.

It was observed in the leading Indian case of *Emperor v Panchkowri Dutt*, (1925) that section 24 does not spell out to whom the inducement is to be directed at. An inducement relating to the charge against the accused emanating from a person in authority need not necessarily be held out to the accused directly. If such inducement comes to the accused person's knowledge indirectly a subsequent confession may be inadmissible.

A confession made by a postman to his superior officer after the latter had made an inducement to his wife was held to be inadmissible in *R v Harding* (1842). In *R v Boswell*, (1882) a murder was committed. A handbill was published by the government offering pardon to any one of the offenders except the person who struck the blow, who would give such information as would lead to the conviction of his accomplices, and it appeared that the prisoner was aware of the offer, and induced by it to make the confession. This confession was rejected.

There are some phrases such as "you had better tell the truth," and equivalent expressions which have acquired a fixed meaning as if a technical term and have always been held to import a threat or promise, ( *per* Ismail Khan J in *PP v Naikan* (1961); *per* Kelly CB in *R v Jarvis* (1715). Such words convey to the accused an impression that it would be better to say something so that his position would be better. It may mean that the accused was told that it would be better for him to tell the truth. So expressions like "I dare say you had a hand in it you may well tell me about it"; "It would have better if you had told at first" (*Rv Walkley and Clifford*); "You had better tell the truth, it may be better for you." "You will not be hung if you tell the truth."; "You had better split and suffer for them all"; have all been held to be inducements. In *Chye Ah San v R* (1954) the court

said that where a person in authority such as an excise officer, says, not that the accused is not bound to say anything, but quite the reverse, that he is bound to say everything, it is difficult to look upon the statement so obtained as being voluntary, relying on the *nemo tenetur seipsum accusare* maxim. But in *R v Baldry*, the statement “You need to say anything to criminate yourself. What you say would be taken down and used as evidence against you,” was held not to be an inducement. In *Poon Heong v PP*, (1949) the appellant was convicted on a charge being in possession of explosives. At the trial a statement made by the appellant to the police after his arrest was admitted in evidence. It appeared that the caution used by the police officer was “You are not obliged to say anything, but anything you say may be given in evidence at your trial”, instead of the proper form of the caution, “It is my duty to warn you that you are not obliged to say anything, or to answer any question, but anything you say whether in answer to a question or not may be given at your trial.” It was held that this improper caution rendered the confession inadmissible.

#### **Oppression:**

In *Dato’ Mokhtar Hashim’s* case, the Federal Court accepted the principle that oppressive conduct as a result of which the accused is made to confess will also render a confession involuntary and therefore caught by the ban in section 24. The Federal Court accepted the principle enunciated in *R v Prager* (1972).

When talking of oppression, it is useful to bear in mind the words of Lord Parker CJ in *Callis v Gunn* (1964) who in reference to statements made by accused persons to the police, said that:

... it was a fundamental principle of law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducement.

In *R v Prager* (1972) in which a confession by a sergeant in the RAF on charges of espionage was made after a prolonged, though interrupted, interrogation, was held not to have resulted from oppression. The English Court of Appeal adopted the statement made by Sachs J in *R v Priestly* (1967) that:

...whether or not there is oppression in an individual case depends upon many elements. They include such things as the length of time of any individual period of questioning, whether the accused person had been given proper refreshments or not and the characteristic of the person who makes the statement. What may be regarded as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an inexperienced man in the ways of the world.

The court also relied on Lord MacDermott’s quotation that:

Questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hope (such as hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent.

In *Dato’ Mokhtar Hashim* (1983) Abdoolcader FJ cited with approval the New Zealand Court of Appeal case of *R v Wilson* (1981) to illustrate an example of a confession made invalid as a result of “oppression.” The defendant had been subjected to prolonged interrogation in the confinement of a small room which was held to be unfair and oppressive. It was there said that there was accordingly “oppression.” The Court of Appeal reiterated that confessions obtained by overbearing the will of a person in custody by tactics amounting to compulsion should not be received in evidence. Whether a case was of that kind was a question of fact and degree.

On the authorities of this case, the learned FJ held that in the case before them since one of the appellant’s confession was taken after prolonged interrogation, at odd hours in the early mornings and under unfair conditions and considering the fact that the appellant was an old man, there was no doubt that the confession was as a result of oppression conduct of the police. Abdoolcader FJ said (at p 273):

As to the long and odd hours of interpretation...this would appear to be suggestive of oppression within the definition thereof of Sachs J in *R v Priestly*, which was adopted in *R v Prager*. We are told by the public prosecutor that this might be the method adopted by the Special Branch, but if we are to approbate and endorse the whims and fancies of interrogators in the systems they choose to utilise, we might as well countenance an interrogator’s preference to stand a man on his head or hang him up by his toenails whilst questioning him so as to better enhance the flow of blood to his cerebral cavity and stimulate his noetic faculties and recollection of past and recent events. We need hardly remind those involved in the interrogation of witnesses and accused persons that any method adopted in the process outside accepted norms and standards must be able to withstand the test of strict crucial scrutiny.

Thus, according to the principles adumbrated in the above cases, the confession was ruled to be involuntary and should have been excluded.

In *PP v Kamde bin Raspani*, (1981) the accused was put on 171/2 hours of interrogation until the early hours of the morning, in breach of rule 20 of the Police (Locke-Up) Rules 1953 which states: “Prisoners should be locked up for the night by 6.30 p.m. and shall rise and be dressed by 6.30 a.m.” Dr Zakaria Yatiim J said at 291:

The way accused was interrogated in indeed unfair and the court must regard it as oppressive.

In *PP v Chong Boo See*, (1988) the accused who was charged for trafficking in dangerous drugs, alleged that the cautioned statement which he had made to the interrogating police officer was as a result of oppression, because from the time of his arrest until he made the cautioned statement, he was not given any food or drink. Edger Joseph Jr J rejecting this argument said at p 297

As for the accused not having had any food or drink from the time of his arrest until he made the cautioned statement, it should be recognized undermined him physically or mentally as to cause his will power to crumble and thus to speak when otherwise he would he would have remained silence, would depend upon subjective consideration such as his age, health, Sex and personality. In this case I was concerned with the man 27 years of age, still in the prime of his life, and apparently in good health, for it was never suggested that he was an invalid. He struck me as a very composed individual with a strong personality of slightly above –average, intelligent and mental alertness, having regard to his station in life, for his answer whether in examination –in-chief or cross examination were always relevant, precise and fluent. I was satisfied that there were no grounds sufficient to persuade me that I should, in the exercise of my discretion, exclude the caution.

In *PP v Chan Choon Keong & Ors*, (1989) Faiza Tamby Chik JC (as he then was) after reviewing the authorities on the meaning of “oppressive conduct”, held that the accused statement of the accused were extracted under oppressive conditions and hence inadmissible.

That oppression as a ground of exclusion has gained acceptance in our criminal jurisprudence is further furnished by *PP v Lee Chee Meng*; (1990) and *PP v Veerankutty* (1990).

In *Hasibullah bin Mohd Ghazali*, (1993) Edgar Joseph Jr SCJ said:

On a further ground also, the judge ought to have excluded the appellant’s alleged confession having regard to the oppressive circumstances under which it was made (assuming for one moment that it was made at all). There is high authority for the proposition that the “voluntariness” test has been expanded to include within its ambit, statement which are rendered inadmissibly by reason of the fact that they were obtained rendered inadmissible by reason of the fact that they were obtained under oppressive circumstances. It is true that the provisions of proviso (a) to s 37A (1) of the act which repeat s 24 of the evidence act 1950, do not provide for the authority to which we shall be referring in a moment, appears to have incorporated the common law.

The “high authority” which the learned SCJ referred to was Dato Mokhtar Hashim. He also referred to *R v Priestly* as to the meaning of “oppression” as well as to *R v Fulling* (1987). Edgar Joseph SCJ felt that:

In the instant appeal, the judge fail to recognize that the psychological oppression can be more insidious than , and just as effective, as physical pressure on a suspect who in many cases will be incapable of evaluating its effect upon him and not sufficient articulate to explain the circumstances and effect to the court. In this context the judge should have, but did not recognize, that he had been forced out of bed where he had been sound asleep, during the early hours of the morning, and while handcuffed, could have implied some impropriety on the part of Giam, however slight.

In *Mohd Desa B Hashim v PP*, (1996) the Federal Court was of the opinion:

...that the circumstances to which we have referred, when taken together, are sufficient to create a reasonable suspicion in the mind of a court that the whole of the statement was involuntary, a product of a mind which was tainted with pressure.

On the other hand, in *PP v Krishma Rao Gurumurthi & Ors*, (2000) Kang Hwee Gee J held that although the interrogation of the three defendants was carried out over long hours (about 7 to 8 hours), it was not oppressive as the defendants were each interrogated only on one occasion. There was no evidence of any form of oppression beyond that which could be reasonably expected of and required by the police to obtain information in the course of their investigation.

#### ***Sufficient to Give the Accused Grounds:***

Section 24 require that the inducement, etc. must give sufficient grounds to the accused to suppose that by making the confession he will gain an advantage or void an evil of a temporal nature.

The meaning of this case was clearly expressed in the leading Indian case of *Emperor v Panchkowri Dutt*: (1925)

It will seem therefore, that the mentality of the accused has to be judged rather than that of the person in authority. That being so, not merely the actual words, but words accompanied by acts or conduct as well as on the part of the person in authority which may be constructed by the accused person situated as he is amounting to an inducement etc. which will have taken into account. A perfectly innocent expression coupled with acts or conduct on the part of the person in authority, together with the surrounding circumstances may amount to inducement, threat or promise. Therefore, in scrutinizing a case from the point of view of s 24, the court will have to perform a threefold function.

It will have as a court to determine the sufficiency of the inducement etc. as affording certain grounds; it will have gain to clothe itself with the mentality of the accused to see whether the grounds would appear

reasonably for a supposition that is mentioned in the section itself, lastly it will have to judge as a court if the confession appears to have been caused in consequence of the inducement etc...

Similar sentiments were expressed by Sharma J in the leading case of *PP v Law Say Seck & Ors (1971)*:

3) It should be sufficient in the opinion of the court to make the accused suppose that he would get the advantage. It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged rather than that of the person in the authority. In scrutinizing the case of this kind the court has to perform a threefold function: it has to determine the sufficiency of the inducement, threat or promise; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in s 24 of the Evidence Ordinance lastly it has to judge as a court if the confession appears to have caused in consequence of any inducement, threat or promise.

In this case, the two accused were arrested and taken to the magistrate who recorded their confessions. Thereafter they were remanded in custody. The confession recorded by the magistrate was under section 126(1) of the Straits Settlements Criminal Procedure Code, section 125(1) of which is substantially similar to section 24 of the Evidence Act. At their trial they challenged their confession to the effect that they had not made statement voluntarily. Sharma J held that he was doubtful whether the confession were in fact voluntarily made, because he felt that the two accused under the circumstances might have still been under inducement held out by the police that by making the confession they supposed that they would have avoided an evil or advantage of a temporal nature. Thus, it must be clear that the accuser's mind was free; that he would not gain an advantage or avoid an evil when making confession. This of course is determined by the court. The court in this case, wearing the mentality of the two accused felt that the accused had not made these confession freely. The learned judge in arriving at this decision reminded himself of dictum of Cave J in the leading case of *Regina v Thompson (1893)* where he said:

I would add that for my part I always suspect these confessions which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that is a very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice.

In laws' case (supra), Sharma J felt that the confession made by the two young men, who were arrested, taken to the magistrate who recorded their confessions, and thereafter detained, created in him a lurking doubt that they were made due to their penitence. He felt when they made the confessions the accused still supposed that they would gain an advantage or avoid an evil.

***The Inducement, Threat, Promise or Oppression Must Proceed from A Person in Authority:***

Needless to say to activate the prohibition contained in section 24 or those laws that contain section 24-like prohibitions, it must be shown that the inducement, threat or promise including oppression was held out by a person in authority. As was clearly articulated by Viscount Dilhorne in *Deokinanan v R (1968)*:

There is doubt the law as it is at present only excludes confessions induced by promises when those promises are made by persons in authority.

Augustine Paul J sanctioned a similar recently in *Aziz Muhamed Din v PP (1996)*.

The Evidence Act does not define a person in authority. It is a question of fact in each case, as *per* Subba Rao J in *Payare Lal v State of Rajasthan (1963)* and there must be evidence of person in authority being such. See *Lee Kim Ching*.

Therefore it is necessary to look to decided cases and textbook.

Needless to say most confessions in this country especially in the form of cautioned statements now days offered in evidence are by police officers, and those involved in preventing crimes.

The reason is simple. Throughout the federation more policemen investigate crimes than any other group of officers. Further one cannot deny that it is generally less difficult for the prosecution to establish that statements so obtained were given freely and voluntarily and that they were not extracted by their fear of prejudice or hope of advantage held out by a person in authority. Frequently when giving evidence police will present a united front against the accused so that some suspicion may be justified in the nature of the confession so obtained. Conspiracy of common front against the accused naturally evokes suspicion. That this often happens when intimated albeit in an *orbiter* form by Humpjery J in *R v Nowell, (1948)* when he observed at p 176 that at one time there had been frequent complains "that one policeman was likely to back up the view of another and that the position was unfair for the person accused."

Thus, that policemen are persons in authority *vis a vis* an accused person is clear. However, this clear position becomes uncertain when confessions are received by persons other than the police. Then it becomes a

matter of vital importance to ascertain whether or not such persons possessed the authority, actual or otherwise with respect to the accused.

Joy, an early authority, seemed to have cleared the matter easily by naming four types of persons to whom an accuser's confession may be vitiated. To him "*the master or mistress, or prosecutor of a prisoner as well as a magistrate or a constable is considered a person in authority.*"

While Joy's classification remains unaltered, Taylor chose to give a broader category of "*person in authority*". *Such a person is one "who is engaged in the apprehension, detention, prosecution or examination of a person charged or accused."* Modern writers have followed this broad view. Phipson states a person in authority to be one "*engaged in the arrest, detention, examination or prosecution of the accused*", while Cross (2003) defines him as "*anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution*" and the learned writer says that "no one has sought to deny that a magistrate, constable or prosecutor is in authority. The test to decide whether a person is in authority is thus whether he stand in such relationship to the accused as to imply some power of control or interference in reference to the prosecution of the accused. so a confession made through inducement etc. offered by a person in authority will be rejected as being involuntary. The same principle will prevail though the inducement was not actually offered by the person in authority; if it were held out by any one in his presence and by his silence sanctioned it. Thus if an inducement is held out by a person not in authority in the presence of someone in authority the resultant confession will be inadmissible unless the person in the authority dissociates himself from the inducement (*R v Cleary*).

In *Murugun v PP*, (1924) the Court of Appeal held a head Kangany (some sort of a supervisor) to be *prima facie* a person in authority over his coolies. Therefore, any confession made by inadmissible. In *Jubri bin Haji Salleh v PP*, (1947) Willans CJ held a penghulu (village headman) of a mukim (district) in which the appellant resided to be person in authority: but on the facts of the case as the confession was not a result of an inducement by the penghulu, it was admitted. On the other hand a manager of an estate was held to be a person in authority, and therefore a confession made by his worker to him was held to be inadmissible. This was in *PP v Naikan* (1961). However, in *Re Lee Kim Ching*, (1974) it was held that fellow worker is not a person in authority.

A confession made as a result of an inducement from a fellow worker was not inadmissible, though the fact that it was a result of an inducement goes to its weight.

On the question, whether an employer is an authority, Parke B's judgment in *R v Moore* (1852) provides a clear answer:

It is only when the offence concerns the master or mistress that their holding out or promise renders the confession inadmissible. In this case the learned judge held that the maidservant's confession of the murder of her child was admissible though induced by her mistress.

On the other hand, in *R v Upchurch*, (1836) it was unsuccessfully contended that the prosecutor's wife was not a person in authority. A servant was charged with arson of his wife was not a person in authority. A servant was charged with arson of his employer's house. The employer's wife extorted to confess because it might save the prisoner's neck led to the rejection of the confession.

A confession is not induced by a person in authority is admissible as stated by Ong Hock Sim J in *Abu Bakar bin Nazmeer v PP* (1970). Therefore, a confession made to a person not in authority will not activate the prohibition of section 24. See *Re Lee Kim Ching* (1974). further a confession made spontaneously even in the presence of a person in authority does not fall within the ambit of section 24 as lucidly articulated in *DPP v Ping Lin* (1975) by lord Hailsham,

A confession, which is simply blurted by a criminal *flagrante delicto*, is not the sort of things at all to which lord sumner's principle applies. It is emphatically not "fear of prejudice or hope of reward excited or held out by a person in authority.

### **The Burden Proof:**

Section 24 begins with the word "a confession made by an accused person is irrelevant in a criminal proceeding if the confession 'appears' to the court to have been caused by inducement, threat or promise, proceeding from a person in the authority..."

It is to be noted that section 24 uses the expression "if the confession appears." In a leading Indian case *R v Panchkowi Dutt*, (1952) it was observed that the use of the word "appears" has been deliberately made with the object of securing absolute fairness in the matter of admitting confession in judicial proceeding. In the leading Malaysian case of *PP v Law Say Seck & Ors*, (1971) Sharma J emphasized at p 201 that "the use of the word 'appears' in section 24 is very significant and the word 'proved' has purposely not been used by the legislator." In *Pancakari*, it was noted that section 24 uses the phrase "If it appears" this has been interpreted to mean that in showing that the confession is involuntary, in the sense that it is the consequence of an inducement, threat or promise, held out by a person in authority the quantum of proof on the accused is not the high one that is cast on the prosecution when it has to prove its voluntariness. it was further observed that under section 24 a well-grounded conjecture reasonably based upon circumstances disclosed in the evidence is sufficient to exclude the



confession, because it was idle to expect the accused to prove the inducement, threat or promise for in most cases such proof is not available (*Law Say Seck*).

Needless to say that the inducement, threat etc must have caused the person to make the confession. The mere existence of those vitiating factors are not enough as was highlighted by Augustine Paul J in *Aziz bin Muhammed Din v PP*, (1991) after citing leading authorities both Malaysian and Indian, that an inducement, threat, etc *per se* is insufficient to render the confession inadmissible.

***The Burden on the Accused:***

It is for the prosecution to prove beyond reasonable doubt that the confession was made voluntarily without any inducement, threat or promise. It is the duty of the prosecution to prove affirmatively to the satisfaction of the court that the sentiments were made voluntarily and not obtained by improper means (*PP v Kamde bin Raspani*).

It is sufficient for the purpose of excluding the confession that the statement appeared to have been the result of an inducement. Cave J said in the leading English case of *R v Thompson (1893)* that it is for the prosecution to establish that the confession is voluntary and not for the accused to negate the voluntariness of the confession.

Thompson itself illustrates the application of the principles. The prisoner was charged with embezzling the money of the company, which employed him. Evidence was adduced to show that he not only confessed to the company's chairman but also returned some money through his brother. The chairman admitted that before he received the confession he had asked the prisoner's brother, "it will be the right thing for your brother to make a statement or to make a clean breast of it." There was no threat or promise, nor any proof that the chairman's statement was, in fact communicated to the prisoner prior to his confession.

Nevertheless, the confession was held inadmissible. Cave J pointed out that though "in the present case there was no evidence that any communication was made to the prisoner at all, but after the chairman's statement that he had spoken to the prisoner at all, but after the chairman's statement that he had spoken to the prisoner's brother about the desirability of the prisoner making a clean breast of it, with the expectation that what he said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any, and if so what, communication was actually made to the prisoner before the magistrate could properly be satisfied that the confession was free and voluntary, and this was not done by the prosecution.

This reason for lesser degree of proof that is cast on the accused was clearly endorsed by Sharma J when he rightly observed in law's case (*supra* at p 201) that:

...a confession can, of course, be rejected on a valid ground or conjecture, but there must be something before the court on which such valid conjecture can rest. In case I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoid the confession under our laws. If the accused is able to point to some circumstances, which arouse suspicion, the confession cannot be admitted. A mere possibility that the confession was not voluntary is sufficient to warrant its rejection, but a probability would suffice to dictate its rejection in evidence.

As has been said in many cases it is idle to expect the accused to lead evidence of any assaults, threats or promise while they remain in police custody. It is virtually impossible for any person of an average understanding to pick up the courage and take the risk of lodging a report in a police station against a police officer or make a complaint against one police officer to another while in custody. The police do not doubt any aspect of the state's ability to maintain law and order and in that sense a symbol of service. Yet the police also represent the force and might of the state. Similarly a magistrate is symbol of justice and equality. He is also in a sense the symbol of the majesty and awe of the law and any ordinary person appearing before a magistrate has in him some inherent fear, more particularly so when he comes from police custody.

In Law's case, the learned judge held that the confession made by the two young men which were recorded by a magistrate when brought to him from police custody, and sent back to their custody after the two accused had made the statements, created a lurking doubt in the judge's mind that they were not voluntarily made as alleged by the two accused.

Some earlier local cases had already made statements on the question of proof respecting the burden of proof required by the accused and the prosecution when the voluntariness of a confession is challenged.

In *Selvadurai v PP*, (1948-49) Callow J noted that section 24 of the Evidence Ordinance states that:

...a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by inducement, threat or promise...A very light inducement is sufficient to render a confession inadmissible.

Clearly, he had in mind the lower burden of proof cast on the accused to prove that the confession was as a result of an inducement by a person in authority. In *PP v Thum Soon Chye*, (1954) Buhagair J set out the law clearly when he said:

Under s 24 of the evidence Ordinance 1950, a confession is irrelevant if the making of the confession appears to the court to have been caused by any inducement...The section is worded in a manner which admits

the exercise of the fullest discretion by the court. The word “appears” indicates a lesser degree of probability than “proof” as defined in s 3,...the does not mean that the requirement of the prudent man which has been adopted in s 3 as an appropriate concrete standard of proof, should be wholly departed from in considering the voluntary or involuntary nature of a confession. All that is meant is that as “proof” of inducement is difficult or in many cases impossible of attainment in a matter like this the discretion of the court is unfettered by the concrete standard of proof which is necessary in other cases. The court is free to form its conviction from the scrutiny of the evidence and surrounding circumstances even if the basis of such conviction be not what is strictly called “proof”... the court is charged with the delicate task of probing the facts which were passing in the mind of the accused at the time of making the confession.

The learned judge expressed the difficulty of laying down any hard and fast rule as to the sufficiency of the circumstances which would make the confession irrelevant under section 24, which must depend on the circumstances of each case. The case concerned the recording of a confession by a magistrate and the learned judge upheld the magistrate’s opinion that it was voluntary. The above statement of the law was expressly approved by Rigby J in *PP v The Lye Tongg* (at 217) where he said that:

The word “appear” in s 24 indicates a lesser degree of probability than “proof” as defined in s 3 of Evidence Ordinance.

The learned trial judge adopted the statement of law found in *Woodroffe and Ameer Ali* that, in considering the quantum of “proof” required “a well grounded conjecture is sufficient.” In *The* (supra) it will be recalled it was held that the word “*tolong*” by the revenue officer in response to the word “*tolong*” by the accused was not an inducement.

What the defence is required to prove was amply described in the judgement of the Supreme Court of India in *Payare Lal v State of Rajasthan* (1963) as follows:

Therefore the test of proof is that there is such a high degree of probability that the prudent man would act on the assumption that the thing is true. But under s 24 of the Evidence Act such a stringent rule is waived but a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof is permitted does not warrant a court’s opinion based on *pur surmise*. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. To put in other words on the evidence and the circumstances in a particular case it may appear to the court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standard of proof has been designedly accepted by the legislature with a view to exclude forced or induced confession which sometimes are exported and put in when there is a lack of direct evidence. It is not possible or advisable to lay down an inflexible standard for guidance of courts, for in the ultimate analyses it is the court, which is called upon to exclude a confession by holding in the circumstances of a particular case that the confession was not made voluntarily.

Recently, in *Juraimi b Husin v PP*, (1998) the Court of Appeal through Gopal Sri JCA felt it is equally trite that the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily. The learned JCA in agreed with Sharma J’s dictum in *PP v Law Say Seck & Ors* (1971) that “a confession can of course be rejected on a valid ground or conjecture, but there must be something before a court on which such a valid conjecture can rest.” In fact, Augustine Paul J had already considered such sentiments in *Aziz bin Muhamad Din v PP* (1996).

#### ***The Burden on Prosecution:***

The *locus classicus* on this subject is *Dato Mokhtar Hashim & Anor v PP* (1983) where Abdoolcader FJ rehearsed the law at p 272: His Lordship further approvingly quoted from Lord Hailsham’s dictum in the Privy Council case of *Wong Kam-ming v the Queen* (1980) (at p 261). It is therefore of very great importance that the courts should continue to insist that before extrajudicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statements were not obtained in a manner which should be reprobated and was therefore in the true sense voluntary.

In fact it was emphasised by Cave J as early as 1893 in *R v Thompson* that it is for the prosecution to establish that the confession was voluntary and not for the accused to negative the voluntariness of the confession. In *Ibrahim v R*, the appellant, a private soldier had been convicted in the Supreme Court of Hong Kong of wounding a company commander while serving with the regiment in the British Indian Army. One of his grounds of appeal was that the confession that he had made shortly after the incident to his superior officer was wrongly admitted as it was a result of inducement of the officer being a person in authority. Lord Summer said:

It has long been established as a positive rule of English criminal law, 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 by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been

decided by high authority in recent times in *Reg v Thompson* [1893] 2 QB 12, a case which it is important to observe was considered by the trial judge before he admitted the evidence.

Lord Sumner following *Thompson* held that the confession was proved beyond reasonable doubt to have been voluntary, and accordingly dismissed the appeal. In *DPP v Ping Lin*, (1975) the appellants along with two others were convicted of conspiracy to contravene the Misuse of Drugs Act 1971, by supplying etc. controlled drugs to the public. One item of evidence, which was admitted against him, was a confession he had made to the police while in custody. The House of Lords dismissing his appeal after comprehensively surveying the history and rationale of the rule against the admissibility of involuntary confessions, it was rightly admitted as the prosecution had proved that it was voluntary beyond a reasonable doubt. Lord Hailsham advised that the issue of whether a confession is voluntary is basically one of fact, and in deciding the admissibility of a confession a trial judge should apply the test laid down in *Ibrahim* in a common sense way having regards to all the facts of the case in their context. This the trial judge had done. In *Dato Mokhtar*, the trial judge had ruled that the prosecution had proved that one of the accused cautioned statement proved voluntary beyond reasonable doubt but the Federal Court thought otherwise, and applying *Ibrahim* and *Ping Lim* held that the confession was involuntary as it was as a result of oppressive conduct of the persons in authority. It will be pointless to cite the plethora of local authorities which has consistently held that the prosecution must prove beyond reasonable doubt that a confession was voluntary. But two most recent cases will suffice. Firstly, in *PP v Kamde bin Raspani*, (1988) the accused challenged the cautioned statement in which he admitted the offence charged, was as a result of beating and oppression. Dr Zakaria Yatim J after reminding himself, and following the decision in *Dato Mokhtar Hashimand PP v Singaran* said at p 290 that:

... for statements to be admissible the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any threat, inducement or promise. It is the duty of the prosecution to prove affirmatively that to the satisfaction of the court that the statements were made voluntarily and not obtained by any improper means;

On the facts of the case that the prosecution had not discharged this burden, and accordingly his lordship held that the cautioned statements were wrongly admitted. Secondly, in *PP v Chong Boo See*, (1988) it was alleged that the cautioned statement of a confessional nature was involuntary, as it was as a result of inducements, threats and oppression by the police, Edgar Joseph Jr J said at p 297:

In considering the above questions, (that the statement was due to inducements, threats and oppression) I recognised that the onus was on the prosecution to prove voluntariness beyond all reasonable doubt and for the defence to prove involuntariness.

On the facts, the learned judge found that the cautioned statement was proved beyond reasonable doubt to be voluntary and not produced as a result of inducement or oppression particularly in the light of youth and strong character of the accused. On the other hand in *PP v Chan Choon Keong & Ors*, (1989) Faiza Tamby Chik JC held that the prosecution had not proved the cautioned statements to be voluntary beyond reasonable doubt. In fact, the statement was clearly the result of “oppression” as defined in *R v Priestley* (1966).

While Lord MacDermont spoke of “oppression” as conditioned “which tend to sap and does sap, the will of the accused until his will crumbles to pressure” and Sachs J described the conditions which will lead into confessing to something which he would not have done, the English Court in *R v Fulling* (1987) when dealing with the construction of the confession provision of the Police and Criminal Evidence Act 1984 chose to give to “oppression” a meaning used in everyday English. At p 69, the court said:

This in turn, leads us to believe that “oppression” as conditions” ... should be given its ordinary dictionary meaning.

The Oxford English Dictionary defines it as follows:

Exercise of authority or power in a burdensome, harsh or wrongful manner. Unjust or cruel treatment of subjects, inferiors etc.

The recent seminal in Supreme Court case of *Hasibullah bin Mohd Ghazali* (1993) again confirmed that the fundamental principle of our own criminal law of evidence that in deciding the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution to prove beyond reasonable doubt that the confession was voluntary. A similar view was ventilated in another good case i.e. *Mohd Desa b Hashim v PP* (1996). In an extremely instructive Singaporean case, *Chien Wei Kelvin v PP*, (1999) where leading authorities were considered and applied, the Court of Appeal emphasised the test for determining the admission of a confession under section 24 was firstly, whether the confession was made as a consequence of any inducement, threat or promise, and secondly, whether in making that confession, the accused did so in circumstances which, in the opinion of the court would have led him reasonably to suppose he would gain an advantage for himself or would avoid some evil of a temporal nature to himself. Both are questions of facts and matters of judicial evaluation. The test of voluntariness is applied in a manner partly objective and partly subjective. The objective limb is satisfied if there is a threat, inducement or promise and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused though hope of escape or fear of punishment connected with the charge. Where voluntariness is

challenged, the burden is on the prosecution to prove beyond reasonable doubt that the confession was made voluntarily and not for the defence to prove on a balance of probabilities that the confession was not voluntary. However, the accused need only raise a reasonable doubt, or, in other words, it is only necessary for a prosecution to remove a reasonable doubt of the existence of the threat, inducement or promise, and not every lurking shadow of influence or remnants of fear.

Recently, in *PP v Kalaiselvan*, (2001) Augustine Paul J again reiterated the general rule – “that the prosecution must adduce sufficient evidence of the facts to show that a cautioned statement was obtained voluntarily in order to discharge the legal burden that it bears.”

### ***The Imposition of Unjust Burden:***

The meaning of oppression by Lord MacDermot, and the conditions, which constitute oppression, and the ordinary meaning of the word in *Fulling* was accepted and applied by the Faiza Tamby Chik JC in *PP v V Chan Choon Keong* (1989). The three accused were charged with kidnapping a six year old girl. The prosecution sought to tender a cautioned statement purportedly made by the third accused. The defence objected to its admissibility on the ground that it was not voluntary in that it was obtained by oppression. Faiza Tamby Chik JC conducted a thorough and systemic analysis of the circumstances under which it was made, which can be described in the learned JC’s own words at pp429–430:

Now back to the cautioned statement. The other point is whether the cautioned statement was obtained under oppressive circumstances. The relevant facts to be looked at were considered to show what are called “*oppressive circumstances*” negating voluntariness are:

- (1) characteristic of the accused;
- (2) period of time during which he was questioned;
- (3) length of time during which he was in custody; and
- (4) whether or not he was given opportunities of rest and refreshment (see Eric Cowsill & John Clegg, *Evidence: Law and Practice*, 1<sup>st</sup> edn, 1985, at p 144).

Applying the above considerations in the instant case, let us look at the facts:

- (1) the third accused was arrested on December 21, 1984 at about 3.00 am. The IO PW16 stated in his evidence that he could not deny that for 30 hours the third accused upon being arrested was put in a room (not a lock-up) and was questioned the whole night with his hands handcuffed at the back. He was only put in the lock-up in a smaller room on December 22, 1984 at 2.00 pm
- (2) the IO PW 16 also admitted in his evidence that while in lock-up, the third accused was allowed only to wear underwear without shirt, without blanket, without pillow and asked to sleep on the cemented floor. This was clearly in breach of lock-up Room No. 13.
- (3) The IO PW16 also admitted in cross-examination that the third accused was interrogated by teams of officers headed separately by Inspector Koh and DSP Santokh Singh. These interrogations according to PW16 were for the purpose of Emergency Ordinance and intelligence.
- (4) From December 21, 1984 to December 24, 1984, there was credible evidence that the third accused was interrogated and at one time even between 12.45 a.m. and 1 a.m. in the morning by a senior police officer and according to the third accused, during those days, there were times when water was poured on his bare body which was made to face the air-conditioner. He was also forced to eat *Chilli Padi*. His request for a doctor was denied unless he co-operated with the police.
- (5) The recording officer started recording the cautioned statement at 11.45 a.m. and finished at 2.15 p.m. – a period of two and a half hour excluding lunch and not even going to the rest-room. It is unthinkable after what had happened to the third accused from December 21 1984 to December 24 1984 that he did not want any lunch or any light refreshment. Even accepting what the recording officer had stated that he did ask the third accused as to the negative, the least the recording officer could do was to stop recording the statement at lunch time and continue after lunch.
- (6) The IO PW16 stated in evidence that all interrogations done by Inspector Koh and DSP Santokh Singh were without his knowledge and it was never recorded anywhere and admitted that it was possible that the police had opportunity to assault the third accused. The third accused’s story that water was poured on his bare back while facing the air-conditioner and ate *Chilli Padi* during interrogation cannot be rejected just because the police witnesses denied them. The evidence of the third accused that he was ill-treated was consistent with the evidence of a witness called by the prosecution namely, PW4. PW4 stated in a trial within a trial that after he was arrested, he was interrogated by five Chinese officers and was hit on the chest and was told that if he did not co-operate, they would use *Chilli Padi* to rob his private parts.

Having considered all the evidence in the trial within a trial, I have no hesitation in coming to the conclusion that the third accused was put under tremendous physical and mental pressure in order to compel him to make a statement. I find this “*wrongful manner of exercise of authority*” by the recording officers and other officers as improper, following *R v Fulling* where it was stated at p 69:

“This in turn leads to believe that ‘oppression’ ... should be given its ordinary dictionary meaning.” The *Oxford English Dictionary* had its third definition of the word ‘oppression’ and wrongs as follows:

‘Exercise of authority or power in a burdensome, harsh or wrongful manner. Unjust or cruel treatment of subjects, inferiors, etc. The imposition of unreasonable or unjust burden.’

Those parts as enumerated in (1) to (6) above are “an imposition of unreasonable or unjust burden” on the third accused. As it was said *R v Priestley* “oppression means something which leads to sap and has sapped that free will which must exist before a confession is voluntary.”

For the reasons I have just stated, I ruled that the cautioned statement purported to be made by the third accused was inadmissible because I was fully satisfied that the statement was not made voluntarily.”

This principle was endorsed by the Supreme Court in *Hasibullah bin Mohd Ghazalli v PP*, (1993) where it was held because of oppressive conditions considering the circumstances in which the cautioned statement was given, it was not voluntary.

### **Confessions Under Islamic Law:**

The legal aphorism which says a person is innocent until the contrary is proved also has relevance in Islamic law (Baderin, 2003). This is because one of the objectives of the *Shariah* is to ensure that justice prevails in the society. Hence, the *Shariah* balances the rights of the accused with that of the victim of crime. In order to achieve this, the *Shariah* has laid down many lofty principles in its criminal justice systems. One of such principles is the one which governs confessions in Islamic law. Confessions are statements of information made by a person indicating that he committed an alleged offence (Fred, 1979).

### **Legality of Confession:**

Since Islam is a religion that lays much emphasis on the concept of justice, it views confessions properly and legally so made as legal and admissible. This is more so that there is the need to balance the right of the accused and the victim of offence in Islam. Evidence may prove difficult to get in certain cases. Confessions where validly made constitute valuable evidence against the accused. An instance could be the rights of God as well as the right of men. With respect to the right of God, it is not encouraged for a person to confess his sins. This is because the right of God in this case may be pardoned and forgiven. However, with respect to the rights of men, confessions constitute a significant way of proving a fact. This is especially so where the evidence seems to be deadlock. In this situation, a person who confesses is bound by such confession. A person, as it will be seen, who wants to retract such statement only has the right to do so with respect to the right of God like issues of adultery and drinking. It is also permissible in respect of the rights that belong partly to the rights of God and the rights of men (Abdullah Ibn Ahmad, 1999).

The legality of a confession is found on the verses of the Holy Qur’an. For example, Allah (s.w.t.) says: “O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. . . And the witnesses should not refuse when they are called (for evidence). . . You should not be weary to write it (your contract), whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence (Qur’an 2:282).” This verse of the Holy Qur’an supports the fact that writing a confession in respect of the rights of others in ones’ possession is admissible in evidence. It also shows that a confession is legal in Islam; though with some exceptions.

In addition to the above verse of the Qur’an, some Hadiths of the Prophet (s.a.w.) also recognise the legal basis of an act of confession. This is evident in the Hadiths where it was reported that two companions of the Prophet, Ma’iz ibn Malik and Al-Ghamidi confessed to committing adultery during the life of the Prophet (s.a.w.) and were punished relying on their confessional statements. In the tradition narrated by Ibn Abbas, Prophet (s.a.w.) told Ma’iz bin Malik in order to ascertain the truthfulness of the confession, that: “Perhaps you only kissed or touched or looked at the woman” but he replied “No, O Allah’s Messenger (al-Buhhari, hadith no 1695).”

In the same vein, there appears to be agreement amongst Muslim jurists that confessions, as a general rule, are legal and acceptable. The jurists made analogical deduction (*qiyaas*) that since eye witness evidence is acceptable under the *Shariah*, a confession is also admissible. They are reasoned that because of the legal consequence of confessions, a person who is aware of the legal effects may not ordinarily confess to committing a crime. So when a confession is made, it is generally taken that the person tells the truth of a given circumstance.

Thus, because of the serious legal consequences involved and to remove all forms of doubts as to the validity of a confession, certain conditions are required to be satisfied before a confession is seen as valid. One of such conditions is that a confession must emanate from a person who is of sound mind; he must have attained puberty (*baaligh*). Thus, a minor’s confession is not valid. This also applies to a sane person and where a person is forced to confess or where a person confessed under suspicious circumstances. The confession must also be explicitly clear. In the case of adultery, for instance, he must use specific legal terms in his confessions like: “I

had sexual intercourse with her” as opposed to “I slept with her”. Also, in the case of theft, he should confess thus: “I stole the man’s property” and not “I took his property (Ibn Qudamah, Mughni, (n., 177), Vol. 5, p. 149).” However, where an act confessed to is criminal in nature, it shows that the person who confesses is ready to bear the consequences of his confessions.

#### ***Vitiating Element of Confessions:***

There appears to be consensus amongst Muslim scholars that coercion vitiates a confession. This is expressed in the Islamic legal maxim that says: *al-'Ikraah yamna' sihah al-'iqraar* (coercion prevents the validity of confession) (Ibn Amir al-Haaj, 1996). In the *Shari'ah*, scholars agree that a faithful person should not be subjected to coercion in any form. A confession made under duress is not admissible. It must be made voluntarily at a time when a person could reasonably be seen as truly saying it (Inban and J.E. Reid, 1967). However, where it has to do with admissibility of the person’s confession made as a result of torture or other forms of coercion, scholars differ on this. While some scholars opine that a confession, whether voluntary or involuntary, should be admitted, the majority of Muslim jurists reject a confession where it is made under coercion. The scholars who would admit any form of confession support their argument with the story of the woman whom Hatib bn 'Abi Balta'ah sent to the pagans of Makkah with a letter. It was reported that the woman was coerced to release the letter after denying it being in her possession. The majority of jurists, who reject the admissibility of confessions, made under duress however, opine that the evidence that the woman carried a letter represented a divine revelation from Allah (s.w.t.) to His messenger. This cannot be denied by any human being. That was why the Prophet (s.a.w.) ordered the retrieval of the letter from her. More so, it was document that was obtained from her and she was not forced to confess to any offence.

To further buttress their views, scholars who opined that confession should not be got from coercion, referred to verses of the Holy Qur’anic, hadiths of the Prophet. For instance, they cited the verse of the Qur’an where Allah (s.w.t.) says: “Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with faith (Qur’an 16:108).” Commenting on this verse, Al-Shirbini opines that if a confession made under coercion is not considered as nullifying of one’s faith, then the same should apply to a confession made under compulsion. Also, since scholars unanimously agreed that a false witness is inadmissible in proving a fact, a confession made under coercion should not be admitted, as it could be untrue. Reference was also made to prophetic tradition which says: “God will ignore what men think in their minds to do till they do it or talk about it and He will leave out of the reckoning of man’s acts under compulsion (Ibn Majah, hadith no. 2043).” This in clear terms rejects any act of coercion. It was also reported that Umar Ibn Khatab rejected a confession gotten from coercion. He was reported to have said: “A person would not be secure from incriminating himself if you made him hungry, frightened him or confined him (Al-Saleh, 1982).” Similarly, 'Abdullah Ibn 'Umar rejected the confession of a man accused of theft and who was beaten until he confessed (Bederin, 2003).

From the foregoing, a confession based on coercion is inadmissible in evidence. It must be voluntarily made. Otherwise, the accused may end up telling lies against himself. However, where, according to some scholars, the accused person is known to be a person that is not reputable and there are other circumstantial evidence(s) to prove his/her involvement in the alleged crime, he can be forced to confess. They however call this measure as “injustice similar to justice (Baderin, 2003).” It was also reported by Ibn Umar that the Prophet (s.a.w.) said: “Avoid these fifty things which Allah (s.w.t.) has forbidden, and if anyone commits any of them he should conceal himself with God’s most High veil and turn to God in repentance. . .” (Ibn Hajar Ahmad Ibn Ali, hadith no. 1048).

#### ***Who Is Bound by Confession?:***

A person is held liable for his own confession. This is expressed in the Arabic legal maxim that says: *al-Mar' mu'aakhadh bi 'iqraarihi* (One is held responsible for one’s confession), (Ali Haydar, vol.1) or *al-'iqraar hujjah qaasirah* (confession is intransitive evidence). Thus, a confession only binds the maker. The reason is that a confession needs to be made voluntarily. This will not be the case where an accused confession is allowed to bind the co-accused. However, the co-accused may be found guilty of another crime not as a result of the confession of the co-accused but because of other compelling evidences which nail the accused (al-Barnu).

It is further observed that the *Shari'ah* gives effect to confessions properly so made. This is based on the assumption that the confessor is telling the truth as to the circumstances that transpired. This does not however, incriminate another person who does not confess to such crimes. In other words, a confession is only admissible against the maker. An example is where there are more than one accused persons in a crime. The confession of one of the accused persons which incriminates himself and the other accused is only admissible against the confessor and not the other accused who does not confess to the alleged crime. Also, in a case of adultery where a person’s confession is found to be false allegation, he will be liable, in addition to the offence in which he has confessed, to the offence of *qadhif* (i.e., false accusation).

It is pertinent to emphasise the position with respect to adultery, which cannot be committed by one person. It involves two partners. To ensure justice, one needs to consider the matter as one that involves doubt (*shubhah*). In such a case, a *hudud* penalty is averted. The Qur'an mentions the two genders when providing for the penalty. However, a confessor to adultery during the period of the Prophet (s.a.w.) was punished on his own, without any questioning of his co-accused. This shows that a single person can be punished for adultery. Also, Mu'iz and al-Ghamidi were punished on their own, and the Prophet did not question their co-accused. This was due to the fact that the confession was made voluntarily and they never indicted any other person.

#### **The Benefit of Doubt:**

A person who confesses to committing the offence of adultery is required to be given the benefit of doubt. This is in accordance with the Islamic legal aphorism which says: *al-'asl baraa' al-dhimmah* (the fundamental principle is freedom of liability or: *al-'asl al-'adam* (the fundamental principle is the non-existence of something) (Ibn Nujaym Zayn al-'Abidin Ibn Ibrahim, 1993). It should be also noted that all cases of adultery decided upon by the Prophet were based on voluntary confessions and not coercion. It was reported by Imran Ibn Husain that a woman of Juhaina (tribe) approached the Prophet (s.a.w.) when she was pregnant due to fornication, and said: "O God's messenger! I have committed something for which a prescribed punishment is due, so execute it on me." God's messenger called her guardian and said: "Treat her well and when she delivers, bring her to me." Abu Hurayrah also reported that: "a man among a group of Muslims approached the Prophet (s.a.w.) in the mosque and called, 'O God's messenger I have committed adultery.' The Prophet turned away from him. The man confessed to that four times and when four people witnessed his claim, the Prophet asked him, "Are you an insane?" The man replied, "No", and then the Prophet asked him, "Are you married?" He replied, "Yes". The Prophet (s.a.w.) said: Take him away and stone him to death (Al-Bukhari, hadith no. 6747)."

It is obvious from the two traditions mentioned above that the confessor, in such an instance, has the right to be given the benefit of the doubt. The judge also has a duty not to admit in evidence the confessional statement in the first instance. This will clarify the nature of the charge against the accused (Baderin, 2003). It will also make clear the consequences of his acts and may thus, decide whether or not to change his mind by retracting his confession especially in offences which involve the rights of Allah (s.w.t.). Also, a person who confesses is required to be informed in clear terms the meaning and consequences of the confession. He should also be given chances to retract his confession.

#### **Retraction of Confession:**

The issue of retraction of confession has attracted many comments by Muslim jurists. This is because retraction shows the significance of criminal justice in Islam as far as the protection of the accused' rights are concerned. It also prevents the infliction of strict penalty on an innocent accused person. In order to determine whether retraction of confession is acceptable in the *Shari'ah*, regards need to be had to the nature of the offence and the penalty involved. Having regards to the nature of the liability involved, scholars have divided crimes into the following three categories:

#### **Crimes Which only Involve Rights of Man:**

These offences involve solely the infringement of the right of man (*haqq al-'aadami*). These include: murder, defamation, rape and defecation. In this category, the victim or his relatives may pardon the offender, and this pardon will be valid. Muslim scholars agreed unanimously that once the offender confesses in such a sensitive case, he has no right to retract it. This is notwithstanding the fact that he voluntarily confesses and the confession met the requirements for validity. This is expressed in the Islamic legal maxim which says: *al-'iqraar fii huquuq al-'ibaad laa yahtamil al-ruuju* (retraction of confession is not allowed in rights of men) (Al-Kasaani, Badaa'i', Vol. 7). This is because allowing retraction in such instances would prejudice people's rights and justice would not be done or seen manifestly to be done. For instance, if a person who had earlier confessed to killing another retracted it later; this is not acceptable because it involves the right of individuals who must have suffered for one injury or another.

#### **Crimes Which only Involve Rights of God:**

In this category, it is the right of God that is violated (*haqq Allah*). Examples are adultery and intoxication. Here, Muslim scholars disagree on the admissibility of retraction. Majority of Muslim scholars accept retracted confession if the crime solely involves the violation of the rights of God. They opine that: "When Ma'iz ibn Malik came to the Prophet confessing his commission of adultery, the Prophet said to him: "Probably you only kissed (the lady) or winked or looked at her!" He replied, "No, O God's apostle!" (M. al-Naysaburi, al-Mustadrak, Vol. 4). They inferred from the question of the Prophet (s.a.w.) that he meant to give Ma'iz an opportunity to retract the confession earlier made by him (al-Shiribiini, Mughni al-muhtaaj, Vol. 4.). When Ma'iz fled and was caught and stoned to death, the Prophet (s.a.w.) was reported to have said: "Why didn't you leave him? Perhaps he may repent and God will forgive him (Al-Nasaai, Sunan, Hadith No. 7207)." This

Prophet's comment shows that when an offender repents after making confession, it indicates a retraction. This is because the retraction casts doubt to the confession thereby putting it between truth and falsehood. Islamic law requires that capital punishment (*hadd*) should be averted if doubt exists (Al-Sarkhasi, *al-Mabsuut*, Vol. 9). In the same vein, Ibn 'Abd al-Barr reported Muslim jurists agree that a retracted confession is invalid in capital punishment (*hudud*). This shows that it cannot be admitted in evidence against the accused.

The other view says that when a person confesses to an offence, which solely involves the infringement of the right of God, retraction is not admissible. They opine that: "If retraction is allowed, the companion must have been ordered by the Prophet to pay *diyyah* compensation for the killing of Mu'iz. Thus, the absence of such judgment indicates that retracting a confession in such an instance is not acceptable (<sup>1</sup>Ibn Qudamah, *al-Mughni*, Vol. 10)." 'Abu Hurayrah reported that a man accused a woman of committing adultery with his son. The Prophet (s.a.w.) said to Unays: "O Unays, go to this woman in the morning and if she makes a confession then stone her." They further opine that if a retraction is acceptable, the Prophet (s.a.w.) would have explained that to Unays, as there is the chance that the woman might want to retract her confession. They noted that if retraction is not permitted in the crimes involving man's right, then, logically, it should not be permitted in the offences involving the right of God (Al-Sarkhasi, *al-Mabsuut*, Vol. 9).

However, it would appear that the former position is more acceptable. This is because it is better supported with evidence than the latter. One needs to comment with regard to the first claim the Prophet (s.a.w.) would have asked them to pay *diyyah*. The Prophet (s.a.w.) did not ask them because Ma'iz had not made retraction and, as such, it is difficult to assume that his running away from the punishment means his retraction. With regard to the second claim, there is a chance that the Prophet (s.a.w.) did not mention the issue of retraction as he might have known all the conditions relating to confession, which includes that of retraction. Also, the two rights are very different in principle. The right of God can be forgiven, while the right of man can be based on contention. Thus, with respect to the right of God, penalty can be escaped by ways of repentance and forgiveness from God. The right of man on the other hand requires an effort to ensure that justice is done among mankind. Besides, with respect to the right of God, one is not required to confess as opposed to the right of man, in which a confession is favourably necessary (Al-Maawaridi, *al-Haawi al-Kabiir*, Vol. 13).

#### **Crimes Which Involve Both Rights of God and Rights of Man:**

Examples of offences under this category are the offences of theft and defamation. Muslim scholars slightly disagree on the validity of retracted confession in this category. This disagreement is expressed by saying if person retracts a confession in respect of crimes, which involve both rights, the *hadd* punishment should not be given. This reason is because of the *shubhah* (ambiguity) that beclouds it. However, the right of man should be given back to the offender from the confessor. This is based on the presumption that the confession satisfies the requirements for its validity in terms of lack of coercion and soundness of mind.

Most Muslim scholars opine that if a person confesses to defamation, the penalty due for the offence is required to be carried out and retraction is not permitted. The reason is that the right of man prevails in that crime. But, if the accused person confesses to theft and later makes retraction of the confession, Muslim scholars agree that the penalty will be dropped. The reason is not only because it is the right of God, but also because the retraction has cast doubt (*shubhah*) to the truthfulness of the confession. Therefore, the accused person will be unjustly convicted. But, the right of man, which is involved in this matter needs to be reclaimed from the confessor. The reason is that the right of man cannot be undermined. Also, since the confessor was not forced to confess, he is liable for the claim (Ibrahim Ibn Muhammad Ibn Muflih, *al-Mubdi' Sharh al-Muqni*, Vol. 10).

#### **Conclusion:**

From the above, the hallmark of the rule on admissibility of confessions under the two legal systems is its voluntariness. Where confession is involuntary, it is inadmissible under the two systems. Thus, involuntariness is a key factor, which can vitiate a confession. Also, unsoundness of mind, being a minor and coercion, threat, promise can affect the validity of a confession. However, Muslim scholars are not unanimous on the issue of coercion. But, the majority opinion seems to be that coercion vitiates confession. Confessions are also an essential aspect of the common law which exported the paradigm in the Malaysian legal system though with some modifications. This is also important under Islamic law. Both systems recognise the legality of confession properly made and is admissible in evidence. The rationale is that such evidence is very liable as it is unlikely that a person tells lies against himself under normal conditions. However, Islamic law does not encourage confessions in matters which relate to the rights of God even though such a confession is admissible. Both systems also reject evidence of confessions not properly obtained. The reason is that a confession may have been given, not with the intention of telling the truth but the desire to escape the oppression imposed on, or the harm threatened to the suspect.

Also, determining what amounts to a confession is not that an easy task. This is why plethora of authorities has given an insight into the meaning of the term. But, as far as Malaysian law of evidence is concerned, section



17(2) presents a very useful guide on the meaning of a confession. It defines it as an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence. The paper therefore makes a deep analysis of this section and the substantive rule relating to admissibility of a confession in Malaysia, being of common law origin.

It is further submitted that Islamic law has established sound legal principles on confessions. These principles are derived from the four major sources of Islamic legal jurisprudence namely: Qur'an, *Sunnah* of the Prophet (s.a.w.), *ijma* and *qiyas*. The paper finds that confessions to commission of crimes are not illegal under Islamic law. It however, distinguishes between the rights of God and the rights of man. While confession of sins is not encouraged by scholars in the rights of God, it is permitted in the right of man as it constitutes the most reliable and valuable source of proof in the law of evidence. In the same vein, the paper examines factors which can vitiate a confession and finds that unsoundness of mind, being a minor and coercion can affect the validity of a confession. However, Muslim scholars are not unanimous on the issue of coercion. But, the majority opinion seems to be that coercion vitiates confession. The paper also examines whether a person who does not confess can be bound by the confession of another person. It finds that confession merely binds the maker of the statement. Also, benefit of doubt needs to be given to a person who confesses in order to test the accuracy or veracity of such confessions.

Another important Islamic contribution to the law of evidence is the retraction of confessions. Thus, the paper discusses the issue of retraction of confessional statement and finds that Muslim jurists make the effect of such retraction dependent on the nature of the crimes involved. In other words, the effect of such retraction depends on whether the crime committed relates to the rights of man, the rights of God or both rights of God and that of man. Where it relates to the rights of man, Muslim scholars appear unanimous that retraction of such a confession is not allowed. This is notwithstanding the fact that he voluntarily confesses in the first place. However, Muslim scholars seem to disagree on where the crimes relate to the right of God. The majority opinion seems to be that the retraction is valid. The opinion of the majority in this situation appears more acceptable. This is more so because a confession in this category is not encouraged in the first place. Where the crime relates to the right of God as well as the rights of man, there is also a subtle disagreement amongst Muslim scholars. The majority view, which is more convincing, is that retraction is not admissible. This is because the rights of man should prevail in the circumstance. It is suggested that where these sound Islamic legal principles are complied with, it will go a long way in ensuring sound criminal justice delivery system in the society.

#### REFERENCES

- Abdul Khalid bin Abdul Hamid v*, 1995. 1 MLJ 692.  
*Abdul Rashid vi*, 1994. 1 SLR, 119.  
Abdullah Ibn Ahmad Ibn Qudaamah, al-Mughni li Ibn Qudaamah, 1999. eds *Abdullah al-Turki and Abdu al-Fattah al-Hilu*, Riyadh: Daar Alam al-Kutub, 5: 164.  
Ahmad Ibn Shaykh al-Zarqa, *Sharh al-Qawaa'id al-Fiqhiyyah*, 1996. 4th edition, Damascus: Daar al-Qalam, 1417, pp: 401 and similar codification in Abdul Rahman al-Suyuuti, *al-Ashbaa' wa al-Nazaa'ir* Beirut: Daar al-Kutub al-'Ilmiyyah, 1403 A.H., pp: 464.  
al-Barnu, *Mawsuu'a*, 1: 233.  
al-Bukhari, Abu Abdullah, Muhammad Ibn Isma'id, *Kitaab Sahiih al-Bukhaari* n.p. n.d. Hadith no. 6438 and Muslim, *Sahiih op. cit.*, Hadith no 1695 (Muslim narration includes the story of al-Ghamidiyyah who came to the Prophet confessing her adulterous act.  
Al-Bukhari, *Sahiih*, Hadith no 6747; Muslim, *Sahiih*, Hadith no. 1691.  
Al-Bukhari, *Sahiih*, Hadith No. 2190; Muslim *Sahiih*, Hadith No. 1697.  
Ali Haydar, *Durar al-Hukkaam Sharh Majallat al-Ahkaam*, ed. Fahmi al-Husayni, Beirut: Daar al- Kutub al-'Ilmiyyah, n.d., 1: 70.  
Al-Kasaani, *Badaa'i*, 7: 216-233.  
Al-Kasaani, *ibid.*, p. 61, al-Ramali, *Nihaayah*, Beirut: Daar al-Fikr 1984/1404, 7: 431.  
Al-Maawaridi, *al-Haawi al-Kabiir* (n.p., n.d), 13: 210-211.  
Al-Nasaai, *Sunan*, *op. cit.*, Hadith No. 7207.  
Al-Saleh, O.A., 1982. "The Rights of the Individual to Personal Security in Islam", in *The Islamic Criminal Justice System*, ed. M.C. Bassiouni, New York: Oceana Publications, pp: 73.  
Al-Sarkhasi, *al-Mabsuut*, 9: 49.  
Al-Sarkhasi, *al-Mabsuut*, 9: 49. Mansur Ibn Yunus Al-Bahuti, *Kashshaaf al-Qinaa 'An Matn al-Iqnaa'*, ed. Hilal Muslihi Hilal, Beirut: Daar al-Fikr 1402 A.H., 6, 85.  
*Anandagoda v The Queen*, 1962. MLJ 289.  
Augustine Paul J in *Evidence: Practice and Procedure*, Butterworths, 3<sup>rd</sup> edn, 2003, 201.  
Bachawat J in *A Nagesia v State of Bihar* AIR (1966) SC 119 at 122.  
*Chin Seow Noi v PP* [1994] 1 SLR 135.

- Chong Teng v PP* [1960] MLJ 153 at 155, where Thompson CJ approved the Privy Council's case of *Nazir Ahmad v King-Emperor* AIR 1936 PP 253 at 258 that the procedure must be strictly complied with.
- Choo Pit Hong v PP* [1995] 2 SLR 255.
- Cross on Evidence 5<sup>th</sup> edn, Butterworths, 541.
- Dato Seri Anwar Ibrahim v PP & Anor Appeal* [2003] 5 AMR 481 at 545, CA.
- Dato' Mokhtar Hashim v PP* [1983] 232 at 253.
- Emperor v Cunna* AIR (1920) Born 270.
- Empress v Ashotosh Churkerbutty* (1874) ILR 4 Cal 483.
- Evidence Act 1950.
- Inban F.F. and J.E. Reid, 1967. *Criminal interrogation and Confession*, Baltimore, USA: The Williams and Wilkins Company, pp: 143.
- Fred Kaufman, 1979. *The Admissibility of Confession*, 3rd edition, Carswell Company Limited, Toronto, Canada, at 4-5.
- Gudjonsson, G.H., 2002. *The Psychology of Interrogations and Confessions*, John Wiley & Sons.
- Gilbert, B., *The Law of Evidence*, 2<sup>nd</sup> edn, Catherine Lintot, 1760, at 140.
- Goi Ching Ang v PP* [1999] IMLJ 50 FC.
- Gregory Durston, *Evidence*, Oxford University Press, 2008, 308.
- Hasibullah bin Mohd Ghazali v PP* [1993] 2 AMR 3117.
- Ibn Abdu al-Barr, al-Istidhkaar, ed. Salim M. Ata, Beirut: Daar al-Kutub al-Ilmiyyah, 2000, 7, pp: 503.
- Ibn Amir al-Haaj, *al-Taqrir wa al-Tahbiir*, Beirut: Daar al-Fikr, 1996/1417, Vol. 2, p. 42; cf. Ahmad al-Nafraawii, *al-Fawaakih al-Daani*, Beirut: Daar al-Fikr, 1415, Vol. 2, p. 178.
- Ibn Hajar Ahmad Ibn Ali, al-'Asqalaani, *Bulugh al-Maram* translated, Riyadh Saudi Arabia: Dar us-Salaam Arabia Dar us-Salaam Publications, 1996/1416, Hadith no. 1048.
- Ibn Hajar al-Asqalaanii, Fath al-Baari Sharh Sahiih al- Bukhaari, ed. Muhibddin al-Khatiiib, Beirut: Daar al-Marifah n.d., Vol. 8, p. 476
- Ibn Majah, Muhammad Ibn Yaziid, *Sunan Ibn Maajah*, ed. Muhammad Fu'ad 'Abdu al-Baqi, Beirut: Dar al-Fikr, n.d. Hadith No. 2043; cf. al-Bukhari, Sahih, Hadith No. 4968.
- Ibn Nujaym Zayn al-'Abidin Ibn Ibrahim, *al-Ashbaa' wa la-Naza'ir 'Ala madhhab Abi Hanifah al-Nu'man*, Beirut: Dar al-Kutub al-'Ilmiyyah, 1993/
- Ibn Qudamah al-Mughni, Vol. 5, p. 288; al-Sarkhasi, al-Mabsuut, Beirut: Daar al-Ma'rifah, n.d., 17: 189.
- Ibn Qudamah, al-Mughni, Vol. 10, p. 167.
- Ibn Qudamah, Mughni, Vol. 5, p. 149; Abu Bakr Ibn Mas'uud al-Kasaani, *Badaa'i al-Sanaa'I* Beirut: Daar al-Kutub al-'Ilmiyyah, 1997/1418, Vol. 7, p. 222; Abdul Karim Zaydan, *Nizaam alqadaa fi al-Sharii'ah al-Islamiyyah* (Judicial Procedure in Islamic Law), Baghdad: Matba'at al- 'Ayni, 1404 A.H., p. 157.
- Ibrahim Ibn Muhammad Ibn Muflih, *al-Mubdi' Sharh al-Muqni'*, Beirut: Daar al-Maktab al-Islami, 1400 A.H., Vol. 10, p. 368.
- Ibrahim v R* [1914] AC 599
- In re *Ahmad* 1950 My 82.
- J. D Heydon – *Evidence: Cases and Materials* (2<sup>nd</sup> edn, chapter 8) at p 177.
- King, P., *Crime, Justice and Discretion in England 1740-1820*, Oxford University Press, at 225–226.
- Kraisak Sakha v PP* [1996] 2 SLR 713.
- Krishnan v PP* [1987] 1 MLJ 292.
- Law Say Seck* [1971] 1 MLJ 199.
- Leimanit v PP* [1965] 2 MLJ 26
- Lim Young Sein v PP* [1994] 2 SLR 254
- Lukman Zakariya, "Confession and Retraction: The Application of Islamic Legal Maxims in Safiyyatu and Amina's Cases in Northern Nigeria," (2010) 30(2), *Journal of Muslim Minority Affairs*, 251-263.
- M. al-Naysaburi, al-Mustadrak, Vol. 4, p. 402, Hadith No. 8077.
- M. Baderin, *International Human Rights*, (n., 175), p. 108; M.M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", in *The Islamic Criminal Justice System*, ibid., pp: 119-120.
- Mashood Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003, at 103.
- Mitchell B., "Confession and Police Interrogation of Suspects" [1983] CLR, 596.
- Mohamed Yusuf v PP* [1983] 2 MLJ 167
- Muhammad al-Shiribini, *Mughni al-Muhtaj*, Beirut: Daar al-Fikr, n.d., 2: 240-241.
- Muhammad Ibn Abdul-Wahid Ibn al-Humam, Fath al-Qadiir Sharh al-Hidaayah, Cairo: al-'Amiriyyah Press, 1336, A.H., 5: 408.
- Muhammad Siddiq Ibn Ahmad al-Barnu, *Mawsuu'at al-qawaa'id al-fiqhiyyah*, (encyclopaedia of Islamic Legal Maxims), n.p., 1416 A.H., 2: 227.
- Pakala Narayana Swami v Emperor* AIR 1939 PC 47.

- Palvinder Kaur v State of Punjab* (1953) SCR 64.  
*Payare v Lal v State of Rajasthan* AIR (1963) SC 1094 at 1096.  
Penny, S., "Theories of Confession Admissibility: A Historical View" (1998) vol. 25, *American Journal of Criminal Law*, 332-372, 309.  
*PP v Abdul Rashid & Ors* [1993] 3 SLR 749.  
*PP v Akin Khan bin Abdul Khanan* [1987] 2 CLJ 244.  
*PP v Kamde bin Raspani* [1988] 3 MLJ 289 at 290.  
*PP v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 at 363.  
*PP v Suradet & Ors* (Cr Case No 13 of 1992, unreported) followed in *Chin Seow Noi v PP* [1994] 1 SLR 135 at 149, opined:  
*PP v The Lye Tong* (1958) 3 MC 208,  
*Queen Express v Babulal* (1884) ILR 6 All 509 at 539.  
Qur'an 16:108.  
Qur'an 2:282.  
*R & Drew* (1834) 8 C & P 140.  
*R v Blackburn* [2005] 2 CR App R 30, CA.  
*R v Cleary* (1963) 48 Cr App R 116; *R v Moore* (1852) 2 Den 522.  
*R v Croydon* (1846-48) 2 Cox 67.  
*R v Fennel* (1881) 7 QB 147.  
*R v Jones* 12 Cox 241.  
*R v Laughter* (1846) 2 C & K 225.  
*R v Mushtag* [2005] 1 WLR, 1513.  
*R v Pountucy* (1836) 7 C & P 302.  
*R v Priestly* (1965) 51 Cr App R 1.  
*R v Reason* 12 Cox 228.  
*R v Sharp* [1988] 86 CR APPR 247.  
*R v Thomas* 6 C & P 353.  
*R v Windsor* 4 F & F 366.  
*R v Wong Ah Khin & Ors* [1935] MLJ 169.  
*R v Wong Ah Khin & Ors* [1935] MLJ 169.  
*Ratten v R* [1962] AC 378 at 387.  
*Rv Walkley and Clifford* 6 C & P 175.  
See Note on the Hadith of Ma'iz in Muhammad Ibn Abdullah al-Naysaburi, al-Mustadrak alaa Sahiihayn, ed. Mustafa A. Ata, Beirut: Daar al-Kutub al-'Ilmiyyah 1990/1411, Vol. 4, p. 402, Hadith No. 8077 and Ghamidi in Muslim, Kitaab Sahiih Muslim, n.p., n.d., Hadith no 1695.  
*Selvadurai v PP* [1948-49] Supp 43.  
*Seyadu v King* (1951) 53 NLR 253.  
*Shabaan & Anor v Chong Fook Kam & Ors* [1969] 2 MLJ 219, PC. A confession when recorded by a magistrate must comply with procedural requirements of section 115 of the Criminal procedure Code.  
Steve Uglow, *Criminal Justice*, Sweet & Maxwell, 2002, 135.  
*Subramaniam v PP* [1956] MLJ 220 PC at 222.  
*Suradet & Ors v PP* [1993] 3 SLR 265.  
*Tan Chee Hwee v PP* [1993] 2 SLR 657.  
*Teng Chee Kong v PP* [1998] 2 SLR 843.  
The Indian Evidence Act 1872.  
*The King v Cooray* (1926) 28 NLR 74.  
*Veera Ibrahim v Maharashtra* AIR 1976 SC 11667.  
*Wai Chan Leong v PP* [1989] 2 CLJ 1168 at 1171, SC.