CONFESSION IN THE LAW OF EVIDENCE : AN INCONGRUITY

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THE APPELLANT in *Palvinder Kaur* v. *The State of Punjab*,[1] was accused of the offences falling under sections 302 and 201 of the Indian Penal Code. The facts of the case in brief, were thus : Palvinder Kaur was the wife of the deceased and mother of two children by him. The deceased was the son of the chief of Bhareli estate in Punjab. The appellant was allegedly in love with her cousin Mohinderpal Singh (a co-accused in the case and a fugitive from justice). It was alleged that in order to get rid of her husband Jaspal Singh—the deceased—Palvinder herself, or in concert with Mohinderpal had administered potassium cyanide to him, and then they together with the help of a domestic servant made away with the evidence of crime (the dead body) by carrying it, after a few days of the occurrence of the death, in a big steel box in a jeep to a secluded place by the road side and threw it into a well in a village. More than a month after the alleged murder, the dead body inside the trunk was recovered from the well and the prosecution was started. As the co-accused was not traceable, the appellant alone was put on trial. There was no direct evidence to establish the charge of murder, and the conviction by the trial court was based on "purely circumstantial" evidence. The High Court on the circumstantial evidence found it "impossible to state with confidence that poison was administered by her",[2] but with regard to the charge under section 201 the High Court found that "the most important piece of evidence" was her retracted confession which she had made before the Magistrate, as "corroborated on this point by independent evidence". The court, therefore, held the latter charge established.

The Supreme Court in agreement with the rulings on confession given by the Privy Council,[3] the Allahabad High Court,[4] and in its own earlier decision,[5] held in this appeal that the statement[6] on which the High

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1. (1953) S.C.R. 94.
2. *Id.* at 99.
3. *Narayan Swami* v. *Emperor*, A.I.R. 1939 P.C. 47.
4. *Emperor* v. *Balmukund*, I.L.R. 1930 All. 1011
5. *Hanumant* v. *State of M.P.*, A.I.R. 1952 S.C. 343.
6. The so-called confession runs as follows:

My husband Jaspal Singh was fond of hunting as well as of photography. From hunting whatever skins (Khalis) he brought home he became fond of colouring them. He also began to do the work of washing of photos out of eagerness. One day in December, 1949, Jaspal Singh said to my cousin (*taya's son*) Mohinderpal Singh to get him material for washing photos. He (Mohinderpal Singh) said to

Court had relied when read as a whole is of an exculpatory character, which does not amount to confession and is thus inadmissible in evidence.[7] Thus, when the basis on which the High Court had convicted the appellant under section 201 was not proved, nothing was left to uphold her conviction at all. The court observed :

> Life and liberty of persons cannot be put in jeopardy on mere suspicions, howsoever strong, and they can only be deprived of these on the basis of definite proof.[8]

In *Hanumant* v. *State of M.P.*,[9] the accused appellant Hanumant Govind Nargundkar, Excise Commissioner, Madhya Pradesh, with another appellant R.S. Patel, was charged *inter alia* with forging a tender (Ex. P. 3A) and a letter (Ex. P. 24). The trial magistrate and the sessions judge relied upon the evidence of the experts with regard to the tampering of the letter and also on the alleged confessional statement of Hanumant. The High Court, though it held that the experts' evidence was inadmissible, nevertheless placed some reliance on it and arrived at the guilt of the accused on the basis of his *so-called* confession.

Harnam Singh, who is head clerk in Baldevnagar Camp, to bring the same from the Cantt. Harnam Singh went to the Cantt. and on return said that the material for washing photos could be had only by a responsible Government official. He told so to Mohinderpal Singh, who said that Harnam Singh should take his name and get the medicine. Thereupon, Harnam Singh went to the Cantt. and brought the medicine. I kept this medicine. As the medicine was sticking to the paper I put it in water in a small bottle and kept it in the almirah. In those days my husband was in Ambala and I lived with him in the kothi in the city. He went for hunting for 2-3 days and there he developed abdominal trouble and began to purge. He sent for medicine 3-4 days from Dr. Sohan Singh. One day I placed his medicine bottle in the almirah where medicine for washing photos had been placed. I was sitting outside and Jaspal Singh enquired from me where his medicine was. I told him that it was in the almirah. By mistake he took that medicine which was meant for washing photos. At that time, he fell down and my little son was standing by his side. He said 'Mama, Papa had fallen'. I went inside and saw that he was in agony and in short time he expired. Thereafter I went to Mohinderpal Singh and told him all that had happened. He said that father of Jaspal Singh had arrived and that he should be intimated. But I did not tell him, because his connections were not good with his son and myself. Out of fear I placed his corpse in a box and Mohinderpal Singh helped me in doing so. For 4-5 days the box remained in my kothi. Thereafter I said to Mohinderpal Singh that if he did not help me I would die. He got removed that box from my kothi with the help of my servants and placing the same in his jeep went to his store in Baldevnagar Camp and kept the same there. That box remained there for 8-10 days. Thereafter one day I went to the camp and from there got placed the trunk in the jeep and going with Mohinderpal Singh I threw the same in a well near Chhat Banur. I do not remember the date when Jaspal Singh took the medicine by mistake. It was perhaps in January, 1950. (See *supra* note at 103-104.)

7. *Supra* note 1 at 104.
8. *Id.* at 108.
9. *Supra* note 5.

The case with regard to the letter in brief was that it was typed on a machine which had not reached Nagpur till the end of December, 1946. Thus the alleged letter could have not been typed on the date which, after the alleged tampering, was marked on it. Allegedly, the letter was typed at a later date but was tampered with and ante-dated so as to make it a piece of evidence favourable to the accused. The Supreme Court, after holding the experts' opinion as inadmissible evidence, held that both the trial magistrate and the sessions judge had erred in using "the part of the statement of the accused for the arriving at the conclusion that the letter not having been typed on Art. B must necessarily have been typed on Art. A." The court held that "such use of the statement of the accused was wholly unwarranted",[10] as :

> [I]t is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it is used against him. An admission must be used either as a whole or not at all.[11]

The statement in question, given by the accused under section 342[12] of the Criminal Procedure Code was :

> Exhibit P-31 was typed on the office typewriter Art. B. Ex. P-24 being my personal complaint letter was typed by my Personal Assistant on one of the typewriters which were brought in the same office for trial, with a view to purchase. As this was my personal complaint no copy of it was kept in the Correspondence Files Ex. P-34 and Ex. P-35 just as there is no copy in these files of my tender Ex. P-3A. . In the months of September, October and November 1946 several machines were brought for trial from various parties in our office till the typewriter Art. A was purchased by National Industrial Alcohol Ltd. Company.[13]

Nishi Kant Jha, a student of Jhajha High School, stood the charge of murder of his fellow student of the same school and of robbing the deceased of Rs. 34 in *Nishi Kant Jha* v. *State of Bihar*.[14] The facts in brief alleged by the prosecution against the accused were that the accused and the deceased had travelled together in the first class compartment of Barauni-Sealdah passenger train from Jhajha. When the train reached Madhupur, in the compartment of which the door was found closed, was found the dead body of Jai Prakash Dubey—the victim—in the lavatory. Blood was coming out from the veins of the neck and there was

10. *Id.* at 350.
11. *Ibid.*
12. S.342 of the Code of Criminal Procedure.
13. *Supra* note 5 at 350.
14. (1669) S.C.R. 1033.

plenty of blood on the floor. The injuries were caused by a sharp cutting weapon. On the very evening of the day on which the murder was committed and detected the accused was seen by a witness, washing his blood-stained clothes in the river *Patro*, at some distance from Madhupur station. The accused also had a cut on his left hand which, on enquiry by the witness, the appellant had told to be caused by a broken glass and that he was assaulted by a cow boy who had snatched away his money. This witness then went to his house in the village, and told about the incident of meeting the accused to some other persons who got suspicious, as by that time the news that a murder was detected at Madhupur station had come to their knowledge and also the fact that the murderer was not traceable. These persons along with the witness set out in search of the accused and overtook him as he was going behind a bullockcart. The appellant said that he had committed no murder but all the witnesses apprehended him. In possession of the appellant were found besides his blood-stained clothes and notebooks, a *chhura* (knife). When the party reached the *sarpanch* of the village, he directed them to go to the *mukhiya*. The *mukhiya* took down the statement of the accused (Ex. 6)[15] and asked the party to take the appellant to the police station. The chemical examiner reported that the articles recovered from the accused and submitted to the chemical tests, were stained with human blood. This report

15. I am Nishi Kant Jha, son of Nilkanth Jha, resident of Baburpur, P.S. Jasidih sub-division Deoghar, District Santhal Parganas. To day 12-10-61 at about 12 midnight, chowkidars Pathal Turi and Ayodhya Turi of village Saptar and Sheo Shankar Pandey, Ram Kishore Pandey and Basudeo Pandey of the same village arrested me and brought me. My statement is that when I boarded the first class compartment in Barauni passenger at Jhajha, an unknown person was sitting in it when the train reached near Simultala and when it stopped there, Lal Mohan Sharma, resident of Deoghar. P.S. Deoghar, district Dumka entered into that compartment. I had been knowing him from before. When the train stopped at the Jasidih station and when I went to get down, Lal Mohan Sharma who had boarded the train at Simultala, did not allow me to get down at the Jasidih station. When the train moved ahead of Jasidih station, in the meanwhile Lal Mohan Sharma took that outsider into the lavatory and began to beat him. At this I caught hold of his hand, as a result of which my left fore-finger got injured with knife. Thereupon he asked me to be careful. Then, on being afraid, I sat quietly in that very compartment. He further said that I should not open the door and windows of the compartment and if I would do so I would be inviting death. At that very time, he killed him. When the train was reaching near Mathurapur, he jumped down from the running train and fled away. Lal Mohan Sharma fled away. I also jumped down on the other side of Patro river near Madhupur and fled away in order to save my life, because I apprehended that I would be the only person who would be arrested. Thereafter, I came to the village Ratu Bahiar lying by the side of Patro river and afterwards I took my clothes to Patro river and washed them with a soap. Meanwhile a bullock cart was going to Deoghar. Therefore I sat on that very bullockcart and started for Deoghar. After I had covered about a mile, Pathal Turi, Shanker Pandey, Ram Kishore Pandey. Ayodhya Turi. the chowkidar and Rameshwar Mahto got me down from the bullock cart and brought before you. I know their names after enquiring the same from them. *Id.* at 1036.

also showed that the blood group of the deceased and the appellant was the same.

Again, the appellant gave another statement under section 342 of the Criminal Procedure Code, and this statement[16] contained many contradictions to his previous statement (Ex. 6).

On the scrutiny of the evidence the High Court found some incriminating circumstances against the appellant, while his exculpating explanations were unacceptable. The High Court upheld the conviction of the appellant for the offence under section 302 of the Indian Penal Code.

16. The appellant said that he could not identify the photographs of the victim as those of Jai Prakash Dubey and that he did not know Jai Prakash Dubey. He did not board a first class compartment of Barauni passenger at Jhajha, that he did not jump off the train when it was nearing Madhupur. He admitted having washed his blood-stained clothes in the river Patro near the village of Ratu Bahiar and that a person had enquired of him the reason for his clothes being stained with blood. He did not admit that he had told anyone that while coming from the side of Gangamarni he had been assaulted by some herdsman and cut his finger with glass and said that his reply to the query was that he had an altercation with a herdsman on his asking about the way when the latter wanted to assault him with a sharp-edged knife and on his catching hold of it he had cut his hand. He denied having enquired of any body about the way leading to Deoghar and he also denied that he was arrested while he was a mile ahead of village Titithapur following a bullock cart. He admitted having held in his hand clothes which had been washed in the river and blood-stained books and copy books, pages of some of the books being blood-stained. He did not admit that he had with him a knife when he was arrested. He admitted having been taken to the house of Mukhiya, Sudama Raut, but his version was that when he reached there they all began to beat him and told him that he must make a statement as suggested by them. With regard to Ex. 6 his version was that it was not his statement but that he had been made to put his signature on a piece of blank paper which was later made use of as his statement. He denied that the writing of the endorsement ascribed to him was his. His account of the activities on that day was as follows. He had boarded a third class compartment in Toofan Express on 12 October 1961 intending to pay a visit to his father's sister's daughter at Roshan and thereafter going to his native place. He had reached Madhupur at about 12.30 p.m. and left for Roshan. He had lost his way after some distance and enquired of some herdsmen adout the way to the village. These herdsmen started to abuse him for having lost his way. On his remonstration, a scuffle took place. At this point of time another herdsman appeared with a lathi which was shining like glass and wanted to assault him with this. On his catching hold of the lathi he got his hand cut which was bleeding. His clothes and books also got stained with blood whereupon the herdsman ran away. He purchased a soap and went to wash his clothes in Patro river and take his bath. People who met him there had asked him about his injury and he had given them the version just now mentioned. Thereafter when he was neariug the village, Roshan, a number of persons came and apprehended him on a charge of murder. They took him to the Mukhiya's house at 8.30 p.m. in the night and kept him there assaulting him with lathis and slaps. The Mukhiya had asked him to confess his guilt and give a statement and on his refusing to do so, he was again assaulted and threatened with death. Through fear he had affixed his signature on a blank paper. *Id.* at 1038-39.

The Supreme Court upheld the judgment of the High Court and rejected the contention for the appellant that the High Court was in error in splitting up the statements of the accused given under section 342 of the Criminal Procedure Code and to the *mukhiya*. The court, in its judgment, referred to some English authorities[17] on evidence and distinguished the circumstances of the *Palvinder Kaur* case[18] from those of the *Hanumant*[19] case where it had disallowed splitting up of the accused's statements. The court again approved the observations of the Allahabad High Court[20] on admissibility of the *so-called* confessional statements of the accused.

The Supreme Court held that the exculpatory statement of the accused in Ex. 6 "is not only inherently improbable but is contradicted by other evidence".[21] Many of the statements in Ex. 6 were contradicted by the accused in his statement made under section 342 of the Criminal Procedure Code.[22] In the circumstances like these the court went on to hold:

> There being enough evidence to reject the exculpatory part of the statement of the appellant in Ex. 6 the High Court had acted rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime.[23]

This trio of the Supreme Court decisions brings to focus an important aspect of the confessions in the law of evidence, *i.e.*, what is the position of the confessional statement of the accused, when that is the only piece of evidence in the case. Or in other words, when a confessional statement consists of inculpatory and exculpatory matters, can it be split up, so that one may be accepted and the other rejected? But, before considering the proposed problem, it would be appropriate to have a look at the development of the law of confession in its historical perspective.

In the ancient times when religion dominated the affairs of man and state, confession of one's sin before God was advised as a remedy from the Supreme wrath.[24] But the role of confession in this

17. Taylor, *Law of Evidence* (11th ed. 1920), *Roscoe's Law of Evidence* (16th ed. 1952); Archbold, *Pleadings, Evidence and Practice in Criminal Cases* (36th ed. 1966).

18. *Supra* note 1.

19. *Supra* note 5.

20. *Supra* note 4.

21. *Supra* note 14 at 1046.

22. Compare text to *supra* notes 15 and 16.

23. *Supra* note 14 at 1046-47.

24. *Manu* III, 227 : "by confession...a sinner is freed from guilt...." As regards several lapses, canfession was part of the procedure prescribed for atoning for the sin." 4 Kane, *History of Dharma Sastra* 40 (1953). A person had to confess his misdeeds while undergoing a penance. *Id.* at 41. Confession of sins played a prominent part in early and medieval Christianity. For exemple, First Epistle of John (1 : 9) says "If we confess our sins, he is faithful and just to forgive us *our* sins, and to cleanse us from all unrighteousness." *Id.* at 98.

form was not evidentiary, for God, the omnipresent and omnipotent, obviously needs no evidence, confessional or otherwise, to ascertain the guilt of His creation. The significance of evidence arises only when man sits to judge upon the deeds of his fellow creatures. The human resources for knowing the inner working of the minds of fellow beings are but limited. Evidence itself, in the judicial process is: "first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings, secondly, the subject-matter of such means."[25] Confession is just one of such "means". Its evidentiary value increases when it is the solitary material upon which the decision of the case depends.

No one would like to incriminate himself and suffer the consequences. Hence, the admission of guilt, *i.e.*, confession, has always occupied an important position as evidence. The maxim runs *optimum habemus testem confitentem reum.* Because of its importance as a piece of evidence it is also fraught with many dangers and problems as well. Going back in the history[26] of "the law's use of confession" not earlier than the Tudors and the Stuarts, it is found that confessions were admitted without any restriction. In the second half of the 18th century "trustworthiness" of confession began to be considered, resulting in rejection of some confessions as "untrustworthy". The third stage, comprising the 19th century under certain influences, developed the principle of exclusion to an abnormal extent and exclusion became the rule, "admission the exception". "In the last phase a reaction set in there, but it represents a future rather than a present movement."[27]

Thus, in earlier stages when confession meant conviction,[28] it was natural, it appears, for the prosecution with all its limited means of crime detection in those days, to be more tempted to procure confession than to discharge the difficult burden of proving the guilt of the accused by producing other evidence. Admissions of guilt were obtained outside courts by cruel tortures,[29] and inside courts by harassing judicial questioning.[30] This state of affairs was not to continue with the advancement in society both in its human feelings and in its means of crime detection. Statutory[31] and judicial[32] efforts were made to check the indiscriminate

25. *Phipson on Evidence* 2 (11 ed. by Buzzard, Amlot and Mitchell, 1970).

26. *3 Wigmore on Evidence* 232 § 817 (1940) (hereinafter cited as *Wigmore*).

27. *Ibid.*

28. *Id.* at 233.

29. "Up to the middle of the 1600s at least, the use of torture to extract confessions was common, and that confessions so obtained were employed evidentially without scruple." *3 Wigmore* at 235, n. 7, *esp.* Jardino, *Use of Torture in the Criminal Law of England*, A. Lawrence Lowell, "Judicial Use of Torture," 11 *Harv. L. Rev.* 293.

30. Hale, *Pleas of the Crown* 225 (Emlyno's ed. 1680), quoted in 3 *Wigmore* 233. See also *Targ's* case, Kelyng 18 (1664).

31. 1547, St. 1 Ed. VI C 12 S. 22, 1554 St. 5 and 6 Ed. VI C. 11 and 8, 1695, St. 7 Wm. III C.3.

32. *Wigmore, supra* note 26 at § 819.

and too frequent admissibility of confessions. As result of statutory efforts two important checks emerged. These are:[33]

(1) Was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess?

(2) If so, was the prisoner induced by such promise or menace, *etc.*, to make the confession sought to be given in evidence?

To make confessions admissible, answers to these questions were to be in the negative. The judicial prescriptions for admissibility of confession resulted in the evolution of "judicial rules", which are as below:[34]

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: "*Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence*". Care should be taken to avoid any suggestion that his answers can only be used in evidence *against* him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely because no caution has been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has

33. Archbold, *supra* note 17 at 462-63 ; § 1115 (35 ed. 1962) Butler and Garsia ed).

34. *Id.* at § 1118; see also Taylor, *Law of Evidence* 881 (11th ed. 1920).

given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and their statements are taken separately, the police should not read these statements to the other persons charged, but each of such persons should be given by the police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the persons making it after it has been read to him and he has been invited to make any corrections he may wish.

The Indian Evidence Act of 1872, which is a concise codification of the rules of evidence as they obtained in England at that time, subject to moderations making those rules adaptable to the requirements of this country,[35] continues these rules of admissibility of confession in their suitably modified form. Sections 24 to 30 deal with the topic of confession. In brief, confessions made involuntarily or under threat or fear or under some promise or hope,[36] or confessions made to a police officer,[37] have been barred from being admitted as evidence in judicial considerations. Statements made by a witness in police custody are also barred,[38] except that part of it which leads to the discovery of an instrument of crime.[39] Again the statements made by any person to a police officer during the course of investigation, are not admissible in any inquiry or trial except to contradict his subsequent statements.[40] The Constitution of India also guarantees the rule against self-incrimination as a fundamental right.[41] Thus confession as a piece of evidence is subject to two considerations : first, whether its admissibilty is affected by any of the statutory provisions;[42] secondly, once admissible, should it be accepted as a whole or in part. It is with this latter aspect that we are concerned here.

The various provisions of the Indian Evidence Act and the Code of Criminal Procedure, as stated above, only prescribe the circumstances in which a confession or statement if made, would *not* be admissible.

35. *Sarkar's Law of Evidence*, 13-14 (10th ed. S.C. Sarker ed. 1959).
36. The Indian Evidence Act, 1872 ; § 24.
37. *Id.* § 25.
38. *Id.* § 26.
39. *Id.* § 27.
40. The Code of Criminal Procedure, 1898 ; § 162.
41. The Constitution of India, art. 20.
42. See *supra* notes 36-41.

Neither of the enactments defines the term "confession". In this regard the views of their Lordships of the Privy Council, as expressed in *Narayan Swami* v. *Emperor*[43] are most appropriate. Their Lordships observed :

> [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 be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.[44]

Thus, a statement in which there is acknowledgement in express words, by the accused in a criminal case, of the truth of the guilt charged or some essential part of it, it is a "confession", but if it contains explanations justifying the commission of the offence strictly speaking, it is not a "confession".[45] This exculpatory part reduces the high credibility potential of the statement which otherwise is attached to the *purely incriminating* admissions. There would hardly be any difficulty in admitting and accepting a confession as the only piece of evidence in criminal trial, provided it has not been barred by any of the statutory provisions.[46] But, the difficulty arises with regard the consideration of a mixed statement consisting of both inculpatory and exculpatory contents. One thing seems clear that even this mixed statement is admissible in evidence if it is not hit by the relevant negative provision of the Constitution of India. the Indian Evidence Act and the Code of Criminal Procedure. The controversy existed[47] on the acceptability or rejection in whole or in part of a confessional statement. One view-point in the words of the Patna High Court, is :

> In the first place, the statement made may contain statements which are unbelievable in *their very nature*, and it is obvious that to hold that the Court was bound to assume the unbelievable statements would be in such conflict with reason that it cannot be supported. The Court if it comes to the conclusion that the statement in its essential particulars is true is entirely entitled to disregard the statements which it may hold in the circumstances are not true.[48]

The other view was expressed by the Allahabad High Court in its

43. *Supra* note 3.
44. *Id.* at 52.
45. *Wigmore* at 238.
46. See *supra* notes 36-41.
47. The controversy appears to have ceased since the Supreme Court's acceptance of one of the conflicting views in the *Palvinder Kaur* case.
48. *Emperor* v. *Itwa Munda*, (1938) 39 Cri. L.J. 554 at 556.

full bench decision in *Emperor* v. *Balmukund.*[49] The Court held :

> [W]here there is *no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false*, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as *inherently incredible.*[50]

This view of the Allahabad High Court got the approval of the Supreme Court in *Palvinder Kaur* v. *The State of Punjab.*[51]

It is submitted, with great respect, that the law laid down by the Allahabad High Court in the *Balmukund* case is not wholly correct, or at least requires reconsideration. The rule propounded by the court, in the concluding paragraphs of its judgment is not in line with the rest of its judgment. The court observed that an examination of the large number of authorities shows that they actually establish no more than this, that

> (*a*) where there is other evidence, a portion of the confession may in the light of that evidence be rejected while acting upon the remainder with the other evidence;
> (*b*) where there is no other evidence and the exculpatory element is *not inherently incredible*, the court cannot accept the inculpatory element and reject the exculpatory element.[52]

After this analysis of "the rule of practice...established and acted on for the last hundred years beginning with the case of *Rex* v. *Sarah Jones*",[53] the court noted that :

> The exculpatory part of the confession has in fact *in no single case been inherently incredible*, the *possibility of any distinction* based upon whether the exculpatory element in the confession was or was not in itself inherently incredible does not seem to have been present to the mind of the court.[54]

On the basis of this experience of "last hundred years" the court answered in negative the question which was under reference before it, namely, "Can the court, if it is of the opinion that the inculpatory part commands belief and the exculpatory part is *inherently* incredible, act upon the former and

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49. (1930) 52 All. 1011.
50. *Id.* at 1014 (emphasis added).
51. *Supra* note 1.
52. *Supra* note 49 at 1013 (emphasis added).
53. (1827) 2 C. and P. 629. Decided at Manmoth Grand. The judgment was delivered by Sergeant Bosenquent.
54. *Supra* note 49 at 1013-14 (emphasis added).

refuse to act upon the latter ?"[55] An answer in affirmative would have, according to the full bench, engrafted an exception to the above mentioned two rules. And that would not have been "expedient".

It is submitted that the High Court in its effort to avoid engrafting an exception to the two rules, actually by its ruling has introduced a limitation on the full play of the two rules and also on the judicial discretion to look at the credibility of evidence rendered before the judge. Further, *Rex* v. *Jones* was decided in that period of the development of law of evidence relating to confession when statues and courts were disposed to check indiscriminate and frequent admissibility of confessions.[56] That was a reaction against the then prevalent practice of obtaining confession through tortures. When the *Balmukund* decision was given the concept of criminal law administration in India was perhaps the same as it had existed in England during *Rex* v. *Jones*. It appears that the same considerations prevailed with the Supreme Court when soon after independence it handed down decisions in the *Hanumant* and *Palvinder Kaur* cases. Today the considerations in England have clearly changed as evidenced by the decisions of the Court of Appeal in *R.* v. *McGregor*[57] and *R.* v. *Storey*.[58] The *McGregor* case has expressly overruled *Rex* v. *Jones* as "no longer authority".[59] Citing with approval the law as stated in *Archbold*,[60] Chief Justice Lord Parker observed :

> [T]he better opinion seems to be that, as in the case of all other evidence the whole should be left to the jury to say whether the facts asserteed by the prisoner in his favour be true.[61]

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55. *Id.* at 1012. (emphasis added). Balmukund was charged with the killing of his wife. The only piece of evidence was his confessional statement wherein he had admitted to have killed her but under extenuatory circumstances. If the extenuatory circumstances were to be believed along with the inculpatory part, the liability of the accused was only for culpable homicide not amounting to murder. If the exculpatory part was to be disbelieved as *inherently incredible* the liability would be of murder.

56. See *supra* notes 31 and 32 and the related text. See also *Rex* v. *Higgins*, (1829) C. and P. 603, and *Smith* v. *Blandy*, (1825) Roy and M 257. Moreover, in *Rex* v. *Jones*, the exculpatory part of the accused's statement, that she had given two cuts across the throat of the child whom she had told to two other witnesses to be a "still-born child", was not *inherently incredible*. The jury after considering the whole statement returned a verdict of not guilty. In *Rex* v. *Higgins* the whole of the statement of the accused was put before the jury, which believed the inculpatory part of it but under the circumstances of the case disbelieved the exculpatory part. A verdict of guilty was pronounced.

57. (1967) 51 Cri. App. R. 338.

58. (1968) 52 Cri. App. R. 334.

59. *Supra* note 51 at 269.

60. Archbold, *supra* note 17 at § 1129 (37th ed. 1969).

61. Archbold, *supra* note 17 at § 1128 cited by L.C.J. Parker in McGregor, *supra* note 57 at 341.

In the *Story* case, the accused, a call girl, was charged with possessing the dangerous drug cannabis. In her statement to the police she had given an explanation for the presence of the drug in the large quantity which was recovered from the bed of the accused in her appartment. The appellant had said that the drug belonged to the man, the co-accused who, at the time of apprehension of the crime, was found inside the lavatory of the appellant's appartment. The explanation of the appellant, if true, was a complete answer to the charge. Lord Justice Widgery of the Court of Appeal observed :

> We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial. Accordingly, in our judgment, in this case the fact that the cannabis was on the applicant's bed in her flat was in itself some evidence of possession to go to the jury. Her unsworn explanation, although, if true, it would have been a complete answer to the charge, did not cancel out or nullify the evidence which was provided by the presence of the cannabis. It was ultimately for the jury to decide whether that explanation was or might be true, and it was not for the judge necessarily to accept it at the stage when he was considering the submission.[62]

Herein the observation of the Lord Justice that "if the accused makes a statement which does not amount to an admission, the statement is *not strictly evidence of the truth* of what was said..."[63] has been commented upon by Phipson as "does not appear to be tenable".[64] It is submitted that Phipon's view is more tenable. There should be no *pre-conceived* notion of "truth" of the accused's statement whether with regard to its inculpatory part or exculpatory part. The correct position seems to be that as to "evidence given in a case, it is for you (the jury) to say whether you

62. *Supra* note 58 at 337-338.
63. *Id.* at 337 (emphasis added).
64. Phipson, *supra* note 25 at 642.

believe it".[65]

The law on the point in America is the same as now obtaining in England. It is :

> When a confession is admissible, the whole of what the accused said upon the subject at the time of making confession is admissible and should be taken together. It is for the jury to say what weight shall be given to the several parts of the statement, for they may well believe that part which charges the prisoner, and reject that which tends to exculpate him. .."[66]

The Indian Supreme Court has also in the *Nishi Kant Jha* case accepted only part of the statement of the accused and rejected the exculpatory part of the statement as "not only inherently improbable but as contradicted by other evidence."[67]

In splitting up the statement of the accused for its acceptability or rejection in part the court quoted with approval some English authorities[68] on evidence. The court quoted with, regard to criminal cases, from Taylor as follows:

> In the proof of confessions—as in the case of admissions in civil cases—the whole of what the prisoner said on the subject at the time of making confession, should be taken together. .. But...after entire statement of the prisoner has been given in evidence...the jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.[69]

And from Archbold the court quoted:

> In all cases the whole of the confession should be given in evidence...It has been said that if there be no other evidence in

65. *R.* v. *Higgins*, (1829) 3 C. and P. 603 at 604. In India where jury trials are not common, it is submitted, the judge must consider at the end of the case, on the basis of entire circumstance of the case, whether exculpatory part of the accused's statement is believable.

66. 20 *Am. Jur.*, *Evidence* 488, and n. 16.

67. *Supra* note 14 at 1046.

68. 1 Taylor, *Law of Evidence* (11th ed. 1920), Roscoe, *Law of Evidence* (16th ed. 1952), Archbold, *supra* note 1 *Criminal Pleadings, Evidence and Practice in Criminal Cases* (36th ed. 1966).

69. Taylor, *id.* at 587-88; § 870-71.

> the case, or none which is incompatible with the confession, it must be taken as true...but the better opinion seems to be that, as in case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true...[70]

No doubt, the court has separated the 'believable' inculpatory parts in the statement from the 'unbelievable' exculpatory part but in reality it has not overruled the *Balmukund* ruling of the Allahabad High Court or its own ruling in the *Palvinder Kaur* case. The court in the *Nishi Kant Jha* case has not excluded the exculpatory part of the statement as 'inherently incredible' but because there was "enough evidence to reject the exculpatory part of the statement".

By basing the rejection of the exculpatory part on "there being enough evidence to reject," the court has, it appears, not accepted the quotations from the English authorities in their *fullest* import. The court appears to have overlooked the play of the words emphasized here in the above quotations. The words "nor is improbable in itself" from Taylor clearly mean not inherently incredible. The portions emphasized in the quotation from Archbold mean that the jury must be allowed to have its full discretion to judge the trustworthiness of any part of the whole confession, irrespective of the fact that there is or is not any evidence other than the confessional statement to uphold or reject any part of the statement.

Now, let us consider the statements of the accused persons in the *Palvinder Kaur* and *Hanumant* cases. In the former case, the prosecution had adduced evidence to support its story of the crime, but the High Court on finding that some of the prosecution witnesses were unreliable and the circumstantial evidence was insufficient to hold the accused liable under section 302, held her liable only under section 201, presumably, on the basis that she was guilty of sharing the charge of making away with the dead body of the allegedly murdered man. But the Supreme Court on a re-appraisal of the entire evidence began to doubt the very fact whether the victim's death had been due to potassium cyanide as was stated by the accused in her confessional statement. Thus the very basis of conviction under section 201 is knocked off and the need to resort to this "inherently incredible" test for rejecting the exculpatory part of the statement does not arise. When the cause of death of the person whose body was found inside the box in the well was not ascertainable, the question of making away with the evidence of murder, by disposing of the dead body does not arise. Indian penal law does not make it an offence to dispose of a dead body unceremoniously or in a suspicious manner. The Supreme Court rightly set aside the conviction under section 201 also.

In the *Hanumant* case, there was no evidence, except that of experts

70. Archbold, *supra* note 60 at 470; § 1127.

that the Ex. P. 24 was typed on Art. A. Beside this there was the statement of the accused recorded under section 342 of the Code of Criminal Procedure, to the effect that Ex. P. 24 was not typed on Art. B, the old machine of his office, but on one of the typewriters which had arrived in his office for approval and purchase in September, October and November until Art. A was purchased. The prosecution case was that Ex. P. 24 was typed on Art. A which had reached Nagpur in December 1946. The accused had not disputed that Ex. P. 24 was not typed on Art. B. As regards the remaining part of the statement there is nothing inherently incredible. The reported decision does not disclose any circumstance under which the possibility of arrival of typewriters other than Art. A in the office of the accused could be ruled out. It is also not improbable that Ex. P. 24 might have been typed on one of the typewriters which might have arrived in his office before Art. A arrived and was ultimately purchased.

The Supreme Court in *Nishi Kant Jha*, it is submitted with respect, has missed the opprtunity[71] of lifting the limitation placed by the *Balmukund* and *Palvinder Kaur* cases on the free play of the mind of a judge with regard to credibility or incredibility of any part of the confessional statement of the accused. The *Balmukund* and *Palvinder Kaur* cases obliunge a judge to accept as a whole or reject as a whole the entire confessional statement of the accused even when the exculpatory part appears to him to be inherently incredible. Interestingly the result, it may be seen, will be the same, *i.e.*, the acquittal of the accused particularly in the case where this statement of the accused is the only piece of evidence. For, if the court chooses to rely on the inculpatory part, under the existing rule of "whole" it must rely on the exculpatory part also which naturally may negative the charge. On the other hand if the court chooses to throw out the whole statement, it has nothing on which it may convict the accused under the charge levelled against him.

This situation fails to satisfy a reasoning mind. To debar a judge's experience and intelligence from considering the credibility of any part of the accused's statement except on the other evidence for or against, is to choose to act like computers—where data both for and against may be fed in the instrument and the resultant decision be obtained in a set mechanical fashion. Justice cannot give satisfaction to all, nor can it help a suspicious mind.[72] No doubt, the interests of the accused must be

71. The Supreme Court missed another opportunity in *State of U.P.* v. *Deoman*, (1960) Cri. L.J. 1504 where the court by refusing to give section 27 of the Indian Evidence Act its obvious interpretation, as was given by the dissenting opinion of Justice Subba Rao (as he then was), instead gave a rather ambiguous interpretation fed on the fiction of constructive police custody. This obviated a chance to attract legislative attention to straighten the said provision of the enactment. For details see Raizada, Mr. Justice Subba Rao and the Criminal Law 9 *J.I.L.I.* 650 at 652-55 (1967).

72. It appears, in search of suspicions free justice, Rajindra Saran Agarwal goes to the extent of suggesting the throwing out of extra judicial confessions in his Extrajudicial Confession a Bad Law, 65(1) *Cri. L.J.* 2 F(*Jour. Sec*).

protected but care must also be taken that justice and common sense are not too frequently "sacrificed at the shrine of mercy."[73] In search of objective justice the fairness of the judge's mind should not be lost sight of.

At the end of a hundred years after the enactment of the Indian Evidence Act, it is time that a careful study be made to ascertain the efficacy of its provisions in the completely changed political, social and administrative outlook of the people today. It is time that a stock may be taken of the role this Act has played in the litigation and judicial field in this country. It might be true that the people get the law, they deserve;[74] but neither law nor the people remain static, and at one time or another one leads the other. As the saying goes, in good old ancient India to redeem a pledged hair of moustaches generation after generation rendered all their mite; or a "word of honour" had great unquestioned value in society. Today even oaths and registered documents are but of questionable value. Confessions, though not rare, are generally retracted, or are not simple explicit admissions of guilt; statements in police custody generally contain parts leading to discovery of some instrument of crime. A class of administrative machinery has been branded as completely faithless—a situation which does not obtain in any other country or at least in the country from where the principles of the Indian Evidence Act have been borrowed. All these beckon us to pause and re-evaluate the viability of the century-old enactment in the light of present social economic and political conditions and in the light of objects which the society has fixed for itself to be achieved. The advanced knowledge in the field of sociology and psychology can be of much help in revising the enactments.

73. Baron Parke in *R.* v. *Baldry*, (1852) 2 Den. C.C. 430: "When I consider what objections have prevailed to prevent the reception of confessions in evidence...justice and commonsense have too frequently been sacrificed at the shrine of mercy."

74. The aphorism is "the people get the government, they deserve."