

*Agreement to give evidence of admission.* Where the parties to the suit agree to treat an admission as evidence in the case there can be no objection to its admissibility.<sup>5</sup>

**3. Conditional admission.** Where an admission is made conditionally and the condition is not fulfilled, the admission cannot be admitted in evidence to prove liability of the maker. Where *A* contracted to sell his property to *B*, later on *A* by a letter requested *B* to relieve him of his obligation under the contract of sale and accept compensation. *B* in his reply marked "without prejudice" offered to accept compensation if the amount was paid within 48 hours. It was held that the words "without prejudice" were intended by *B* to convey that if the offer was not accepted, no further use of the offer in his letter was to be made and that therefore the letter could not be admitted in evidence under this Article.<sup>6</sup>

**4. Admission in arbitration proceedings.** An admission before an arbitrator or *panchayat* is admissible in evidence. It is for the Court dealing with the facts to attach whatever weight it thinks proper to such an admission. This Article does not apply to such an admission.<sup>7</sup>

37. *Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.* 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 any inducement, threat or promise having inference 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 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.

Evidence Act, 1872. Article 37 is exact reproduction of section 24 of the Act.

#### Synopsis

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| 8. Confession made in hope of pardon or promise. |  |

5. AIR 1930 Sind 105.

6. AIR 1959 All. 440=ILR 1949 All. 735 (DB).

7. AIR 1954 Madh. B 58.

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1. **Scope and object.** Under Qanun-e-Shahadat, confessions are treated as a species of admission and under the scheme of the Order of admissions, Arts. 37, 38, 39 provide the circumstances under which they are not relevant or provable. Arts. 40, 41, 42 provide the limitations in the operation of Arts. 37, 38, 39.<sup>8</sup>

The provisions of Art. 37 are general and are intended to exclude confessions which have been improperly obtained.<sup>9</sup> A confession which falls within the mischief of this Article is not admissible in evidence.<sup>10</sup> To attract the provisions of Art. 37, the following facts need be established: (a) that the confession has been made by an accused person in authority; (b) that it must appear to the Court that the confession has been caused or obtained by reason of any inducement, threat or promise proceeding from a person in authority; (c) that the inducement, threat or promise must have reference to the charge against the accused person, and (d) the inducement, threat or promise must be in the opinion of the Court, be such that it would appear to the Court that the accused in making the confession believed or supposed that he would, by making it, gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. All these conditions must cumulatively exist. Therefore the mere fact that a confession is made to a person in authority is plainly insufficient to exclude that confessions from evidence.<sup>11</sup>

Art. 37 would be inapplicable to a case where none of the circumstances mentioned in the Article exist.<sup>12</sup>

2. **Confession--what is.** The word 'confession' is not defined in the Act.<sup>13</sup> It means an admission of certain facts which constitute an offence, made by a person who is charged with the offence which is the subject-matter of the statement.<sup>14</sup> The particulars of the offence should be put to the accused and he should admit the allegations constituting the offence. A mere plea of guilty entered by the accused without referring to any facts constituting the offence does not amount to confession.<sup>15</sup>

Confession is a voluntary statement made by a person charged with the commission of a crime or misdemeanour, communicated to another person, wherein the

8. AIR 1951 Orissa 168=ILR 1951 Cut. 65=1952 Cr. L.Jour 1743 (FB).
9. AIR 1920 Bom. 270=22 Cr. L.Jour 68 (FB).
10. 1968 P.Cr.L.J. 1784 (DB).
11. PLD 1952 FC 1-4 DLR 199+AIR 1965 Bom. 195 (DB).
12. AIR 1936 Lah. 409=37 Cr.L.Jour 732 (DB).
13. AIR 1939 PC 47=40 Cr.L.J. 364+AIR 1959 All. 518.
14. AIR 1952 SC 354+AIR 1956 Madh-B 107 (DB)+35 Mad. 397 (FB)+6 All. 509 (FB).
15. 1985 P.Cr.L.J. 167 (Pesh).

acknowledges himself to be guilty of the offence charged, and discloses the circumstances of the act or the share and participation which he had in it.<sup>16</sup>

*Admission and confession--distinction.* The term "admission" is a term of wider connotation and it can be used to indicate "confessions" also.<sup>17</sup> But there is a clear distinction between an admission and a confession. "Confession" does not include a disciplinary admission, which falls short of being an admission of guilt.<sup>18</sup> In order to distinguish between a confession and an admission a simple test can be applied. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If on the other hand, the statement falls short of it, it amounts to an admission. Where there is direct admission of guilt, it is not possible to treat the statement as an admission. Where conviction can be based on the statement alone it is a confession and where some supplementary evidence is needed to authorise a conviction, it is an admission.<sup>19</sup>

*Admission of guilt necessary.* A confession is an admission of facts as well as an admission of guilt.<sup>20</sup> Statement made by an accused person, charged with a crime, can only be treated as a confession if he admits having committed the crime, and discloses other incriminating facts.<sup>1</sup> It is a statement which either admits in terms the offence or substantially all facts which constitute the offence. The statement of an offence which is not self-exculpatory but which minimises the part he played in the offence and which ascribes to himself a part much less important and much less active than that ascribed to others named by him is a confession.<sup>2</sup> Where an accused in a statement made before a Magistrate confesses his having given blows by a dagger on the body of the deceased, it amounts to a confessional statement.<sup>3</sup>

Where the accused does not, in so many words, admit his guilt but admits all the ingredients required to constitute the offence, his statement amounts to a confession.<sup>4</sup> Thus the statements made by an accused who was charged with receiving stolen property in the course of police investigation, that he had kept it and would show it to the police and statements made after he took the police to the spot where it was buried, that he buried it there, are in the nature of a confession.<sup>5</sup> Where a prosecution witness while referring to the information given by the accused, leading to the recovery of a rifle, also stated that the accused had told him in the presence of the Investigating Officer that he (the accused) would point out the rifle;

16. Black's Law Dictionary, 6th edition, 1993, p. 296.
17. Madh BLJ 1954 HCR 1269.
18. 10 Cr.L.J. 369 (DB) (Bom.)
19. NLR 1982 Cr. 117=PLD 1982 Lah. 180=1982 Law Notes 43 (DB)+AIR 1959 All. 518=1959 Cr.L.J. 940.
20. PLD 1982 Lah. 180=NLR 1982 Cr. 117=1982 Law Notes 43 (DB)+4 Cr.L.J. 471 (FB).
1. AIR 1946 Cal. 156 (DB)
2. AIR 1956 MB 107=1956 Cr.L.J. 408 (DB)
3. AIR 1956 MB 107=1956 Cr.L.J. 408 (DB)
4. 10 Cr.L.J. 584 (DB) (Lah).
5. 14 Bom. 260 (FB).

the latter part of the information announced to a confession and was inadmissible in evidence.<sup>8</sup>

*Admission of guilt must be clearly made.* An admission of guilt should be clear and not ambiguous. Where the statement of the effect of the statements might at most be described as suggesting the inference that the accused committed the crime, but it could not be extended to show that the accused admitted in terms the offence, or substantially all the facts which constituted the offence, the statements individually or taken together did not amount to a confession of the crime.<sup>9</sup> Where a person charged with stealing a mare was asked a long composite question by the trying Magistrate, viz., whether he had stolen the mare and whether he had been arrested while riding it, it was held that the accused's affirmative answer did not amount to an admission of guilt.<sup>9</sup>

*Intention to admit guilt necessary.* A statement in section 164, Criminal P.C., includes a statement by the accused not amounting to a confession. A statement amounts to a confession only if it is made with *animus confitendi*. A statement made neither with the intention to confess nor amounting to an admission of facts from which guilt is directly deducible, does not amount to confession.<sup>10</sup>

*Admission must be express.* An admission of guilt to be a confession must be an express admission. In a criminal case if an accused keeps silent and does not speak, it would not amount to confession of the guilt on his part. The confession of the accused should be in unequivocal terms admitting the confession of the crime.<sup>11</sup> An admission by conduct such as by signs,<sup>12</sup> or by acts as by making of a counterfeit coin is not statement and hence the evidence of witnesses saying that the accused made counterfeit coins in their presence is not barred by Art. 37.<sup>13</sup>

*Admission of intention to commit offence.* Where an offence requires the existence of dishonest intention, but the accused does not admit such intention, his admission is not a confession.<sup>14</sup>

*Admission should be relating to offence charged.* A confession must relate to the particular crime with which the accused is charged and admission which is not connected with the ingredients of the offence charged would not amount to a confession.<sup>15</sup>

6. AIR 1958 Mys. 1=ILR 1957 Mys. 81=1958 Cr.L.J. 54 (DB).
7. AIR 1945 NUC (Punji) 1381.
8. AIR 1960 SC 479 (Reversed AIR 1957 All. 387)+AIR 1939 PC 47+AIR 1952 SC 354.
9. AIR 1927 Lah. 650=28 Cr.L.J. 767.
10. AIR 1937 Nag. 254=ILR 1937 Nag. 524=38 Cr.L.J. 648 (DB).
11. AIR 1954 J & K 19=1954 Cr.L.J. 505 (DB).
12. AIR 1920 Lah. 84 (DB).
13. AIR 1931 All. 9=32 Cr.L.J. 1006.
14. AIR 1934 Pat. 651=36 Cr.L.J. 447.
15. AIR 1945 Bom. 152=ILR 1945 Bom. 278=46 Cr.L.J. 541 (DB).

*Exculpatory statement is not a confession.* A confession must either admit in terms 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, if the exculpatory statement is of a nature which would negate the offence alleged to be confessed. A statement which read as a whole is of an exculpatory character and in which the statement denies his guilt is not a confession and cannot be used in evidence to prove his guilt.<sup>16</sup> But where part of confessional statement is inculpatory and part exculpatory and there is evidence on record to show that exculpatory part is false, the Court can ignore the exculpatory part and convict the accused on the basis of the inculpatory portion of the confession.<sup>17</sup>

*Statement to police.* Every statement made to Police by the accused is not a confession and statements which are not of an incriminatory nature are admissible.<sup>18</sup> Thus where an accused person states to the police that he was in the company of the decoits but never says that he committed the dacoity, the statement does not amount to a confession and is admissible in evidence.<sup>19</sup> A statement to Police regarding the article produced by the accused as really belonging to deceased is not a confession but an admission.<sup>20</sup>

*False statement by accused.* A statement of the accused which is relied upon as false is not a confession. It may be admitted in evidence as an admission.<sup>1</sup>

*Joint confession.* A joint confession by more than one accused is no confession in the eye of law.<sup>2</sup>

3. "Made by an accused." Art. 37 refers to a person who is not only an accused at the time when he made a confession, but also to one who becomes an accused subsequently. The section refers to the status of the person not at the time when he made the confession but when the confession is being considered by the court and when he is undoubtedly an accused person.<sup>3</sup> Hence a confession made by a murderer to a *lambardar* on his telling him that if he confessed he would help him, is not admissible in evidence even though the murderer was not an accused person at that time but ultimately come to be an accused person.<sup>4</sup> It follows that even when a confession is made before a report was made to the police and before the person

16. NLR 1978 Cr. 789=PLJ 1978 SC 293+PLD 1975 SC 187+AIR 1952 SC 354+AIR 1939 PC 47.
17. PLD 1982 Lah. 180=NLR 1982 Cr. 117=1982 Law Notes 43 (DB).
18. AIR 1934 Sind 100=35 Cr.L.J. 1332 (DB).
19. AIR 1942 Pat. 156=43 Cr.L.J. 615 (DB).
20. 5 Lah.J. 128 (DB).
1. AIR 1937 Mad. 209=38 Cr.L.J. 323.
2. 1998 MLD 299 (FSC).
3. PLD 1960 Lah. 739=12 DLR WR 34+AIR 1965 Guj. 5 (DB)+AIR 1960 SC 1125+AIR 1920 Bom. 270 (FB)+48 Cr.L.J. 651 (Lah).
4. AIR 1920 Bom. 270 (FB)+48 Cr.L.J. 651 (DB) (Lah)+AIR 1941 Bom. 50.

confessing was accused of an offence by others, the confession must be regarded as one made by an accused.<sup>5</sup>

4. **Confession must be voluntary.** In criminal cases great responsibility rests upon the Courts to determine if the confession is voluntary and true or is lacking within the scope of either term "voluntary" and "true". If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary. Voluntary and true are two different terms related with confession and each of them has its own significance. A confession, which is voluntary, is admissible in evidence even though it may be incorrect in its contents. As against above, a confession, which is not voluntary, is not admissible though it may be true, whether a confession is voluntary and true is a question of fact and is to be determined keeping in view the attending circumstances of each case. Voluntariness of confession and of being true are totally distinct. Voluntariness relates to its admissibility, while its truth is looked into for the purpose of assessing its value. Therefore, for proving confession it shall be both voluntary and true.<sup>6</sup>

Before a confession is taken into consideration, the Court has not only to be satisfied that it was genuinely made, but it has also to be satisfied that it was made freely and voluntarily.<sup>7</sup> A confession which is not voluntary cannot be made basis of conviction.<sup>8</sup> In order to determine whether confession was voluntary or not, attending circumstances must be subjected to very close, minute and rigid scrutiny and then alone probative value of confession could be determined. Voluntariness and truthfulness of confession could be evaluated on the considerations viz. the character and duration of custody; as to whether confessor was placed in a position to seek advice of his relatives or his lawyers; nature and quantum of proof which was available against confessor before he confessed and whether confessions were consistent with evidence which was available at the time when confession was made.<sup>9</sup> And while the Court is considering this question, the question whether it is true or false does not arise. It is abhorrent to notions of justice and fair play and is also dangerous to allow a man to be convicted on the strength of a confession unless it is made voluntarily and he realises that anything he says may be used against him.<sup>10</sup> The Courts look into the facts and surrounding circumstances independently in order to ascertain the voluntariness or involuntariness of a confession and any circumstance giving rise to suspicion as to voluntariness has been regarded as sufficient to reject a confession.<sup>11</sup> Where while recording confession of an accused lady the Magistrate did not satisfy himself if conditions under which she was confessing were natural and sufficient enough to compel her to make a confession and take risk of punishment.

5. AIR 1950 Mys. 82=ILR 1951 Mys. 239 (DB).
6. PLD 203 SC 704=2004 SCJ 33.
7. 2002 SCJ 26+PLD 1964 SC 598=1965 (1) PSCR 304+PLD 1978 Pesh. 38 (DB)+PLD 1961 Lah. 167 (DB)+AIR 1958 Pat. 166 (DB)+AIR 1960 Mys. 199 (DB).
8. PLD 1986 Quetta 193 (DB).
9. 2002 P. Cr. L.J. 1631=2002 AC 433 (DB).
10. PLD 1958 Dacca 75=9 DLR 511 (DB)+AIR 1956 SC 217.
11. PLD 1984 Lah. 113=PLJ 1984 Cr.C. 230=ILR 1984 Cr. 18=1984 Law Notes 46+AIR 1981 J&K 11 (DB).

Confessions are mostly extracted through undue influence, coercion and torture, it thus bounden duty of Magistrate to make sure that confessional statement of accused lady was not a result of torture at the hands of police. Not a single question was asked by the Magistrate to that effect specially when confession came from the weaker sex though all accused were almost equally related to deceased. It was held that the confessional statement of lady accused seemed to have been obtained through coercion and torture, thus it could not be made basis of her conviction.<sup>12</sup>

Under Islamic Jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.<sup>13</sup>

*Confession made under pressures is inadmissible.* When considering confessions one of the most important factors which should be taken into consideration is the length of time during which the accused was in police custody before making the confession.<sup>14</sup> No doubt, no hard and fast rule can be laid down in this regard but the Court will have to judge for itself from the intrinsic evidence of the confession and the surrounding circumstances as to whether such confession should be relied upon.<sup>15</sup> A confession recorded after seven days of arrest of accused is inadmissible in evidence.<sup>16</sup> Where a confession is made after the accused has been in police custody for four months and when he had injuries on his person which necessitated his admission to the hospital and the confession was also retracted subsequently, it is not admissible.<sup>17</sup> Similarly a confession made after police custody and consultation of the accused with investigating officer and when it is also retracted subsequently is not admissible in evidence.<sup>18</sup>

*Confession may be presumed to be voluntary.* Under the law, a confession must be presumed to be voluntarily made unless the contrary is proved.<sup>19</sup> The assumption that a person would not make a confession of his guilt, which will be prejudicial to his interest unless some pressure is exerted on him is not wholly correct. A man who has committed a grave crime, unless he is a confirmed offender hardened by his repeated crimes, feels an overwhelming desire to unburden himself and share with some person his terrible secret.<sup>20</sup> The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage does not necessarily show that the confession was not voluntary.<sup>1</sup> Similarly the fact that an accused person confessed guilt on being asked twice or thrice or did so on being asked to produce stolen articles, does not mean that the confession was made as a result of persuasion.<sup>2</sup>

12. 1996 MLD 924 (DB).
13. 1992 SCMR 1983.
14. AIR 1940 Mad. 136=41 Cr.L.J. 323 (DB).
15. AIR 1953 Hyd. 145=ILR 1951 Hyd. 895=1953 Cr.L.J. 785.
16. 1987 P. Cr. L.J. 1773 (DB).
17. PLD 1969 Dacca 504 (DB).
18. AIR 1919 Cal. 11=20 Cr.L.J. 833 (DB).
19. AIR 1949 Nag. 405=ILR 1949 Nag. 301=51 Cr.L.J. 224 (DB).
20. AIR 1951 HP 1=52 Cr.L.J. 50.
1. AIR 1949 Mad. 817=51 Cr.L.J. 8 (DB).
2. AIR 1960 Cal. 519 (DB).

*Confession recorded by Magistrate.* Where a confession was duly recorded by a Magistrate after observing all the formalities, and he purports to have satisfied himself that it was voluntary and to have recorded it after being so satisfied, the presumption is that it was voluntary.<sup>1</sup> But that does not mean that all confessions duly recorded by Magistrates are reliable evidence.<sup>2</sup> Where the Magistrate took all precautions to satisfy himself that the confession was voluntary, long detention of the accused in police custody coupled with the fact that on the very first occasion when he was called by the Magistrate, he denied having committed any offence arises some doubt about the voluntary character of the confession.<sup>3</sup>

Where Magistrate has not complied with all the formalities, the confession made to him is not reliable. Thus where the Magistrate had not informed the appellant that he would not be sent back to the custody of the police and instead would be sent to the judicial lock-up, it would be extremely doubtful if the confession was voluntary, and was not made under duress.<sup>4</sup> The question whether a confession is voluntary or not is always a question of fact, and there is no rule of law that if a certain period is not given for reflection that by itself would be sufficient to rule out the confession. But at the same time, all the factors and all the circumstances of the case, including the important factor of the time given for reflection, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by any inducement, threat or promise has been fully removed as provided in Art. 41.<sup>5</sup>

*Tests of voluntariness of confession.* It must be established that a confession is voluntary and also that it is true. For the purpose of establishing its truth it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case.<sup>6</sup> But whether a confessional statement was voluntarily made or not is essentially a question of fact. In ascertaining the voluntary nature of the statement, attending circumstances must be subjected to very close, minute and rigid scrutiny.<sup>7</sup> Different tests will have to be applied to different sets of facts. The tests evolved by constant process of judicial thinking are important. But in the very nature of things there can be no rigidity about them. What test is best applicable to a given set of facts is for the judge of fact to decide.<sup>8</sup> It has been held that the fact that confessional statement discloses minute details of occurrence and gives details of sensitive and delicate facts which could be in knowledge only of confessing accused, would be sufficient proof of voluntary nature of confession.<sup>11</sup>

1. AIR 1951 Kut. 92=1952 Cr.L.J. 10.
4. 10 Cr.L.J. 125 (DB) (Cal)+AIR 1947 Oudh 95 (DB)+AIR 1922 Oudh 302 (DB).
5. AIR 1954 Sui. 39=1954 Cr.L.J. 561 (DB).
6. 1984 P.Cr.L.J. 2727 (DB)+1984 P.Cr.L.J. 2690 (DB)+PLD 1964 Pesh. 1 (DB).
7. AIR 1957 SC 937.
8. AIR 1957 SC 637=1957 SCR 953=ILR 1957 Punj 1602.
9. 1986 P.Cr.L.J. 1153=PLJ 1986 Cr.C. 371=ILR 1986 Cr. 599=KLR 1986 Cr.C. 322 (DB).
10. AIR 1960 Mys. 199 (DB).
11. ILR 1993 Cr. 672=1993 P. Cr. L.J. 1403 (SAC).

*Proof of voluntariness of confession.* Voluntary or involuntary nature of a confession involves mixed questions of both fact and law.<sup>12</sup> The accused must be free and unhampered at the time when his confession is recorded and should not be subject to the influence of the police.<sup>13</sup> Article 37 does not require strict proof that the confession has resulted from inducement, threat or promise, but that does not mean that the Court can declare the confession irrelevant even if there is no material to suggest that the confession was not voluntary.<sup>14</sup> It is sufficient to exclude a confession under Art. 37 if there are circumstances which afford a well-grounded inference that the confession was not voluntary.<sup>15</sup> But inference would be drawn that confession was voluntary in nature when there is nothing on record to the contrary.<sup>16</sup>

It is for the prosecution to prove that a confession was made without threats or promise or inducement.<sup>17</sup> If an accused person challenges a confession as involuntary, the onus is on him to displace the presumption which arises under Art. 91 that the confession was duly recorded.<sup>18</sup> Where the accused alleged that the confession was extorted from him by giving him a beating by the police but there were no injuries or marks of injuries on his body to prove that allegation, the confession would be held to be voluntary.<sup>19</sup>

*Plea as to involuntariness of confession.* Where the accused in his statement under S. 342, Cr.P.C. had stated that he had written the confession under duress and had not referred to the inducement offered. It was held that omission on the part of accused was not fatal as an accused person was entitled to raise a plea at the stage in his statement under S. 342, Cr.P.C.<sup>20</sup>

*Confession not falling under this Article, if may be excluded from evidence.* A confession not precisely hit by Art. 37 may yet be not voluntary. It is the duty of the judge to determine whether it is admissible.<sup>1</sup> If a confession is not voluntary in the wider sense of the term, *ex hypothesi* a person who made it, did not do so from a desire to tell the truth. This fact introduces an element of suspicion. Hence, if facts are proved which suggest that inducement of some kind, although outside the terms of Art. 37 was in fact given, a Court may well refuse to accept the confession as true.<sup>2</sup>

*Confession true but not voluntary.* Where the confession is not voluntary and free the fact that it is true cannot make it admissible.<sup>3</sup> Thus a confession of an

12. AIR 1936 Cal. 227=37 Cr.L.J. 676=63 Cal. 1089 (DB).
13. AIR 1948 Nag. 344=ILR 1948 Nag. 147=49 Cr.L.J. 561 (DB).
14. PLD 2002 Kar. 530.
15. AIR 1947 Pat. 305=25 Pat. 612 (DB).
16. 2003 SD 180=2003 YLR 263 (FSC).
17. AIR 1951 Orissa 168 (FB)+AIR 1951 HP 82+AIR 1958 Pat. 166 (DB)+36 Pat. 141 (DB).
18. PLD 1962 Pesh. 91 (DB)=APR 1962 WP 103.
19. PLD 1967 Kar. 233.
20. 1989 P.Cr.L.J. 574 (FB).
1. AIR 1936 Cal. 227=37 Cr.L.J. 676=63 Cal. 1089 (DB).
2. AIR 1936 Cal. 316=37 Cr.L.J. 775=63 Cal. 1053 (DB).
3. 3 Sui LR 14 (DB).



retracted confession may be taken into consideration as against a co-accused and may form the basis of conviction if there is substantial and independent corroboration both as to the crime and the criminal.<sup>12</sup> Where the confession of an accused was sought to be used against another accused although the confessing accused had committed a minor offence. It was held that it will be laying too wide and dangerous a proposition to hold that the confession of a co-accused who has been charged with to corroborate the retracted confession.<sup>13</sup> having committed a graver offence.<sup>13</sup>

✓ 38. *Confession to police-officer not to be proved. No confession made to a police-officer shall be proved as against a person accused of any offence.*

Evidence Act, 1872. This Article is a reproduction of section 25 of Evidence Act.

## Synopsis

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| 1. Object and scope.                                    | 8. Mere act of accused not accompanied by statement. |
| 2. Confession to police-officer.                        | 9. Recoveries accompanied by confession.             |
| 3. Police-officer—who is.                               | 10. Evidence of police-officer as to confession.     |
| 4. Confession in presence of police-officer.            | 11. F.I.R. by accused.                               |
| 5. Purpose for which confession to police is admissible | 12. "Person accused of an offence."                  |
| 6. Use of confession against co-accused.                | 13. Statement to police not amounting to confession. |
| 7. Use of confession in favour of maker or co-accused.  | 14. Statement to police amounting to confession.     |

1. **Object and scope.** According to Article 38 a confession made to a police officer shall not be proved against a person accused of any offence. The rule embodied in the Article is for the reason that a police officer shall not be encouraged to extort confession for showing efficiency by securing convictions.<sup>14</sup> Intention of Legislature in enacting Arts. 38 and 39 was to deter the police from extorting confessions, by rendering such confessions absolutely inadmissible in proof unless made in the immediate presence of a Magistrate. The prohibition contained in Art. 38 should be applied very strictly.<sup>15</sup> Recording of whatever nomenclature. No doubt muchless surrendered to investigating agency of whatever nomenclature. No doubt there may be very few and rare exceptional cases wherein under particular law limited powers of recording/collecting an admissible statement/evidence are conferred upon a specified authority of an administrative department but the scope of

12. PLD 1968 Lah. 49+AIR 1959 SC 1+AIR 1942 Lah. 271 (DB)+AIR 1946 Sind 43 (DB).
13. PLD 1960 Kar. 73+PLR 1961 (1) WP 588 (DB).
14. PLD 2003 SC 704+2004 SCJ 33.
15. AIR 1977 Bom. 4+28 Cr.L.J. 122 (FB)+6 All. 509 (FB).

is legal effects and efficacy is always kept within narrow compass and can be used only for limited purposes. One of such instance is the provisions of S. 166, Customs Act, 1969, wherein only a gazetted officer is empowered to perform such duty.<sup>16</sup>

*Special Military Court, applicability to.* Provisions of Art. 11(2) of P.O. 4 of Act, 1969, wherein only a gazetted officer is empowered to perform such duty.<sup>16</sup> Special legislation overrides all other laws contrary to it and applies even to the subsequent proceedings before a Special Military Court. Provisions of Art. 11(2) of the P.O. 4 of 1982 therefore cannot be applied to the proceedings of any Court including Special Military Court.<sup>17</sup>

*Only confessions are hit by this Article.* The word "confession" in Art. 38 includes incriminatory statements which suggest guilt of person making them.<sup>18</sup> It could not have been used in the wide and popular sense as meaning an acknowledgment of some fault. There can be little doubt that it is to be understood in the technical sense of the criminal law.<sup>19</sup> The section excludes only confessions made to police officers and not every statement made by an accused to the police<sup>20</sup> and for that matter it does not prohibit the proof of any other matter unconnected with the confession of the crime.<sup>1</sup>

*Exculpatory statement.* No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negate the offence alleged to be confessed.<sup>2</sup>

*Confession to person in authority.* Confession made before a person in authority was inadmissible and such a confession was hit by Art. 38.<sup>3</sup>

*Confession before investigation.* Art. 8 covers a confession made to a police officer before any investigation has begun or made otherwise not in the course of an investigation.<sup>4</sup>

*Confession of offence other than one charged.* The prohibition contained in Art. 38 is of a general nature and is not limited only to confessions of offences with which the accused is charged.<sup>5</sup> A confession of one crime during the investigation of another crime is equally inadmissible.<sup>6</sup> It follows that a confession made by an

16. NLR 2004 Cr. 84 & 168 (DB).
17. PLD 1989 Kar. 572 (DB).
18. AIR 1917 Low Bur 5+19 Cr.L.J. 42 (DB).
19. 35 Mad. 397+13 Cr.L.J. 352 (FB).
20. AIR 1941 Lah. 82+AIR 1915 Cal. 256+AIR 1959 Bom. 534.
1. 1980 P.C.L.J. 201+PLJ 1980 Cr.C. 231 (Pesh) (DB) (Admission of accused of his presence at occurrence—Not hit by this Article)+AIR 1957 Mys. 50.
2. 1970 SCMR 857.
3. 2000 P.C.L.J. 1734 (DB).
4. AIR 1939 PC 47+43 Cr.L.J. 364.
5. AIR 1941 Sind 134+42 Cr.L.J. 805 (DB).
6. 1937 Mad. 209+38 Cr.L.J. 323.

424 accused to the police, of an offence of culpable homicide not amounting to murder is not admissible in evidence in a trial for murder on the same facts.<sup>7</sup>

*Article 39 and Article 38.* Articles 38 and 39 do not overlap each other. Article 39 cannot be treated as an exception or proviso to Art. 38. The two Articles lay down two clear and definite rules. In Art. 38, the criterion is answer to the question, "to whom was the confession made?" If the answer was that it was made to a police officer, it shall be excluded. The criterion in Art. 39 for exclusion is the answer to the question, "Under what circumstances was the confession made?" If the answer was that it was made whilst in police custody, it shall be excluded unless it was made before a Magistrate.<sup>8</sup>

*Articles 23 and 38.* Article 23 does not avoid, in appropriate cases, operation of Art. 38.<sup>9</sup>

**2. Confession to police-officer.** Confession of an accused person before any Police Officer of any rank about a case triable by the Special Court or by the Court of general jurisdiction is inadmissible in evidence.<sup>10</sup> Therefore, confession made before Police Officer or investigating officer cannot be used as proper and legal evidence against an accused.<sup>11</sup> The law is imperative in excluding what comes from an accused person in custody of the police, if it incriminates him.<sup>12</sup> Statement by accused before police tending to incriminate him with reference to offence with which he is charged is not worth the paper it is written on and has to be left entirely out of account.<sup>13</sup> Therefore any incriminating statement made by an accused person at an inquiry held under section 161, Criminal P.C. would be excluded at the trial under Art. 38 as having been made to a Police Officer.<sup>14</sup> Similarly a statement made by an accused to a police officer on being halted, if regarded as a confession, will be hit by Art. 38.<sup>15</sup> Where the prosecution case was based on the disclosure made by accused during police custody, such course was inadmissible and of no legal value in view of Art. 38.<sup>16</sup>

This Article does not set out anything regarding the statement of the person who is making the confession. It is not necessary that the confession should be made when he is in police custody, nor is it necessary that he must be an accused person. The

Article merely means that when an accused person is being tried, a confession, which is on a previous occasion made to a police officer cannot be produced against him. It is not specified that the accused person must have been an accused person at the time of making the statement, nor need he have been in police custody.<sup>17</sup>

*Confession to person deputed by police officer.* There must be some communication to a police officer for the purposes of showing that the statement was made to a police officer, it is such communication which makes it tainted evidence. Therefore, in each case the question must be examined whether the statement was in fact made to police officer or not.<sup>18</sup> Where a statement is communicated to the Police Officer, not directly, but through a person deputed by the police officer for that purpose, while the officer himself is standing nearby, it becomes vitiated.<sup>19</sup>

*Confession to police officer in presence of Magistrate.* A confession made to a police officer is to be ignored even if it was made in the immediate presence of a Magistrate, as Article 38 is independent and is not controlled by Article 39.<sup>20</sup>

*Repetition of confession before Magistrate.* Where an accused person makes a confession of his guilt before a police officer and subsequently repeats before a Magistrate the fact and contents of his earlier confession but does not vouch for its truth, Art. 38 makes the statement before the Magistrate inadmissible.<sup>1</sup>

*Several statements amounting to confession when read jointly.* Where several statements by several accused to a Police Officer during investigation do not amount to confession when taken separately but when taken together, show that the accused were engaged in a conspiracy. If they are sought to be used to prove such conspiracy, the statements would amount to a confession and will be inadmissible.<sup>2</sup>

*Recovery list signed by accused.* A recovery list prepared after a house search is a confession to a police officer when it is signed by the accused.<sup>3</sup> A confession of guilt to the police recorded on a recovery list of property recovered at the instance of the accused is inadmissible.<sup>4</sup> Therefore a statement made by the accused to the police that the articles recovered in his house were articles of loot is not admissible in evidence.<sup>5</sup> Where in a trial for murder the prosecution proved the *panchanama*, prepared by the police on the day the murder was committed and signed, not only by the *panchus* but purporting to have been signed also by the accused persons. That document was a record which was a complete confession of the crime from the beginning to the end, by all the accused persons. It was held to be inadmissible and

7. AIR 1941 Sind 134-42 Cr.L.J. 805 (DB).
8. 6 All. 509 (FB).
9. AIR 1939 Sind 185-40 Cr.L.J. 882.
10. 2000 YLR 600+2000 P. Cr. L.J. 652 (DB)+NLR 1999 Cr. 577+1998 P. Cr. L.J. 12 (DB)+PLJ 1997 C.C. 161-1997 MLD 258+1996 MLD 1356.
11. PLJ 1997 SC 19+1996 P. Cr. L.J. 1603+1995 SCMR 1793+PLD 1992 Kar. 5 (DB)+PLD 1989 Kar. 572 (DB)+1982 P. Cr. L.J. 476+NLR 1982 Cr.L.J. 278-PLJ 1981 Cr.C. 112 (DB)+AIR 1936 Lah 380 (DB) (Before or after commencement of investigation)+AIR 1919 Lah 466 (DB) (Report amounting to confession)+10 Cr.L.J. 193 (SB) (Cal.) (Confession of murder before arrest).
12. 10 Cal. 1022+AIR 1925 Bom. 529-26 Cr.L.J. 1478.
13. 2002 Cr.L.J. 659 (DB).
14. AIR 1925 Sind 237-26 Cr.L.J. 778.
15. AIR 1954 SC 15-1954 Cr.L.J. 230.
16. 1997 P. Cr. L.J. 1610.

17. PLD 1992 Kar. 5 (DB).
18. AIR 1965 Guj. 5 (DB).
19. AIR 1926 All. 737=27 Cr.L.J. 1068 (DB).
20. PLD 2003 SC 704=2004 SCJ 33.
1. AIR 1925 Bom. 529=26 Cr.L.J. 1473.
2. AIR 1938 Mad. 893=40 Cr.L.J. 108.
3. AIR 1927 Lah. 343=28 Cr.L.J. 323.
4. AIR 1954 All. 127=1954 Cr.L.J. 228.
5. AIR 1957 All. 459=1957 Cr.L.J. 803+12 Cr.L.J. 429 (DB) (Bom).



highly irregular as the provisions of Qanun-e-Shahadat and of the Code of Criminal Procedure had not been observed.<sup>8</sup>

*Part of confession made before police.* Where a part of the confessional statement is made before the police and a part not before them, the Judge can record only the part admissible, leaving out the rest as being not admissible. But he should not record the statement in a truncated fashion. The proper course is not to record the statement at all.<sup>7</sup>

*False statement by accused.* If prosecution rely on statements of the accused to Police as being true, then they may, and in many cases will, be found to amount to confessions and hence would be inadmissible. If, on the other hand, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible as admission.<sup>8</sup>

**3. Police-officer--who is.** The term "police-officer" has not been defined anywhere and must be taken in its more popular meaning.<sup>9</sup> The expression is not confined only to such officers who are appointed under the Police Act, but includes also other officers who exercise the same powers as that of a police officer of a police station in respect of investigation of certain offences. The confessions recorded by them in exercise of the power of investigation into offences would be inadmissible in evidence under Art. 38. The mere fact that they are also given duties other than investigating certain offences would not be good reason for holding that they are not police-officers provided the powers of investigation exercised by them are the powers of investigation under the Criminal Procedure Code, which are exercisable by a police officer-in-charge of a police station.<sup>10</sup> But it does not include men who are provisionally and for a limited purpose only invested with some powers of police-officers.<sup>11</sup>

*Excise Officer.* An Excise Officer invested with the powers of an officer in charge of a police station for investigation of offences under section 20 of the Opium Act is a "police-officer" coming within the purview of Art. 38.<sup>12</sup> Therefore admission of the accused to Excise Sub-Inspector or Excise Officer is inadmissible.<sup>13</sup> But an Excise Officer while discharging duties under the Customs Act is not a police officer and a confession made to him is not hit by this Article.<sup>14</sup>

*Customs officer.* The duties of the Customs Officers are very much different from those of the police officers and their possession of certain powers, which may have similarity with those of police officers, for the purpose of detecting smuggling

6. AIR 1957 SC 737=1958 SCR 283=1957 Cr.L.J. 1320.
7. 1931 Mad WN 725.
8. AIR 1937 Mad 209=38 Cr.L.J. 323.
9. AIR 1938 Sind 1 (FB)+AIR 1959 Punj. 287+AIR 1932 Pat. 293 (SB) (Term not restricted in persons enrolled under Police Act).
10. AIR 1938 Sind 1 (FB)+AIR 1965 Bom. 195 (DB)+26 Cal. 569.
11. AIR 1932 Pat. 293 (SB)+AIR 1955 NUC (Pat) 3261.
12. AIR 1964 SC 828+AIR 1953 Mad. 917 (DB) (AIR 1932 Pat. 293 (SB), Dist).
13. AIR 1964 SC 828+AIR 1938 Sind 1 (FB) (AIR 1925 Sind 70 Overruled)+AIR 1934 Cal. 580.
14. AIR 1965 Bom. 195 (DB).

and the persons responsible for it, would not make them police officers. The goods and the persons, when they act to prevent smuggling of goods by imposing customs officers and penalties, act judicially. A police officer never acts judicially. Hence a confession officer is not a police officer for the purpose of Art. 38.<sup>15</sup> The Assistant Customs Officer is not a police-officer as the section should not be extended to a class of officers merely on the ground of similarity of function.<sup>16</sup> An Excise Inspector of officers discharging his duties under the Customs Act is also not a police officer while discharging his duties under the Customs Act is also not a police officer.<sup>17</sup>

*Village 'chaukidar'.* A village *chaukidar* in Bangladesh and India is a Police Officer. A confession to him is inadmissible.<sup>18</sup> But in the Punjab a village *chaukidar* is not a police officer.<sup>19</sup>

*Ward Rationing Officer.* The position of a Ward Rationing Officer is analogous to that of an Excise Officer carrying out a raid on suspected premises and a confession made by an accused person to the Ward Rationing Officer is on no different footing from a confession made to a police officer and is therefore inadmissible under Art. 38.<sup>20</sup>

*Foreign police officer.* A confession made to a foreign police officer is not admissible in evidence.<sup>1</sup>

*Frontier constabulary.* A member of the Frontier Constabulary is a Police Officer.<sup>2</sup>

*Political Muharrir.* The political Muharrir in N.-W.F.P. Tribal Areas occupies the position of a Police Officer.<sup>3</sup>

*Civic guard.* A civic guard is a police-officer when called out on duty. But confession made to him while he was not on duty, or acting in connection with his duties, cannot be regarded as one made to a police-officer.<sup>4</sup>

*'Lambardar'.* Merely because the persons to whom a confession was made happen to be *lambardars* their evidence is not to be rejected. Their evidence stands exactly on the same footing as that of any other witness.<sup>5</sup>

*Sub-Divisional Officer.* A Sub-Divisional Officer cannot be taken to be a police officer at all. A confession made to him is admissible in evidence.<sup>6</sup>

15. AIR 1962 SC 270 (AIR 1959 Punj. 287 (reversed)+AIR 1965 SC 481+AIR 1965 Bom. 195 (DB)+AIR 1957 AP 81+AIR 1958 Mad. 31.
16. AIR 1947 Mad. 308=148 Cr.L.J. 326.
17. AIR 1965 Bom. 195 (DB).
18. 7 DLR 205 (DB)+AIR 1914 Oudh 414+AIR 1936 All. 753 (FB).
19. AIR 1918 Lah. 127=19 Cr.L.J. 52 (DB).
20. AIR 1951 Punj. 387=52 Cr.L.J. 661.
1. 13 Cr.L.J. 528 (DB) (Mad).
2. 24 Cr.L.J. 136 (Pesh).
3. AIR 1933 Pesh. 38=34 Cr.L.J. 804 (DB).
4. AIR 1944 Lah. 57=57 Cr.L.J. 555 (DB).
5. AIR 1951 Punj. (Simla) 283 (DB).

does amount to a confession and is hit by Art. 38. Thus, an admission by the accused to a police officer that he had received certain property from the deacon's would amount to a confession in respect of an offence under section 411, Penal Code, and would be inadmissible in evidence.<sup>5</sup> Where the accused was being tried for possession of an unlicensed arm. Even the statement made by the respondent that he had concealed the knife is not admissible because the same is a total confession for the simple reason that he could not conceal an object without possessing it and by admitting such a statement a confession in its totality will be admitted. The result is that the statement of the respondent is only admissible to the extent that he would produce the knife before the police.<sup>6</sup>

*Intention of accused in making statement.* The mere fact that an accused while making a statement intended it to be self-exculpatory is insufficient to take that statement out of the operation of the Article. Where its effect is inculpatory it would be inadmissible in spite of the intention which the accused might have had in making it.<sup>7</sup>

✓ 39. *Confession by accused while in custody of police not to be proved against him.* Subject to Article 40 no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

*Explanation.* In this Article "Magistrate" does not include the head of a village discharging magisterial functions unless such headman is Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898).

Evidence Act, 1872. This Article reproduces section 26 of Evidence Act.

#### Synopsis

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| 1. Scope and applicability.            | 6. Immediate presence of Magistrate.                 |
| 2. "In the custody of police-officer." | 7. Magistrate--who is.                               |
| 3. Police-officer.                     | 8. Confession to Magistrate.                         |
| 4. Confession.                         | 9. Use of confessional statement against co-accused. |
| 5. Extra-judicial confession.          |  |
1. **Scope and applicability.** Article 39 deals with confessions, which are made not to a police officer but to persons other than police officers i.e. to fellow prisoner, a doctor or a visitor and makes such confessions inadmissible, if they were made while the accused was in the custody of police officer.<sup>8</sup> Confessions falling within the

5. AIR 1955 NUC (Sau) 5765.
6. PLD 1974 Quetta 28=PLJ 1974 Quetta 109 (DB).
7. AIR 1925 Bom. 65=24 Cr.L.J. 870.
8. PLD 2003 SC 704=2004 SCJ 33.

of Articles 37 to 39 are neither relevant nor admissible in evidence.<sup>9</sup> Statements made to a police officer are hit by Arts. 38 and 39.<sup>10</sup> Both Articles are intended to prevent the use of statements made actually to a police officer. But the Articles do not contain identical propositions of law. The former lays down a general proposition against the admissibility of confessions made by police officers. This Article carries the principle further by rendering similar confessions inadmissible even though not made to a police-officer but made by a person whilst he is in the custody of a police officer.<sup>12</sup> Thus Art. 39 applies to confessional statements made while the accused is in police custody irrespective of the fact to whom they are made, with the exception of a Magistrate. Therefore under this Article a statement made to a fellow prisoner, a doctor or a visitor will be all inadmissible in evidence.<sup>13</sup>

2. "In the custody of police-officer." Any statement made by an accused person while in police custody is inadmissible in evidence and the same cannot be read in evidence.<sup>14</sup> The word "custody" in Art. 39 or Art. 40 does not mean formal custody but includes such state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction.<sup>15</sup> As soon as an accused or suspected person comes into the hands of a police officer, he is in the absence of unmistakable evidence to the contrary, in custody. Actual arrest and detention is not necessary.<sup>16</sup> This is so because when a person accuses himself though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the Police, he must be deemed to be in the custody of the police.<sup>17</sup>

*Restriction on liberty--necessary.* The word 'custody' in Art. 39 though not defined, implies that there must be some limitation imposed upon liberty of the confessor and that limitation must be imposed either directly or indirectly to police.<sup>18</sup> A person is not in police 'custody' merely because he has been invited to explain certain circumstance unless he has been arrested or is under police supervision.<sup>19</sup> Even indirect control over the movements of suspects by the police would amount to 'police custody' within the meaning of Art. 39.<sup>20</sup> Immediate presence of a policeman or police-officer is not necessary to prove that the accused was in the custody of the police. Temporary absence of a policeman or a police

9. NLR 1984 Cr. 18=PLD 1984 Lah. 155=1984 Law Notes 46=PLJ 1984 Cr. C. 230.
10. AIR 1963 SC 1113.
11. 35 Mad. 397 (FB).
12. 6 All. 509 (FB).
13. AIR 1939 PC 47=40 Cr.L.J. 364.
14. 2003 YLR 263=2003 SD 180 (FSC)+2001 MLD 807=NLR 2001 Cr. 536.
15. 1992 SCMR 1983+AIR 1965 Punj. 5 (DB)+AIR 1964 Orissa 114 (DB)+AIR 1948 All. 7 (DB).
16. 1992 SCMR 1983+AIR 1924 Rang. 173=25 Cr.L.J. 381.
17. AIR 1965 Guj. 5 (DB).
18. AIR 1932 Sind 201=34 Cr.L.J. 147 (DB).
19. AIR 1921 Sind 145=26 Cr.L.J. 609 (DB).
20. AIR 1964 Orissa 144 (DB).

officer would not terminate his custody.<sup>1</sup> Thus a person in the immediate presence of a Magistrate with the police outside to see that he does not escape cannot be said to be not in the custody of the police, simply because they cannot be seen by the prisoner.<sup>2</sup>

*Accused in custody of person deputed by police.* An accused person in the custody of a person, not a police-officer, but deputed by the police to keep him in custody, would be deemed to be in the custody of the police. Thus a statement of a confessional nature made to a village headman at the instance of the police is accused is in the act of being arrested by the headman at the instance of the police is very near to a statement made by a man in police custody, and so must be scrutinised with the greatest care.<sup>3</sup> Where accused had been interrogated by a police officer and was brought in a police van the next day to the residence of the person before whom he made an extra-judicial confession. Although regular police officers went away after leaving the accused with that person, some other person, who had come in the police van, were left there. After the accused made the confession, the police officer came there the next day and formally arrested him. The confession was inadmissible in evidence under Art. 39.<sup>4</sup>

*Pointing out of places by accused.* Statements of the accused while in custody of a police officer, and of his having pointed out places where he committed the offence, are not admissible as being of an incriminating nature.<sup>5</sup>

*Confessional statement relating to recoveries.* A statement made by the accused to the police that the articles recovered from his house were articles of loot is not admissible in evidence in view of the provisions of Arts. 37, 38 and 39.<sup>6</sup>

*Confessional statement to police.* A statement made to a police officer by an accused person while in police custody, if it is an admission of an incriminating circumstance cannot be used in evidence under Arts. 37 and 38.<sup>7</sup> Thus statements made to the 'daroga' by an accused showing the place in the jungle where the occurrence in question took place, are not admissible, being in the nature of confessions made to a police officer while in custody.<sup>8</sup> In Bangladesh a *choukidar* is a Police Officer for the purpose of Art. 39. Hence a confession made to a *choukidar* by the accused is not admissible against him.<sup>9</sup> But the mere presence of a *choukidar* among the villagers to whom the accused made a confession cannot make

1. AIR 1941 Peah. 22-42 Cr.L.J. 381 (DB)+AIR 1959 All. 518 (DB)+AIR 1941 Oudh 561 (DB)+AIR 1928 Lah. 282-29 Cr.L.J. 386 (DB).
2. AIR 1944 Nag. 105-45 Cr.L.J. 673 (FB).
3. AIR 1936 Rang. 455-37 Cr.L.J. 1137 (DB).
4. AIR 1964 Orissa 144 (DB).
5. AIR 1914 Lah. 380-15 Cr.L.J. 613 (DB)+13 Cr.L.J. 127 (DB) (Cal)+AIR 1935 Oudh 1 (DB).
6. AIR 1957 All. 459-1957 Cr.L.J. 803.
7. 19 Bom. 363 (DB).
8. AIR 1933 Cal. 146-34 Cr.L.J. 638 (DB)+1946 Rang LR 229.
9. 7 D.L.R. 205 (DB)+AIR 1947 Pat. 146 (DB)+AIR 1943 Cal. 612 (DB).

that he was in the custody of the *choukidar* and the confession made to the villagers would not be excluded from evidence.<sup>10</sup>

*Confessional statement in presence of police.* Where the accused is not in custody, his confession to a third person will become admissible even though made in the absence of a Magistrate.<sup>11</sup> But an extra-judicial confession in the presence of the police cannot be admitted in evidence.<sup>12</sup>

*Illegal custody of police.* Since the policy of the Legislature is to exclude confessions made by an accused while in the custody of the police, the Article will apply even where that custody is the result of an illegal arrest.<sup>13</sup>

*Judicial custody.* A confession by an accused person when he is in judicial custody is not a confession in police custody and is therefore admissible in evidence. Where an accused, while in judicial lock-up, made a confession to fellow prisoners. The policeman whose duty it was to guard the lock-up was present. It was held that the presence of the policeman did not make the confession inadmissible as the accused was in Magisterial custody as opposed to police custody.<sup>14</sup> But where judicial lock-up to which accused was sent was a police lock-up for all intents and purposes as it was supervised by a police guard headed by a Head Constable who regulated it by *roznamcha* as was maintained at all the police stations. A confession made by the accused was not admissible.<sup>15</sup> But where the accused while he was formally in magisterial custody and before the magistrate had made an order authorising his detention in police custody gave information to a Circle Inspector, in pursuance of which some discoveries were made. It was held that the accused though in judicial custody was temporarily in the custody of the police officer when he was interrogated by the Circle Inspector. His statement was, therefore, perfectly admissible under Art. 40 to corroborate the extra-judicial confession made by the accused prior to the statement.<sup>16</sup>

Where accused makes a confession in judicial custody, it must be relied upon in its entirety if it is to be relied upon.<sup>17</sup>

*Jail custody.* The keeper of a foreign jail is not a police officer. The custody of the jailor does not become custody of a police officer, though his subordinates, the jail wardens are members of the police force. In the absence of evidence of close custody of the prisoner inside the jail, such as may possibly occur when the evidence watched and guarded thereby a police officer investigating the offence, the evidence

10. AIR 1965 Gujarat 5 (DB)+AIR 1948 All. 7-48 Cr.L.J. 939 (DB).
11. AIR 1933 Oudh 192-34 Cr.L.J. 653 (DB).
12. 1969 P. Cr.L.J. 381.
13. AIR 1938 Pat. 308-39 Cr.L.J. 428 (DB).
14. AIR 1934 Lah. 75-35 Cr.L.J. 1432 (DB).
15. PLD 1973 Lah. 714.
16. AIR 1960 Mad. 191 (DB)+AIR 1952 HP 68.
17. 1996 MLD 95.



their testimony. No connection was established between them and party of the deceased. There evidence may be relied upon.<sup>17</sup>

✓41. Confession made after removal of impression caused by inducement, threat or promise, relevant. If such a confession as is referred to in Article 37 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

Evidence Act, 1872. This Article is reproduction of section 28 of the Act.

Synopsis

- 1. Scope.
- 2. Removal of impression caused by inducement.
- 3. Impression must be fully removed.

1. Scope. The rule prescribed by Arts. 37 and 91 relate to the rule of relevancy while those prescribed by Arts. 38 to 40 are not strictly speaking so. The rules in these are positive prohibitions necessitated by the exigencies of the conditions in Pakistan.<sup>18</sup>

2. Removal of impression caused by inducement. When once the existence of improper inducement, threat or promise has been established so as to bring the case within the provisions of Art. 37 there is a presumption of its continuance, and the prosecution has to prove that the impression caused by the original inducement, threat or promise was fully removed when the prisoner made the confession.<sup>19</sup> Therefore where the accused had been 12 days in police custody after the police beating or threats and had time to reflect before making a confession to a Magistrate will not necessarily lessen the effect of the influence which had been brought to bear on him. The prosecution must prove that the impression had been removed.<sup>20</sup>

Period between inducement, etc., and confession. The question whether a confession is voluntary or not is always a question of fact, and there is no rule of law that if a certain period is not given for reflection that itself would be sufficient to rule out the confession. But at the same time, all the factors and all the circumstances of the case, including the important factor of the time given for reflection, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by any inducement, threat or promise has been fully removed as provided in Art. 41.<sup>1</sup> Therefore if the accused had admitted his confession to be correct before the Magistrate after about five or six months of having made the confession under section 164, Cr.P.C. and when he was no more under the influence of the police, being lodged in the judicial lock-up. The confession, even when

- 17. PLD 1977 SC 4=PLJ 1977 SC 140=1977 Law Notes 15.
- 18. 6 All. 509 (FB).
- 19. AIR 1959 Madh Pra 17=1959 Cr.LJ. 48.
- 20. AIR 1951 Kutch 27=52 Cr.LJ 257.
- 1. AIR 1963 Guj. 135 (FB)+AIR 1957 SC 637.

retracted at the trial will be saved by the provisions of Art. 41.<sup>2</sup> On the other hand where the period between inducement, threat, etc., is very short, in the absence of definite proof that the impression was removed, the confession would not be admissible. Thus a confession to a Magistrate soon after inducement by a person in authority is inadmissible unless it is shown that the impression caused by inducement was removed.<sup>3</sup> Where the accused was given inducement by a *lanbaradar* and he made an extra-judicial confession. Two hours later he made another confession to another person. It was held that there is no evidence to show that the impression created by the *lanbaradar* on the appellant's mind had been removed when he made the second confession. Therefore the confession was not relied upon.<sup>4</sup>

3. Impression must be fully removed. The word 'fully' in Art. 41 means 'thoroughly', 'completely', 'entirely', so as not to leave any trace of the impression created by the torture or fear for a confession forced from the mind by the flattery or hope or by torture or fear comes in so questionable a shape that no credit can be given to it. A free and voluntary confession is presumed to flow from the strongest sense of guilt and, therefore, it is admitted as proof of the crime.<sup>5</sup> However where the accused was made to understand by the Magistrate that she was not in any way bound to make a statement and that after making a voluntary statement she will be sent to judicial lock-up and not police custody. The fact that after she made the confessional statement she was handed over to Police for medical examination would not affect the value of the confession.<sup>6</sup>

✓42. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him:<sup>7</sup>

Provided that the provisions of this Article shall not apply to the trial of cases under the laws relating to enforcement of *Hudood*.

Evidence Act, 1872. This Article reproduces section 29 of Evidence Act with the addition of the proviso at the end.

- 2. PLD 1963 Pesh. 178 (DB).
- 3. 12 Cr.LJ 119=4 Sind LR 209 (DB).
- 4. PLD 1960 Lah. 189.
- 5. AIR 1949 Madh Pra 17=1959 Cr.LJ 48.
- 6. PLD 1983 FSC 62.

## Synopsis

1. Scope.
2. Confession in answer to questions by Court.
3. Non-compliance with section 164(3), Cr.P.C.

**1. Scope.** Art. 42 assumes that there is no bar to the admissibility of a confession arising from any of the earlier provisions, viz. Arts. 37 to 41 and it then proceeds to invalidate or negative other possible objections or bars that may be raised against its admissibility. The Article covers the field of confessions other than those dealt with in its preceding Articles or in other words extra-judicial confessions, Any other view as to the meaning of the Article would lead to repugnancy between it and the preceding Articles and may, in certain conditions of things, lead to absurdity. Art. 42 is meant to dispel doubts with regard to extra-judicial confession made under circumstances similar to those which make judicial confessions inadmissible and with respect to confessions relevant otherwise than as confessions, for example, as admissions under conditions not requiring proof of guilt.<sup>8</sup>

**2. Confession in answer to questions by Court.** Where there is no torture or threat of punishment and the prisoner answers the questions of the Magistrate under an erroneous impression that he is bound in law to answer them, the answers are admissible in evidence even where they amount to a confession.<sup>9</sup>

**3. Non-compliance with section 164(3), Cr.P.C.** Art. 42 does not, in its practical application, come in conflict with the operation of section 164, Criminal P.C.<sup>10</sup> The latter section does not override the provisions of the Article. It is the latter that must be looked at when there is a question of the admissibility of a particular piece of evidence. Hence a confession otherwise admissible does not become inadmissible because the accused person was not warned that he was not bound to make such confession and that it might be given in evidence against him.<sup>11</sup> This Art. provides that even if the warning is not given to the accused in the negative form that he is not bound to make a confession, the confession would be admissible provided, that the Court is satisfied that the accused knew that he was not bound to make a confession.<sup>12</sup> But the Court must find out how far such a confession can be acted upon if the provisions of section 164, Cr.P.C. have not been properly complied with.<sup>13</sup> Where in fact there has been no adequate explanation of questioning by the Magistrate of the nature prescribed in section 164(3), Cr.P.C., before he starts recording the confession, his record of the confession cannot be said to be in substantial compliance with the requirements of section 164(3), Cr.P.C. and no evidence *alimide* that the confession was in fact voluntarily made would be

7. AIR 1954 Bom. 285-ILR 1954 Bom. 484-1954 Cr LJ 887 (DB).
8. AIR 1947 Pat. 305-25 Pat. 612 (DB).
9. 1 Beng LR (O Cr) 15 (FB).
10. AIR 1951 Orissa 168-ILR 1951 Cr 65 (FB).
11. AIR 1932 Mad. 431 (DB)+AIR 1954 Bom. 285 (DB)+AIR 1941 All. 145 (DB).
12. ILR (1952) 2 Raj. 93 (DB)+AIR 1957 Raj. 141 (DB).
13. AIR 1950 Mad. 579-51 Cr LJ 1047 (DB).

admissible. There is thus no scope for invoking the aid either of Art. 42 or section 533, Criminal P.C. to cure such defect.<sup>14</sup>

**43. Consideration of proved confession affecting person making it and others jointly under trial for same offence.** When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved,--

- (a) such confession shall be proof against the person; making it; and
- (b) the Court may take into consideration such confession as circumstantial evidence against such other person.

**Explanation.** "Offence," as used in this Article, includes the abatement of or attempt to commit, the offence.

## Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said: "B and I murdered C." The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said: "A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

**Evidence Act, 1872.** Corresponding provision of Evidence Act reads as follows. Illustrations to this Article are exact reproduction of illustrations in section 30 of Evidence Act.

**30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.** When more persons than one are being tried jointly for the same offence, and confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

**Explanation.** "Offence," as used in this section, includes the abatement of, or attempt to commit, the offence.

## Synopsis

1. Scope and applicability.
2. Joint trial of accused and co-accused.
3. Death of confessing accused.
4. Plea of guilty by confessing accused.
5. Trial must be for same offence.
6. Confession must be proved.

14. AIR 1951 Orissa 168-ILR 1951 Cr 65-1952 Cr. L Jour 1743 (FB).

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- 7. Statement of accused under section 342, Cr.P.C.
- 8. Confession must implicate maker and his co-accused.
- 9. Evidentiary value of confession against co-accused.
- 10. Corroboration of confession.
- 11. Retracted confession.

1. Scope and applicability. Judicial confession of each of the accused shall have the effect of implicating and corroborating the charge as against the co-accused to the extent confessed.<sup>15</sup> The rule laid down in this Article being an exception to the general rule that a confession is only a piece of evidence against the confessor and not against others,<sup>16</sup> must be construed strictly.<sup>17</sup> Therefore though a confession by an accused may be admitted against his co-accused and he can confess as to his own acts, knowledge or intentions, but he cannot "confess" as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. If he does so the confession cannot be admitted against his co-accused.<sup>18</sup>

Section 30, Evidence Act and this Article--comparison. A comparison of section 30, Evidence Act and Art. 43, Qanun-e-Shahadat shows that under S. 30 of the Evidence Act, 1872 confession of co-accused was to be taken into consideration against him and also against such other persons against whom the confession was made but under Article 43 of Qanun-e-Shahadat, a confession is a proof against the person making it and the same is to be taken into consideration as circumstantial evidence against persons who are being tried jointly for the same offence.<sup>19</sup>

Conditions for applicability. This Article will apply to a case if the following conditions are fulfilled: (a) that more persons than one are being tried jointly, (b) that the joint trial is permitted by the law, and (c) that the joint trial is for the same offence, or for its abetment or attempt. If these conditions are fulfilled then the Court may take into consideration the confession made by one of such persons affecting himself and some other of such persons, against such other person as well as against the person who makes such confession. But if any of the conditions enumerated above is not fulfilled, then such a confession cannot be taken into consideration against any other person except the maker of such confession.<sup>20</sup>

Statement by accused must be of confessional nature. The Article seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself.<sup>1</sup> The Article applies to confessions, and not to statements which do not admit the guilt of the confessing party.<sup>2</sup>

- 15. 2M03 P. Cr. L.J. 1264 (DB).
- 16. PLJ 1975 Lah. 176=PLD 1975 Lah. 1569.
- 17. AIR 1952 All. 796 (DB)+AIR 1955 Mys. 27 (DB)+AIR 1936 Ouhd 156+AIR 1931 Mad. 177 (DB).
- 18. PLD 1959 PC 28.
- 19. 1992 P. Cr. L.J. 1910 (DB).
- 20. PLJ 1976 Lah. 176+PLD 1960 Lah. 31+10 Cr.L.Jour. 369 (DB).
- 1. AIR 1949 P. C 257=76 App Ind 147=50 Cr L Jour 872.
- 2. 1983 SCMR 573+1984 P. Cr. L.J. 283+PLD 1949 PC 90=2 DLR 39+AIR 1920 Cal. 300 (DB)+13 Cr L Jour 305 (SB).

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Statement must be by an accused person. A statement by a person before he is charged for any offence by the police is only an admission and is admissible against him but not against his co-accused.<sup>3</sup> A statement to be admissible under this Article must have been made by a person accused of the offence with which he and his co-accused are charged. When the person was not an accused at the time he made a statement on solemn affirmation to the magistrate, that statement would be inadmissible against his co-accused.<sup>4</sup> A person originally charged with the accused but discharged on withdrawal of a case against him is a competent witness against the accused and as he ceases to be on trial with his accomplices, his statement is not a 'confession' within the meaning of this Article.<sup>5</sup>

Implied confession. An admission amounting to a confession must be a clear one, unreserved by accepting guilt, and not a mere statement from which the guilty may be inferred and such an admission cannot be used against a co-accused.<sup>6</sup> If the accused tarred himself with the same brush with which he tarred the others, the statement would, no doubt, be admissible under Art. 43. But where he confessed to having taken part in a robbery and it was sought to be produced as evidence against another accused of murder. Implied terming of himself would not make the statement admissible in evidence against his co-accused under Art. 43.<sup>7</sup>

Confession not admissible against maker. Confession of a co-accused can be taken into consideration only if it can be used as evidence against the maker. Where the confession is inadmissible against the maker, being the result of inducement, it is inadmissible against his co-accused.<sup>8</sup> Thus an extra-judicial confession made by boys enjoined or frightened but retracted before a Magistrate, does not prove the case against persons jointly accused with the boys.<sup>9</sup> Similarly statements made by a conspirator to the police are not admissible in evidence if they are incriminating against the other conspirators.<sup>10</sup>

Confession of accused falling under Art. 40 is also a confession under this Article and is admissible against the co-accused subject to independent evidence being available.<sup>11</sup>

Confessional statement at trial. Statements made by an accused person during the trial can hardly be regarded as statements by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy and are, therefore not admissible under Art. 23, Art. 43 applies only to statements made before and proved at the trial.<sup>12</sup>

- 3. AIR 1928 Pat. 473=29 Cr L Jour 913 (DB).
- 4. AIR 1915 Lah. 487=16 Cr L Jour 257 (FB).
- 5. AIR 1920 Cal. 330=21 Cr L Jour 5 (DB).
- 6. AIR 1929 Bom. 296 (DB)+AIR 1939 Bom. 327 (DB)+10 Cr L Jour 369 (DB).
- 7. PLD 1956 Lah. 157=PLR 1956 Lah. 58 (DB).
- 8. 2003 SCMR 1419+AIR 1923 All. 352+1911 Pun Re (Cr) No. 9.
- 9. 12 Cr L Jour 597=1911 Pun Re (Cr) No. 14 (DB).
- 10. AIR 1939 Sind 85=40 Cr L Jour 882.
- 11. AIR 1941 Mad. 238=42 Cr L Jour 654 (DB).
- 12. AIR 1933 Ouhd 86=34 Cr L Jour 124.