

# The Admissibility of Confessions in Criminal Proceedings: A Comparative Analysis of the Law of Sri Lanka and England

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## 1. The Definition of a Confession

The definition of a confession is of practical importance, since several statutory rules which have the effect of excluding evidence are confined in their operation in Sri Lanka to confessions as distinguished from admissions.

The Evidence Ordinance of Sri Lanka recognizes the principle that "Admissions are relevant and may be proved as against the person who makes them or his representative in interest." On the other hand, the admissibility of confessions is subject to exclusionary rules which are inapplicable to admissions.

The law of Sri Lanka, while not setting out any general rule barring proof of confessions, recognizes instead a series of particular prohibitions which have the effect that confessions may not be proved in certain limited circumstances. Statutory provisions which govern the subject in Sri Lanka, preclude proof of the following categories of confessions:

- (a) confessions caused by an inducement, threat or promise;<sup>2</sup>
- (b) confessions made to a police officer, a forest officer or an excise officer;<sup>3</sup>
- (c) confessions made by any person while in the custody of a police officer, a forest officer or an excise officer.<sup>4</sup>

1. Evidence Ordinance, 1895, section 21

2. Evidence Ordinance, section 24.

3. Evidence Ordinance, section 25 (1) and 25 (2)

4. Evidence Ordinance, section 26 (1) and 26 (2)

The essential distinction between a confession and an admission is that, while a confession represents an acknowledgment of guilt, an admission does not refer to the whole offence but to a single fact or facts each of which the prosecution would otherwise be required to prove.<sup>5</sup> The law of Sri Lanka contains a definition of the terms "admission" and "confession". An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by persons and under circumstances referred to by the statute.<sup>6</sup> A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence.<sup>7</sup> Admission is the genus of which confession is the species.<sup>8</sup>

Although the object of the statutory provisions excluding confessions in limited circumstances is the protection of the accused, the availability of this protection in Sri Lanka depends on the characterization of a statement as a confession and not as an admission. In Sri Lanka the contemporary law adopts a stringent approach to the definition of confessions.

The decided cases in Sri Lanka indicate a difference of opinion in regard to the interpretation of the statutory definition<sup>9</sup> of "confessions."

In the cases decided during the early decades of this century, the definition of a confession has been construed liberally. In a case<sup>10</sup> involving a charge of grievous hurt to X the accused, while declaring that he had struck X with a mamoty, insisted that he did so while defending himself against an attack by X with a knife. In rebuttal, Crown Counsel elicited evidence from two headmen that the accused had made statements to them but had not mentioned that X threatened or attacked him with a knife. The Supreme Court held that the statement made by the accused to the headmen was equivalent to a confession. This conclusion was reached on the basis that "The evidence in question was calculated to have in the minds of the jury the effect of eliminating from the statutory statement of the accused the only circumstance he relied on as a defence, namely, the circumstance that he himself had been attacked."<sup>11</sup> In 1923 the principle was authoritatively formulated that "If the Crown, at the

5. H. J. May, *South African Cases and Statutes on Evidence* (Juta, 4th edition, 1962), p. 77.

6. Evidence Ordinance, section 17 (1).

7. Evidence Ordinance, section 17 (2).

8. *R. v. Cooray* (1926) 28 NLR 74, per Garvin, A. C. J.

9. Evidence Ordinance, section 17 (2)

10. *R. v. Kalubanda* (1912) 15 NLR 422

11. At p. 427, per Pereira, J.

trial of a prisoner, tenders in evidence a statement by the prisoner, whether self-inculpatory or self-exculpatory in intention with a view to an inference being drawn by the court from that statement against the prisoner, that statement becomes, *ex vi termini*, a confession.”<sup>12</sup>

In another case<sup>13</sup> a police officer gave evidence that the accused, in a statement, had denied the act of cutting with a knife and had claimed that the injured man, in attempting to seize the knife, was cut accidentally. The court ruled that the accused’s statement amounted to a confession. The rationale underlying this ruling was spelt out as follows: “It (the statement) placed the accused on the spot and gave what was stated to be his explanation of how the wound was inflicted – an explanation which may have created an unfavourable impression on the mind of the Magistrate. The Legislature desired to prevent the reception of any evidence by police officers as to statements made to them by accused persons which would either bring home the charge to the accused or strengthen the case for the prosecution.”<sup>14</sup>

This trend is reflected strikingly in several cases dealing with charges based on theft and the retention of stolen property. Statements made by the accused that he had effected a sale of a portion of the rubber<sup>15</sup> and that he had bought a cow some years previously,<sup>16</sup> were held to be confessions in cases involving, respectively, a charge of theft of rubber and a charge of retaining possession of a cow dishonestly. Where the accused was charged with dishonestly retaining a stolen shirt and the prosecution sought to prove a statement made by him to a police constable that he had the shirt stitched by a tailor, the statement was held to be confessional in character.<sup>17</sup>

The view emerging from these cases is that a “confession” is not necessarily restricted either to (i) an admission of the commission of the offence by the accused, or to (ii) a statement suggesting the inference that the accused committed the offence. The principle which may be deduced from this line of cases is that the following categories of statements fall within the ambit of a “confession”:

- (a) a statement by the accused which expressly or by implication shows that a defence taken or capable of being taken is false;

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12. *R. v. Ukkubanda* (1923) 24 NLR 327 at p. 333, per Bertram, C. J.

13. *Weerakone v. Ranhamy* (1926) 25 NLR 267

14. At pages 267-268, per Branch, C. J.

15. *Hamid v. Karthen* (1917) 4 C. W. R. 363

16. *Dionis v. Peiris Appu* (1917) 7 Tambiah Rep. 28

17. *Nambiar v. Fernando* (1925) 27 NLR 404

- (b) a statement by the accused which places him at the scene of the crime at the material time;
- (c) a statement by the accused which permits an inference prejudicial to him to be drawn.

However, later cases support a narrower interpretation of the definition of a "confession." It has been emphasized judicially that a statement by an accused person which suggests an inference inconsistent with a defence pleaded by him, cannot on that ground be treated as a confession.<sup>18</sup> This view has been endorsed subsequently.<sup>19</sup> The Court of Criminal Appeal has declared that "An admission by an accused of facts which can establish motive, or opportunity, or knowledge of a death, does not suggest an inference that the offence was committed by him; the inference which such a fact suggests is only that he may have had a reason or an opportunity for, or knowledge as to the commission of, the offence."<sup>20</sup>

According to the Privy Council, the appropriate test in deciding whether a statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or whether, taken together in their context, they inferentially admit guilt.<sup>21</sup> The Privy Council has adopted,<sup>22</sup> with reference to the law of Sri Lanka, the definition of a "confession" suggested by an American authority:<sup>23</sup> "The admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and out of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established."

The prevailing view is that a confession is a statement admitting the commission of an offence or a statement suggesting the inference of commission of an offence. The strictness of the test applicable is exemplified by the assertion that, where several admissions by the accused

18. *R. v. Cooray* (1926), 28 NLR 74 *per* Garvin, A.C.J.

19. *R. v. Gunawardena* (1944) 42 NLR 217; *R. v. Obiyas Appuhamy* (1952) 54 NLR 32

20. *R. v. Anandagoda* (1960) 69 NLR 241 at p. 254, *per* H. N. G. Fernando, J. See also *R. v. Fernando* (1939) 41 NLR 151; *R. v. Thuraisamy* (1952) 54 NLR 449; *R. v. Seyadu* (1951) 53 NLR 251

21. *R. v. Anandagoda* (1962) 64 NLR 73 at p. 80, *per* Lord Guest. See, for a clear instance of a confession, *R. v. Kiriwasthu* (1939) 40 NLR 289.

22. *ibid*

23. Wigmore, *The Law of Evidence*, Vol. 1. sect. 281, p. 930

are sought to be led in evidence against him and each admission, taken by itself, does not satisfy the characteristics of a confession, all the admissions taken together cannot be regarded as confessional in content.<sup>24</sup>

This principle has been formulated explicitly by the courts of Sri Lanka.

Although the distinction between a confession and an admission falling short of a full confession is firmly embedded in the law of Sri Lanka in the context of the admissibility of evidence, this distinction may be criticized cogently from the standpoint of policy. Statutory provisions which stringently restrict the admissibility of confessions in Sri Lanka have not been so interpreted by the courts as to preclude the reception in evidence of incriminating or otherwise prejudicial admissions. The effect of the decided cases is that an admission, however disadvantageous, caused by an inducement, threat or promise or made to a police officer may be received in evidence, while a confession falls within the purview of the statutory bar in both situations. Since the same coercion or pressures may induce one man to make a complete confession and another to make one or more incriminating statements equivalent to an admission, the rule which permits reception in evidence of the admission while requiring exclusion of the confession, is difficult to support in principle.<sup>25</sup> The considerations of policy which militate against the reception of such evidence, cut across the distinction between confessions and incriminating admissions not amounting to confessions, in circumstances where the statement of the accused has been obtained by means characterized by the law as involving substantial unfairness to the accused.

For comparative purposes it is interesting to note that a similar distinction does not form part of English law. The new Judges' Rules<sup>26</sup> published in 1964 purport to bring confessions and incriminating admissions, in the circumstances envisaged, within the scope of a uniform principle. Rule 3 of the Judges' Rules provides that "It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer, or of any statement made by that person that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority or by

24. *R. v. Ananlagoda* (1960) 62 NLR 241 at p. 254, per H. N. G. Fernando, J. (CCA)

25. See the criticism of the effect of Indian and Sri Lanka law by Lord Reid in *Customs and Excise Commissioners v Harz* (1967) 1 A. C. 760 (H. L.)

26. Home Office Circular No. 31 of 1964, p. 5.

oppression." This formulation of the principle applicable, not involving discrimination between confessions and other incriminating admissions, confers a greater measure of protection on the accused in circumstances where his exceptional vulnerability is recognized by the law.

Where a confession is equivocal, the English courts have consistently asserted that a conviction founded solely thereon may be quashed.<sup>27</sup> As examples of ambiguous statements may be cited the words "Just my luck",<sup>28</sup> "There is no end to my troubles"<sup>29</sup> and the reply "Yes, Sir" given by the accused to an observation by the judge that there was a long list of convictions against him.<sup>30</sup> However, once it is apparent that the statement made by the accused is substantially incriminating, English law recognizes no distinction, for purposes of applicability of the exclusionary doctrine, between confessions and admissions which fall short of complete confessions.

The distinction drawn by Sri Lankan law between confessions and other admissions entails the curious result that, where the accused's guilt is manifest *ex facie* the words he has used, his statement would be treated as a confession and compulsorily excluded in a variety of situations so that, in the absence of other compelling evidence, the accused may secure acquittal. On the other hand, if the accused's statement, potentially adverse to him, is incomplete or ambiguous, it would be regarded as an admission and consequently capable of being received in evidence against him, with the result that the likelihood of conviction is enhanced. This anomaly is eliminated by the divergent approach of English law.

## 2. The Voluntary Character of Confessions

The voluntary character of a confession is a precondition of its admissibility in evidence. Although the form of words used in English and Sri Lanka authorities is not identical, there does not seem to be any difference of substance.

The courts of Sri Lanka have explicitly adopted the attitude<sup>31</sup> that a "voluntary" confession is synonymous with a confession not made under the influence of an inducement, threat or promise within the meaning of these terms in the relevant statutory provision.<sup>32</sup>

27. *R. v. Barker*, (1915) 11 Cr. App. Rep. 191

28. *R. v. Schofield* (1917) 12 Cr. App. Rep. 191

29. *R. v. Curtis* (1913) 29 T. L. R. 512

30. *R. v. Metcalfe* (1913) 9 Cr. App. Rep. 7

31. *R. v. Cicilin* (1956) 58 NLR 472 at p. 475, *per* Gunasekera, J.

32. Evidence Ordinance, section 24

In seeking to ensure that no confession which does not comply with the test of voluntariness is received in evidence, the courts have evolved a series of useful principles:

- (i) The rule is applicable in Sri Lanka<sup>33</sup> that the voluntary nature of a confession must be proved by the prosecution. Moreover, it has been accepted that the prosecution must discharge this burden beyond a reasonable doubt.<sup>34</sup>

The principle that the burden of proving the voluntary character of a confession devolves on the prosecution may be justified convincingly. Confessions are admitted as an exception to the rule against hearsay, and the burden of demonstrating their voluntariness should fall on the prosecution in accordance with the general rule as to establishing facts which render hearsay evidence admissible.<sup>35</sup>

In regard to the standard of proof, Sri Lankan law follows English law which favours, in this connection, proof beyond a reasonable doubt.<sup>36</sup> By contrast, Australian law<sup>37</sup> and Canadian law<sup>38</sup> require proof on a balance of probabilities. In theory the Australian and Canadian position may seem attractive, since it conforms with the rule that the standard of proof based on the balance of probabilities applies to the determination of collateral facts such as those pertaining to admissibility of evidence.<sup>39</sup> However, in pragmatic terms, the attitude adopted by the courts of England and Sri Lanka is defensible, since the reception in evidence of a confession makes a conviction virtually inevitable, so that great circumspection is necessary in putting the confession to the jury.

- (ii) In Sri Lanka<sup>40</sup> a confession made to a police officer is inadmissible in evidence unless the confession is confirmed to, and reduced to writing by, a Magistrate.

33. *R. v. Amaris Appoo* (1895) 1 NLR 209; *R. v. Weerasamy* (1941) 43 NLR 152; *Perera v. Inspector of Police, Galagedara* (1955) 57 NLR 132; *R. v. Gnanaseeha* (1968) 73 NLR 154. But see, for the contrary view, *R. v. Franciscu Appuhamy* (1941) 42 NLR 553 at pp. 556-557 per Wijeyewardene, J.

34. See *R. v. Martin Singho* (1964) 66 NLR 391, per Basnayake, C.J. and *R. v. Kalimuttu* (1966) 69 NLR 349 at p. 352, per Sansoni, C. J.

35. J. D. Heydon, *Cases and Materials on Evidence* (Butterworths 1975), p. 182

36. *R. v. Sartori* (1961) Crim. LR 397

37. *R. v. Wendo* (1963) 109 C. L. R. p. 559

38. *R. v. Lee* (1952) 104 Can. Crim Cas. 400

39. Heydon, *op. cit.*, p. 182

40. Evidence Ordinance, section 86

The importance of this principle lies in the realization by the accused that he is in the presence of a judicial officer who has no connection with the police and that he has nothing to fear and can speak freely. He should be asked specifically whether he has been assaulted or threatened to induce him to make a statement, or been advised to make a statement, or whether any promise or inducement has been made to him.

The courts of Sri Lanka have insisted that any unwarranted departure from the formalities statutorily<sup>41</sup> required for the recording of a confession by a Magistrate, renders the confession inadmissible. For instance, a confession recorded by a Magistrate but taken under oath is inadmissible, because the law does not provide for the administration of an oath.<sup>42</sup> Where the Magistrate has been perfunctory in putting questions to the accused, the confession should be excluded.<sup>43</sup> *A fortiori*, if the Magistrate fails altogether to question the accused in order to satisfy himself that the confession was voluntary, no use can be made of the confession.<sup>44</sup> The omission by the Magistrate to read over the confession to the accused is a fatal irregularity.<sup>45</sup> The Magistrate is bound to probe adequately the accused's motive in making the confession.<sup>46</sup> If the accused is in a state of fatigue, the Magistrate should not record the confession immediately.<sup>47</sup>

Judicial attitudes have placed emphasis on the requirement that the Magistrate's inquiry into the factors impelling the accused to make the confession, should be complete and persevering.

- (iii) The accused is further protected in Sri Lanka by the requirement that the voluntary nature of the confession should be established independently to the satisfaction of the jury, notwithstanding the Magistrate's certificate that the confession, in his opinion, has been made freely and spontaneously.

41. Criminal Procedure Code, section 134

42. *R. v. Mudianse* (1918) 21 NLR 48, per Shaw, J. A less stringent view has been taken in South Africa, *R. v. Van As* 1941 A. D. 361

43. *R. v. Mudiyanselage Ranhamy* (1937) 2 C. L. J. 104, per Abrahams C. J.

44. *R. v. Bilinda* (1926) 27 NLR 390, per Jayewardene, A. J.

45. *R. v. Karaly Muttiah* (1940) 41 NLR 172, per Mosley, J.

46. See the case cited at note 43, *supra*.

47. *ibid.*

The law of Sri Lanka expressly provides that "No Magistrate shall record a statement being a confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily".<sup>48</sup> Nevertheless, the Magistrate's opinion is not conclusive,<sup>49</sup> in that it does not preclude the existence of an earlier taint.<sup>50</sup>

Indeed, it would seem that the certificate issued by the Magistrate does not give rise in Sri Lanka even to a tentative presumption. The law of Sri Lanka recognizes the maxim *omnia praesumuntur rite esse acta* in relation to official acts.<sup>51</sup> But it has been judicially asserted that the presumption is merely that all the necessary formalities purporting to have been performed have in fact been performed, and that it implies nothing about the voluntary or the truthful nature of the contents of a confession recorded by a Magistrate.<sup>52</sup>

In England the question whether a confession was voluntary is determined by the judge on the *voir dire*.<sup>53</sup> At this stage the central issue is not the truth, but the voluntary nature, of the confession. It is a cardinal aspect of the rules delineating the respective functions of judge and jury that the judge decides, as a preliminary issue, whether the confession is voluntary and, if so, puts it to the jury who will act on it only if they are convinced of its truth. The orthodox view that the jury is not entitled to exclude confessions which they consider involuntary, although it has been departed from in some controversial English decisions,<sup>54</sup> has consistently found favour in other parts of the Commonwealth including Canada<sup>55</sup> and Australia,<sup>56</sup> and is now followed in England.<sup>57</sup> This traditional view, which has not been challenged in Sri Lanka, is sustained by a cogent rationale, in that the elements of the legal test governing the voluntary character of a confession may well be unintelligible to a jury who, in any

48. Code of Criminal Procedure Act No. 15 of 1979, Section 127 (3)

49. *R. v. Ranhamy* (1940) 42 NLR 221 at p. 225, *per* Soertsz, J.

50. *R. v. Weerasamy* (1941) 43 NLR 154 at p. 157, *per* Soertsz, J.

51. Evidence Ordinance, Section 80

52. *R. v. Wittie* (1960) 63 NLR 121 at p. 124, *per* Sansoni, J.

53. R. Cross, *Evidence* (Butterworths, 3rd Edition, 1957), p. 56

54. *R. v. Bass* (1953) 1 Q. B. 680-; *R. v. Hammond* (1941) 3 All ER 318

55. *R. v. Weighill* (1945) 2 D. L. R. 471; *R. v. Hnedish* (1958) 26 W. W. R. 685; *R. v. Laplante* (1959) O. W. N. 80

56. *R. v. Basto* (1954) 91 C. L. R. 628.

57. *R. v. Burgess* (1968) 2 Q. B. 112; *R. v. Ovenell* (1969) 1 Q. B. 17.

event, may find it puzzling to be directed that they are precluded from acting on a confession which they believe to be true, if they consider the confession involuntary.

The burden of proof in English law was referred to by Lord Edmund-Davies in the recent case of *Wong Kam-Ming v. R.*<sup>58</sup> The principle applicable was stated to be that where, on a *voir dire*, the accused's statement had been ruled inadmissible, the prosecution is not entitled at the trial of the general issue to adduce evidence as to what the accused said during the *voir dire* or to cross-examine him on the basis of what he said; and that, accordingly, the calling of the shorthand writers and the Crown's cross-examination constituted substantial irregularities which resulted in evidence being placed before the jury wrongly. This view is in accord with previous authority.<sup>59</sup>

The predominantly positive appraisal which has been made so far of the law in both jurisdictions has to be qualified, by reference to some anomalous aspects of the prevailing rules. It is submitted that the approach adopted by both Sri Lankan law and English law to the attributes of "voluntariness" in the context of confessions is unduly restricted in several respects.

- (a) Only an inducement, threat or promise which has "reference to the charge against the accused person",<sup>60</sup> has the effect of depriving a confession of its voluntary quality in Sri Lanka.

A similar requirement has been postulated in respect of English law, in textbooks<sup>61</sup> as well as in some decided cases.<sup>62</sup> The suggested justification of this rule is that it facilitates the confinement of the exclusionary doctrine of the common law, as applied to confessions, within acceptable limits. However, the illogical effect of the limiting principle is demonstrable. "Suppose that a daughter is accused of shop-lifting and later her mother is detected in a similar offence, perhaps at a different branch, where the mother is brought before the manager of the shop. He might induce her to confess by telling her that she must tell him the truth and it will be worse for her if she does not; or the inducement might be that if she will tell the truth he will drop proceedings against the

58. (1979) 2 W. L. R. 81

59. *R. v. Treacy* (1944) 2 All E. R. 229. See also *R. v. Spilsbury* (1835) 7 C. & P. 187

60. Evidence Ordinance, section 24.

61. Joy, *Confessions* (1842) p. 13; of Taylor, *Evidence* (1st edition, 1848), p. 592

62. *R. v. Joyce* (1957) 3 All E. R. 623, per Slade, J; *R. v. Shuter* (1965) Times 27 November, per Fenton Atkinson, J; *R. v. Lloyd* (1834) 6 C. & P. 393

daughter. Obviously, the latter would in most cases be far the more powerful inducement and far the more likely to lead to an untrue confession."<sup>63</sup>

A well-known Sri Lankan case<sup>64</sup> concerned a prosecution under Income Tax Ordinance for making a false return of income. One of the matters for decision was whether statements of a confessional nature made by the assessee to the Deputy Commissioner of Inland Revenue were admissible in evidence against him. Weeramantry, J. concluded on the facts of the case that there had been no offer of a settlement and no inducement to settle, since the Department had made no promise to waive its right to prosecute the assessee. The confession was held admissible on the basis that "the advantage gained or evil avoided was certainly not in reference to the criminal proceedings against the accused."<sup>65</sup>

This construction of the law is unavoidable in Sri Lanka where the criterion based on "reference to the charge against the accused" is expressly adverted to by statute.

For English law, the House of Lords declared in *Customs and Excise Commissioners v. Harz and Power*<sup>66</sup> that it is not invariably necessary, to render a confession inadmissible, that the improper inducement or threat must relate to the prosecution. This approach is carried even further by the statement of Edmund Davies, L. J., in *R. v. Middleton*<sup>67</sup>: "The question that arises in this appeal is whether there is any authority for the proposition that the inducement or threat is relevant only if it infringes on the small circle embracing the alleged offender and members of his family and possibly, his very close inmates.... Each member of this Court does not so regard it."<sup>68</sup>

(b) The harm threatened or the benefit proffered, to render the confession inadmissible in Sri Lanka, must be "of a temporal nature".<sup>69</sup> This excludes any kind of spiritual or "other-worldly" retribution or penance which may be feared. The limitation involved is that any form of apprehension, or hope of advantage, is not sufficient. The fear or hope entertained by the accused at the time of making the confession must be of the kind specified.

63. *Customs and Excise Commissioners v Harz* (1967) 1 A. C. 730 (H. L.), per Lord Reid

64. *Jayanetti v Mitrasena* (1968) 71 NLR 385.

65. At page 393

66. (1967) 1 A. C. 760

67. (1974) 2 All E. R. 1190

68. At page 1194

69. Evidence Ordinance, section 24

A similar qualifying principle has been adverted to by the English courts. In accordance with the principle that the inducement must relate only to temporal and not to spiritual or moral consequences,<sup>70</sup> it has been held that the inducements contained in the words "I hope you will tell me the truth, in the presence of the Almighty"<sup>71</sup> and "Don't run your soul into more sin, but tell the truth"<sup>72</sup> do not render confessions inadmissible.

The defence of this rule, propounded by Joy<sup>73</sup> and supported by Wigmore<sup>74</sup> is that "It seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would confess himself guilty of a crime of which he was not guilty. Such spiritual convictions or spiritual exhortations seem from the nature of religion, the most likely of all motives to produce truth. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth". However, this argument is not entirely convincing. It has been aptly pointed out that "A remark from a priest to a simple parishioner in the presence of a policeman might be calculated to lead to an untruth, however sound the rule is in the generality of cases."<sup>76</sup>

This limitation which has its origin in the English common law<sup>76</sup> has little to commend it in terms of policy. A confession induced by threats or promises should be ruled out as evidence because of the element of coercion operating on the mind of the accused. It is not difficult to conceive of circumstances in which threatened evil of a non-temporal nature is likely to be more effective in breaking down the accused's willpower and resolve than harm of a mundane character which is sought to be forestalled. This distinction, rigidly made by Sri Lankan law as well as by English law, has no relevance to the quality or degree of the pressure brought to bear on the accused person's mind.

(c) In Sri Lanka, an inducement, threat or promise renders a confession inadmissible only if it proceeds from "a person in authority" or "from another person in the presence of a person in authority and with his sanction."<sup>77</sup>

70. *R. v. Gilhams* (1828) 11 Mood. C. C. 186; J. D. Heydon, *Cases and Materials on Evidence* (London, 1975), p. 173.

71. *R. v. Wild* (1835) 1 Mood C. C. 452

72. *R. v. Sleeman* (1853) Dears. 249

73. *Confessions*, p. 51

74. *Evidence*, paragraph 840

75. Heydon, *op. cit.*, pages 173-174.

76. *R. v. Gibbons* (1823) 1 C & P 97; *R. v. Tyler and Finch* (1823) 1 C & P 129

77. *Evidence Ordinance*, section 24.

The phrase "a person in authority" is amenable to more than one interpretation. The narrower interpretation of the phrase is that it denotes exclusively a person having power to control criminal proceedings which involve jeopardy to the accused. According to the broader interpretation, a person in authority can be as much one who has authority or control over an employee as one who exercises authority over proceedings or a prosecution against him.

The decided cases in Sri Lanka uniformly support the broader view. In three cases<sup>78</sup> the superintendent of a plantation who had exhorted the accused, an employee on the estate, to make a confession relating to an alleged theft of property under the superintendent's control, was held to be a "person in authority." On the other hand, a person who detained a suspect until the arrival of the police on the scene, has not been considered, *ipso facto*, "a person in authority."<sup>79</sup>

Clearly, the reason for the emphasis on "a person in authority" as the source from which the threat or promise emanates, is that an inducement made by such a person is more likely to operate effectively on the accused's mind and to culminate in a confession. However, if the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, there may be a similar risk that in some circumstances the confession may not be true, if induced by a promise held out by a person not in authority, for instance, if such a person offers a bribe in return for a confession.<sup>80</sup> An example of such a situation is provided by the facts of a leading case<sup>81</sup> where the accused confessed to B, a "trusted friend", while in police custody, in response to B's promise to help him recover certain money he was alleged to have stolen. The Privy Council held the confession admissible on the ground that the inducement did not come from "a person in authority."

This result, it is submitted, is not defensible from the standpoint of policy. Indeed, the English Law Revision Committee has recommended the abolition of the "person in authority" rule on the practical ground that effective inducements are just as likely to proceed from persons not in authority.<sup>82</sup> Recognizing this, South African courts, for example, have

78. *Hodson v. George* (1909) 12 NLR 273; *Seeni v. Alagana* (1916) 3 C. W. R. 274; *R. v. Goonetilleke* (1970) 74 NLR 118

79. *R. v. Weerasamy* (1942) 43 NLR 207

80. *Customs and Excise Commissioners v Harz* (1967) 1 A. C. 760

81. *Deokninan v. R.* (1969) 1 A. C. 20

82. 11th Report, paragraph 58

accepted that "undue influence" is not limited to inducements relating to the prosecution or proceeding from a person in authority.<sup>83</sup> However, the "person in authority" rule is firmly embedded in the English case law.

A constable or other officer having the accused in custody,<sup>84</sup> a private individual arresting a person accused of felony, the prosecutor<sup>85</sup> or his wife<sup>86</sup> or a partner's wife where the offence concerned a partnership,<sup>87</sup> the prosecutor's attorney,<sup>88</sup> the accused's employer if the offence had been committed against his person or property,<sup>89</sup> a magistrate,<sup>90</sup> a magistrate's clerk,<sup>91</sup> a coroner,<sup>92</sup> and a high-ranking officer like a sergeant vis-a-vis a soldier<sup>93</sup> or a headmistress vis-a-vis schoolgirls<sup>94</sup> have all been held to be "persons in authority". On the other hand, a private person to whose temporary custody the accused has been committed by a constable,<sup>95</sup> the chaplain of a gaol,<sup>96</sup> a doctor called in by the police to examine an accused person,<sup>97</sup> the captain of a ship vis-a-vis his crew,<sup>98</sup> the wife of a constable,<sup>99</sup> an insurance adjuster,<sup>100</sup> a fellow servant<sup>101</sup> and a trusted friend<sup>102</sup> are not "persons in authority" in this context.

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83. *R. v. Frans Selepi* 1919 TPD 105 at p. 110; *R. v. Gwija* 1960 (4) S. A. 435 (C); cf. *R. v. Khan and Duncan* 1954 (2) S. A. 23 (N); L. H. Hoffman, *South African Law of Evidence* (Durban) (1963) p. 351. However, some South African cases refer to the "person in authority" requirement: see, for instance, Innes, C. J. in *R. v. Barlin* (1926) A. D. 459 at pp. 462 and 465.
84. *R. v. Shepherd* (1826) 7 C & P 579
85. *R. v. Jenkins* (1822) Russ. & Ry. 492
86. *R. v. Upchurch* (1836) 1 Mood 465
87. *R. v. Warrington* (1852) 2 Den. 447 n
88. *R. v. Croydon* (1846) 2 Cox 67
89. *R. v. Moore* (1852) 2 Den. 522; cf. *R. v. Wilson* and *R. v. Marshall-Graham* (1967) 2 Q. B. 4C6
90. *R. v. Cooper* (1833) 5 C & P 535; *R. v. Gillis* (1866) 11 Cox 69
91. *R. v. Drew* (1837) 8 C & P 140
92. *R. v. Waltho*, *The Times*, June 17, 1905
93. *R. v. Smith*, (1959) 2 Q. B. 35
94. *R. v. McLintock* (1962) Crim. L. R. 549
95. *R. v. Enoch* (1833) 5 C. & P. 539; *R. v. Windsor* (1864) 4 F & F. 363
96. *R. v. Gilham* (1828) 1 Mood. 186
97. *R. v. Nowell* (1948) 1 All E. R. 794. A different view was taken for Scots law in *Reid v Nixon* (1948) Sess. Notes 17.
98. *R. v. Moore* (1852) 2 Den. 526
99. *R. v. Hardwick* (1811) 1 C. & P. 98n
100. *R. v. Eftoda* (1965) 37 D. L. R. 269
101. *Keefe v. R.* (1917) 21 W. A. R. 88
102. *Deokinanan v. R.* (1969) 1 A. C. 20

If a person in authority makes an inducement and a confession is then made, but to a different person in authority, it can be excluded.<sup>103</sup> The result is different if the inducement proceeds from one not in authority and the confession is made to one in authority.<sup>104</sup>

The principle has been authoritatively formulated<sup>105</sup> for English law that, to exclude a confession, the inducement must have been held out by a person in authority,<sup>106</sup> or by someone acting in the presence and without the dissent of such a person,<sup>107</sup> or perhaps by someone erroneously believed by the accused to be in authority.<sup>108</sup>

The intention of the framers of the Evidence Ordinance of Sri Lanka was to modify and establish in the Island the principles of the English Law of Evidence subject to appropriate modification.<sup>109</sup> The condition of English law during the nineteenth century on this topic has been described as "liberalism run wild".<sup>110</sup> A variety of factors such as the unscrupulous methods frequently resorted to by the police, the ignorance or poverty of accused persons, the harshness of the penalties prescribed by the criminal law for comparatively trivial offences in early times and the inherent bias of English law against acquiescence in self-incrimination by the accused cumulatively gave rise in England to a climate of judicial opinion pervaded by overt hostility to the reception of confessions in evidence. The reaction to this spirit of unbridled liberalism had set in before the end of the nineteenth century when the Evidence Ordinance of Sri Lanka, modelled on the lines of the Indian Evidence Act, was drafted in conformity with trends and attitudes current in England.<sup>111</sup> It is against this background that the law of Sri Lanka purported to restore the equilibrium by giving due weightage to the legitimate interests of the prosecution. With this objective in view, the exclusionary rules pertaining to confessions were formulated by Sri Lankan law with in-built restrictions which have the effect of whittling down appreciably the protection conferred on the accused.

103. *R. v. Cooper* (1833) S. C. & P. 535

104. *R. v. Tyler and Finch* (1823) 1 C & P 129; *Deokinanan v. R.* (1969) 1 A. C. 20

105. Phipson, *Evidence* (10th edition 1963), p. 330

105. *R. v. Simpson* (1834) 1 Mood. 410; *R. v. Boughton* (1910) 6 Cr. App. Rep. 8

107. *R. v. Pountney* (1836) 7 C. & K. 302; *R. v. Laughler* (1846) 2 C. & K. 225 *R. v. Jones* (1885) 49 J. 1. 728

108. But see *R. v. Frewin* (1855) 6 Cox. 530

109. *Attorney-General v. Rawther* (1924) 25 NLR 385 at p. 389, *per* Pertram, C. J.

110. *R. v. Baldrý* (1852) 2 Den. 430; *cf. R. Cross op. cit.*, p. 446

111. G. L. Peiris, *The Law of Evidence in Sri Lanka (Lake House Investments)* 2nd edition, (1977), pages 7-10

Nevertheless, this approach to the criteria subsumed in the definition of the "voluntary" character of a confession is exposed to fundamental criticism. A New Zealand court has observed that "In broad terms any circumstance which robs a confession of the quality described by the word 'voluntary' will render the confession inadmissible."<sup>112</sup> The symmetry and logical development of the law should not be impaired by the superimposition of technicalities which do not lend themselves to rational justification. The House of Lords has made the apt comment, in an analogous context, that "If the tendency to reject confessions is thought to have been carried too far, it cannot be proper to try to redress the balance by engrafting on the general principle an illogical exception, which at best can only operate sporadically, leaving the mischief untouched in the great majority of cases".<sup>113</sup>

In a jurisdiction like Sri Lanka where the test of "voluntariness" of confessions incorporates formulae which inhibit, to some extent, a realistic evaluation of the impact of insidious pressures on the confessor's mind, it is of practical importance that the courts should have power to exclude confessions which are technically admissible on the ground of substantial unfairness to the accused.

The structural framework of English law is seen, in this connection, to have intrinsic value. The approach of English law to the admissibility of confessions in criminal proceedings is founded on three cardinal principles: (i) a confession which does not satisfy the test of "voluntariness" is strictly inadmissible as a matter of law, (ii) a confession which has been obtained in contravention of the Judges' Rules may be excluded as a matter of discretion; (iii) a confession the reception of which involved unfairness to the accused may also be excluded at the court's discretion.<sup>114</sup>

The Judges' Rules in England have been described as "an expression of the Judge's discretionary power to exclude evidence unfairly or oppressively obtained."<sup>115</sup> Similar guidelines are followed as a matter of practice in other jurisdictions like Nigeria and the Australian State of Victoria. According to the English Criminal Law Revision Committee, "In practice it seems that nowadays, before the prosecution can adduce evidence of a statement obtained in breach of the Rules, there must be a positive decision by the

112. *R. v. William* (1959) N. Z. L. R. 502

113. *Customs and Excise Commissioners v. Harz* (1967) 1 A. C. 760, *per* Lord Reid.

114. T. D. Heydon, *op. cit.*, p. 168

115. P. Devlin, *The Criminal Prosecution in England* (London) (1960), p. 37

court to exercise its discretion in favour of admitting the statement."<sup>116</sup> The burden of proving that violation of the Judges' Rules leads to exclusion should rest, both in principle and on authority,<sup>117</sup> on the accused.

Although there is a partial overlap between rules (ii) and (iii) set out above in relation to English law, their spheres of operation are not coextensive. The Judges' Rules merely represent an example of the manner in which confessions may be excluded in the court's discretion, notwithstanding their voluntariness.<sup>118</sup> Confessions which are not repugnant to the criteria governing voluntariness have been excluded in England on the ground of the confessor's age,<sup>119</sup> and in Canada on the footing of serious prejudice to the accused.<sup>120</sup> The limits of the discretion to exclude on grounds of unfairness are incapable of clear demarcation, but the Criminal Law Revision Committee in England has recommended retention of this discretion.<sup>121</sup>

Some of the English cases interpreting "voluntariness" have assumed a needlessly technical complexion. For instance, it has been authoritatively declared that the words "You had better tell the truth" have acquired a technical meaning involving either a threat or a promise.<sup>122</sup> This construction is supported by a *cursus curiae* during the nineteenth century.<sup>123</sup> The extent of the artificiality reflected in the view emerging from these cases is illustrated by the fact that, although the words "You had better tell the truth" have been held to import a threat or an inducement,<sup>124</sup> the addition of a qualification such as "Be a good girl and speak the truth"<sup>125</sup> and "You had better as good boys tell the truth"<sup>126</sup> has been considered to make a material difference.

It is difficult to conceive of a convincing distinction between cases in which the confession has been held to be voluntary and those in which a threat or inducement was thought to have led to the confession. As

116. 11th Report, paragraph 45

117. *R. Batty* (1963) v. R. 451

118. J. D. Heydon, *op cit*, p. 208

119. *R. v. Stewart* (1972) 56 Cr. App. Rep. 272

120. *R. v. Wray* (1970) 11 D. L. R. 675

121. 11th Report, paragraph 278

122. *R. v. Jarvis* (1867) L.R. 1 C.C.R. 96 *per Kelly*, C.B.

123. *R. v. Enoch* (1833) 5 C. & P. 539;

*R. v. Hearn* (1841) Car & M 109

*R. v. Garner* (1848) 1 Den. 329

*R. v. Baldry* (1852) Den. 442

124. See the cases cited at notes 122 and 123

125. *R. v. Stanton* (1911) 6 Cr. App. Rep. 198

126. *R. v. Reeve and Hancock* (1872) L. R. 1 C. C. R. 362

examples of the former category may be cited the words "You had better be careful what you reply"<sup>127</sup>, "Be sure to tell the truth",<sup>128</sup> "I hope you will tell because Mrs. G. can ill afford to lose the money,"<sup>129</sup> "I must know more about it",<sup>130</sup> "Now is the time to take (the stolen property) back to the prosecutrix",<sup>131</sup> "I am a constable. You will have to accompany me to the police station where you will be charged",<sup>132</sup> "What you say will be used as evidence against you",<sup>133</sup> "What you say will be used against or for you",<sup>134</sup> and "Take care, we know more than you think we know"<sup>135</sup>. On the other hand, the latter category is exemplified by cases involving the use of the words "It is no use to deny it, for there are the man and the boy who will swear they saw you do it",<sup>136</sup> "I dare say you had a hand in it; you may as well tell me all about it",<sup>137</sup> "You had better tell me all about the corn that is gone",<sup>138</sup> "If you tell me where my goods are, I will be favourable to you",<sup>139</sup> "I only want my money; if you give me that, you may go to the devil",<sup>140</sup> "If you don't tell me, you may get yourself into trouble and it will be the worse for you",<sup>141</sup> "If you don't tell me, I will send for a constable",<sup>142</sup> "If you decline to make a statement, we must draw our own conclusions",<sup>143</sup> "It will depend on your statement whether you are charged or not",<sup>144</sup> "I shall be obliged if you would tell me what you know about it; if you will not, of course we can do nothing for you",<sup>145</sup> "Now be cautious about your answers to the questions I am going to put about this watch",<sup>146</sup> "Do not be frightened; I hope nothing will happen to your husband beyond

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127. *R. v. Day* 147 C. C. C. Sess. Pap. 960  
 128. *R. v. Court* (1836) 7 C. & P. 486; *R. v. Holmes*, 1 Cox. 9  
 129. *R. v. Lloyd* (1834) 6 C. & P. 393  
 130. *R. v. Reason* (1872) 12 Cox. 228  
 131. *R. v. Jones* (1872) 12 Cox. 241  
 132. *R. v. Males* (1902) 137 C. C. C. Sess. Pap. 225  
 133. *R. v. Baldry* (1852) 2 Den. 430  
 134. *R. v. Lang* (1905) 142 C. C. C. Sess. Pap. 1427; *R. v. James* (1909) 2 Cr. App. R. 319  
 135. *R. v. Jarvis* (1867) L. R. 1. C. C. R. 96. See also *R. v. Moore* (1852) 2 Den. 52  
*R. v. Sleeman Dears.* (1853) 249; *R. v. Thornton*, (1826) 1 Lew 49; *R. v. Dingley*  
 (1845) 1 C. & K. 637; *R. v. Burley* (1818) 2 Stark Er. 3rd ed. n. 13; *R. v. Wright* 1 Lew. 48  
 136. *R. v. Mills* (1833) 6 C. & P. 146  
 137. *R. v. Craydon* (1846) 2 Cox. 67  
 138. *R. v. Rose* (1898) 18 Cox 717  
 139. *R. v. Cass* (1784) 1 Leach 293n  
 140. *R. v. Jones* (1809) Rus. and Ry. 142  
 141. *R. v. Coley* (1868) 10 Cox 536  
 142. *R. v. Richards* (1832) 5 C. & P. 318  
 143. *R. v. King* (1909) 151 C. C. C. Sess. Pap. 233  
 144. *R. v. Inger* (1901) 134 C. C. C. Sess. Pap. 505  
 145. *R. v. Partridge* (1836) 7 C. & P. 551  
 146. *R. v. Fleming* (1842) 1 Arm. M. & O. 330

the loss of his situation",<sup>147</sup> "This is a serious charge; take care that you do not say anything to injure yourself",<sup>148</sup> and "It will be the right thing to make a clean breast of it."<sup>149</sup>

The distinction drawn in these cases turned primarily on verbal and technical considerations and were, in the main, devoid of substance. In recent times a more realistic approach has been adopted by the English courts. Thus, it has been conceded that the surrounding circumstances are no less important than the terms of the inducement.<sup>150</sup> Moreover, although there is some authority to the contrary,<sup>151</sup> it is generally accepted today that nothing turns on the distinction between threats and promises<sup>152</sup> which are both viewed as factors violating the requirement of voluntariness. The general principle has been laid down that "Whatever be the nature of the inducement made and however trivial it may seem to the average man to have been, such an inducement will be at least capable of rendering the statement then made inadmissible. It will have that effect unless in a given case it becomes plain beyond a reasonable doubt that it did not operate at all on the mind of the person to whom it was made."<sup>153</sup> Although the use or threat of violence would undoubtedly result in a confession being characterized as involuntary,<sup>154</sup> it is clear in the present condition of the authorities that a similar conclusion could be reached justifiably in the complete absence of actual or threatened violence. There is no doubt that self-induced hopes entertained by the accused will not deprive the confession of its voluntary character.<sup>155</sup>

These principles have been applied consistently in recent English cases. In *R. v. Zaveckas*<sup>156</sup> the appellant was suspected by the police of having been connected with the commission of an offence. He was told by a police officer that an identification parade had been arranged and that if he was not picked out, he would be allowed to go. The appellant asked whether he would be given bail at once if he made a statement.

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147. *R. v. Harding* (1842) (Ir) M 40. 320

148. *R. v. Thompson* (1893) 2 Q. B. 12

149. *R. v. Hornbrook* (1843) 1 Cox 54. See also *R. v. Fennel* (1881) 7 Q. B. D. 147; *R. v. Upchurch* (1836) 1 M. C. C. 465; *R. v. Mansfield* (1881) 14 Cox. 639; *R. v. Windsor* (1864) 4 F. & F. 360; *R. v. Hearn* (1841) 1 C. & M. 109; *R. v. Cook* (1959) 2 Q. B. 340.

150. *R. v. Priestley* (1966) 50 Cr. App. Rep. 1831

151. *R. v. Williams* (1968) 52 Cr. App. Rep. 439

152. J. D. Heydon, *Cases and Materials on Evidence* (London, 1975) p. 169.

153. *R. v. Richards* (1967) 1 All E. R. 829 (C. A.), per Winn, L. J.

154. *R. v. Parratt* (1831) 4 C. & P. 570; *R. v. Luckhurst* (1883) 6 Cox C. C. 233

155. *F. v. Godinho* (1911) 7 Cr. App. Rep. 12 (C. C. A)

156. (1970) 1 All E. R. 413

On the police officer replying in the affirmative, the appellant made a statement admitting guilt. The lower court seems to have felt that it was not the police officer who, in the first instance, held out the inducement, since the appellant raised the question whether the making of the inducement would result in his being released on bail. However, the Court of Appeal had no doubt that the question asked by the appellant, together with the police officer's answers, amounted to an inducement. The conclusion reached in this case is substantially in accord with the ruling in *R. v. Northam*.<sup>157</sup>

When the accused's father told the accused in the presence of police officers: "Put your cards on the table, tell them the lot, if you did not hit him they cannot hang you", it was held by the Court of Appeal that the resulting confession could not be regarded as voluntary.<sup>158</sup> Similarly, where the police indicated to the accused that, if he made a statement, he might be tried by a military court and that his family would be spared the odium of publicity, an inducement was held to have been used.<sup>159</sup> A threat by a regimental sergeant major to put his men on parade and to keep them there until he was told who participated in a stabbing incident, deprives a confession of its voluntary character.<sup>160</sup>

In *D. P. P. v. Ping Lin*<sup>161</sup> Browne L. J. pointed out, on behalf of the English Court of Appeal, that the issue whether a statement is voluntary is basically one of fact and that, in determining the admissibility of such a statement, the trial judge should approach his task by applying the test enunciated by Lord Sumner in *Ibrahim v. R.*<sup>162</sup> in a common sense way to all the facts of the case in their context. The trial judge should ask himself whether the prosecution had proved that the contested statement was voluntary in the sense that it was not obtained by fear or prejudice or hope of advantage excited or held out by a person in authority. Emphasis was placed on the principle that it is not necessary, before a statement is held to be inadmissible because it was not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made. What has to be considered is whether a statement is demonstrated to have been voluntary rather than one brought about in an improper manner.

157. (1967) 52 Crim. App. Rep. 97

158. *R. v. Cleary* (1963) 48 Cr. App. Rep. 116

159. *Sparks v. R.* (1965) A. C. 964

160. *R. v. Smith* (1959) 2 Q. B. 35

161. (1973) 3 W. L. R. 419

162. (1914) A. C. 599

In *R. v. Isequilla*<sup>163</sup> the English Court of Appeal presided over by Lord Widgery C. J. conceded that conduct could amount to inducement although, on the facts of the case, no inducement was held to have been used. In this case three detectives acting on information about a proposed armed robbery went to a bank where they saw the appellant sitting in the passenger seat of a car. One of the detectives jumped into the car, caught hold of the appellant and handcuffed him. Another detective approached the car from the other side with a gun. Inside the car was a briefcase containing an imitation firearm and a note which read: "Keep calm. Hand over £3,000 or I'll blow your head off". When asked about the revolver and the note, the appellant began to cry, saying: "I won't cause any trouble, I have been very stupid". He was taken to a police car and asked what he had been intending to do. The appellant replied: "I was short of money and I was going to try and get some from the bank". He was cautioned and taken to a police station. At all times it was clear that the appellant was very frightened and, by the time he had arrived at the police station, he was completely hysterical. He was charged with, *inter alia*, possessing an imitation firearm and having an article for use in connection with theft. At his trial objection was taken to the admission of the confessions. The trial judge concluded that the detectives had acted properly and held that the confessions were admissible. The appellant was convicted and appealed, contending that, although the police officers had acted quite properly, their conduct had been such as to amount to an inducement to confess, even though that had not been their intention. The Court of Appeal, rejecting this contention, stated that the exclusion of a confession as a matter of law on the ground that it was not voluntary had to be related to some conduct on the part of the person in authority which was improper or unjustified, such as the offer of an inducement. This view is unequivocally supported by English<sup>164</sup> and Commonwealth<sup>165</sup> authority.

The difficulty of reaching an equitable result in keeping with the criteria as to voluntariness, spelt out or tacitly acted upon in some of the English cases, has provided an impetus for suggestions in regard to an entirely different approach to the admissibility of confessions. Thus, it has been suggested<sup>166</sup> that the judge should be given a discretion to exclude

163. (1975) 1 All E. R. 77

164. *R. v. Scott* (1856) Dears & B. 47 at p. 58, *per* Lord Campbell

165. *Naniseni v. R.* (1971), N. Z. L. R. 269

166. R. Cross, *Evidence* (3rd edition, London, 1967), p. 448

confessions which he considers to have been unfairly obtained<sup>167</sup> and that all confessions should be placed before the jury to assess their probative value<sup>168</sup>.

The anomalies resulting from the excessively technical criteria which governed the approach of the courts at one time to the interpretation of the requirement of voluntariness, were mitigated by the structure of English law. Even though a confession is treated as voluntary as a matter of law, the judge has a discretion to reject it if he considers that it was obtained in circumstances which would render its reception unfair to the accused.<sup>169</sup> Confessions obtained in breach of the Judges' Rules are liable to be rejected in England at the judge's discretion.<sup>170</sup>

The Judges' Rules drawn up in 1912 at the request of the Home Secretary for the guidance of police officers and revised in 1964, reflect a compromise between conflicting objectives. It had always been recognized that "It would be a lamentable thing if the police were not allowed to make enquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoners were left to themselves they would not have made them."<sup>171</sup> On the other hand, "it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produced the effects of that examination against him."<sup>172</sup>

It is a fundamental feature of the Judges' Rules that "These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice."<sup>173</sup> Three points have been emphasized judicially about the Judges' Rules: (a) They are not mandatory or even directed to the court at all. They are rules of conduct directed to the police.<sup>174</sup> (b) Where a statement has been made without caution in circumstances where compliance with the Judges' Rules would have necessitated a caution, or where the rules have been contravened in some other way, it is a matter for the trial judge to

167. See, for Scots law, *Brown v. H. M. Advocate* (1966) S. L. T. 105

168. *R. v. Baldry* (1852) 2 Den. 430

169. *R. Cross*, *op. cit.*, p. 446

170. *Ibid*

171. *R. v. Cook* (1918) 34 T. L. R. 515 (C. C. A.) *per* Darling, J.

172. *R. v. Male* (1393) 17 Cox C. C. 689 at p. 690, *per* Cave, J.

173. *R. v. Voisin* (1918) 1 K. B. 531

174. *R. v. Owenell* (1969) 1 Q. B. 17

exercise his own discretion as to whether the statement should be admitted or not.<sup>175</sup> (c) In exercising that discretion, so long as the statement is not inadmissible, the trial judge will apply his mind, *inter alia*, to such factors and principles as the balance between probative value and potential prejudice.<sup>176</sup>

The English courts, interpreting the Judges' Rules, have held that there should be no cross-examination after the accused is charged regarding the offence in question, but that this may properly occur respecting other offences.<sup>177</sup> The police are entitled to question a man without cautioning him on the basis of a hearsay underworld tip-off.<sup>178</sup> In interpreting the rules governing interrogation of persons in custody, the English courts have taken the narrow view that "custody" envisages police custody exclusively and not that of other authorities such as military officers<sup>179</sup> and mental institutions.<sup>180</sup> However, in the context of the Rule that "Persons other than police officers charged with the duty of investigating offences shall, so far as practicable, comply with (the Judges') Rules",<sup>181</sup> the English Court of Appeal has held that this principle extends beyond the police to professional investigators who are likely to know the caution and not ordinary citizens who by chance find themselves in a position where they happen to be interrogating suspects.<sup>182</sup> The principle is also established, in keeping with the spirit of the Judges' Rules, that the police ought not to interrogate persons in custody as to an offence suggested to have been committed by one of them<sup>183</sup> or confront such persons with one another.<sup>184</sup>

The principle that failure to observe the Judges' Rules does not necessarily render a confession inadmissible, was emphasized in *R. v. Stewart*.<sup>185</sup> This concerned an appeal against a conviction on six counts of housebreaking and larceny. The point in issue in appeal was the admissibility of the evidence of a detective constable of a conversation overheard between the appellant and his co-accused when they were both

175. *R. v. Lemasatef* (1977) 1 W. L. R. 812. See also *Beese v. Governor of Ashford Remand Centre* (1973) 3 All E. R. 689; *R. v. Osbourne* (1973) 2 W. L. R. 209; *Chan Wat-Keung v. R.* (1967) 1 All E. R. 101

176. *R. v. Prager* (1973) 1 All E. R. 114, *per* Edmund Davies, L. J.

177. *R. v. Buchan* (1964) 1 All E. R. 502

178. *R. v. White* (1964) Crim. L. R. 720 (C. C. A.)

179. *R. v. Harris-Rivett* (1936) 1 Q. B. 220

180. *R. v. Straffen* (1952) 2 Q. B. 911

181. Judges' Rules, Rule VI

182. *R. v. Nichols* (1967) 51 Cr. App. Rep. 233

183. *R. v. Grayson* 16 (1921) Cr. App. Rep. 7

184. *R. v. Pilley* 16 (1922) Cr. App. Rep. 138

185. (1970) 1 All E. R. 689

confined in cells at a police station. The detective constable had been put in a nearby cell in civilian clothes. Counsel for the appellant contended that this evidence ought not to have been admitted, since it was obtained by the effect of a trap and, although not contrary to the actual letter of the Judges' Rules, amounted to a violation of their spirit. However, Phillimore, L. J., delivering the judgment of the Court of Appeal pointed out that there was clearly a discretion in the court in such a case and that the discretion had been rightly exercised. The court noted that this was not a matter involving life and that the conversation was not only inconsistent with innocence but showed that the accused persons were planning to concoct alibis.

It is submitted that the English courts could adopt with advantage the principle favoured in Australia<sup>186</sup> that the burden of proving that a breach of the Judges' Rules should lead to exclusion of the statement, devolves on the accused.

The resilience and malleability of English law are illustrated also by the principle that a confession, the reception of which involves unfairness to the accused, should be excluded by the trial judge. It has been declared to be a fundamental principle of English law that "No answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements."<sup>187</sup> Moreover, the test of "oppression" in English law is predominantly subjective. "What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."<sup>188</sup>

It is submitted that a residuary discretion to exclude confessions on grounds of unfairness may be exercised properly and usefully by the courts of Sri Lanka. Although this jurisdiction has not been conferred by statute, its invocation may be supported by an argument based on analogy. The Evidence Ordinance of Sri Lanka embodies a series of elaborate definitions of "relevant facts" which are treated as judicially receivable evidence. Notwithstanding that the provisions of the statute governing admissibility are couched in imperative terms, the courts of Sri Lanka have claimed jurisdiction to exclude technically admissible evidence on grounds

186. *R. v. Batty* (1963) V. R. 451

187. *Callis v. Gunn* (1964) 1 Q. B. 595 at p. 501, per Lord Parker, C. J.

188. *R. v. Priestley* (1966) 51 Cr. App. Rep. 1, per Sachs, J., adopted by the Court of Appeal in *R. v. Prager* (1973) 1 All E. R. 1114 at p. 1119

of unfairness. This attitude is explicit in a judgment of Gratiaen, J., who ruled out, on this footing, a letter tendered in evidence by the prosecution. His Lordship declared: "It is important to realize that, on the one hand, the evidential value, if any, of the letter standing by itself is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial. I confess that this is a circumstance which weighs very considerably with me."<sup>189</sup> A residuary principle of exclusion, if acceptable in the setting of the doctrine relating to relevancy, has at least an equal justification in regard to confessions.

If judicial discretion to exclude a confession on grounds of substantial unfairness may be recognized in Sri Lanka, the concept of "oppression", as it has been developed within the framework of English law, becomes superfluous. In keeping with the English doctrine a court has a duty to exclude as "involuntary" confessions obtained in oppressive circumstances.<sup>190</sup> This duty is an example of the general involuntariness rule and arises from a basis of exclusion considerably narrower than the criterion of "unfairness" which involves an effective discretion on the part of the court. "Oppression", clearly, covers only part of the area catered for by the rule relating to "unfairness".

A broad conception of jurisdiction is desirable in this context. A parallel is suggested by the assumption of supervisory powers by the Supreme Court of the United States of America over inferior federal courts in regard to the reception in evidence of confessions in criminal proceedings.<sup>191</sup>

The guidelines reflected in the Judges' Rules in England are unsatisfactory in one respect. The Rules require that, before any question is put to an accused person, he should be cautioned that he is not obliged to answer any of these questions but that, if he does, the questions and answers will be taken down in writing and may be given in evidence.<sup>192</sup> The practical result of administering such a caution is, in most cases, to bring the interrogation to an end. The undesirability of stultifying police investigation of crime to this extent accounts for the view of the Criminal Law Revision Committee in England that the requirement relating to a

189. *R. v. Sathasivam* (1955) 55 NLR 255 at p. 257

190. *Contra*: Phipson, *The Law of Evidence* (12th ed., 1976), Sections 791-794, where the submission is made that a confession induced by oppression is in strict law admissible though a court should reject it in the exercise of its discretion.

191. *McNabb v. U. S.* (1943) 318 U. S. 332; *Mallory v. U. S.* (1957) 353 U. S. 449

192. Judges' Rules, paragraph 3 (b)

compulsory caution should not be retained.<sup>193</sup> It is submitted that the absence of a requirement of this nature from the law of Sri Lanka is justifiable.

The law of the United States of America goes even further than English law to protect the accused. American law concedes to the accused his right to be informed of the privilege to remain silent<sup>194</sup> and of his right to be represented by counsel<sup>195</sup> at public expense.<sup>196</sup> These rights have been held to emerge inferentially from the Fifth and Sixth Amendments to the American Constitution which declare, respectively, that "No person shall be compelled in any criminal case to be a witness against himself" and that "The accused shall have the assistance of counsel". Although these rights, apart from those conferred on accused persons by the United States Supreme Court through interpretation of the "due process" clauses in the Bill of Rights,<sup>197</sup> seem unassailably entrenched in American law, their content and scope signify a grave impediment to law enforcement. "To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation."<sup>198</sup> The American doctrines have found expression in a modified form in the law of other jurisdictions like Ireland and Papua-New Guinea. It is apparent, however, that their exclusion has enabled the law of England and Sri Lanka to evolve a more acceptable compromise between the conflicting interests of the accused and the community at large.

### 3. Confessions Made to Police Officers

Statutory provisions in Sri Lanka<sup>199</sup> incorporate a prohibition against the reception in evidence of a confession made to a police officer, unless the confession has been recorded by a Magistrate. Sri Lankan law has adopted the prohibition from the Indian Evidence Act 1872, based on the work of Sir Fitzjames Stephen.

193 11th Report (1972 Cmnd. 4991), paragraphs 43 and 52

194. *Miranda v. Arizona* (1966) 384 U. S. 436, *per* Warren, C. J.

195. *Escobedo v. Illinois* (1964) 378 U. S. 478

196. *Gideon v. Wainwright* (1963) 372 U. S. 335

197. See, for example, *Stein v. New York* (1953) 346 U. S. 156; *Wong Sun v. U. S.* (1963) 83 S. Ct. 407

198. *Miranda v. Arizona* (1966) 384 U. S. 436, *per* Harlan, J. (dissenting)

199. Evidence Ordinance No. 14 of 1895, section 25

The statutory bar on the use of confessions made to police officers is the subject of controversy. The rationale of the principle excluding confessions obtained in consequence of improper threats, inducements or promises is self-evident, and disagreement is possible only in regard to the scope and implications of this principle. However, the inadmissibility of confessions made to police officers is not a necessary feature of a rational system of criminal justice and indeed does not find recognition in Anglo-American law.

Wide powers need to be conferred on the police, since thorough questioning of the first suspected person often makes possible the pursuit of the right trail for the others<sup>200</sup>. Wigmore, while conceding that there are abuses by the police, denies emphatically that a strict rule of exclusion of confessions obtained by the police is the proper remedy.<sup>201</sup> The first remedy suggested by him is to improve police personnel, and the second is to provide a means of speedy confession which is less susceptible to abuses, while still taking advantage of the inherent psychological situation.

The practice in England is to exclude confessions made to police officers only if it is considered on a review of all the circumstances that they have been secured in an improper manner.<sup>202</sup> A distinguished English judge has commented that "It would be a lamentable thing if the police were not allowed to make inquiries."<sup>203</sup> The object of the Judges' Rules in England is to ensure that questioning of an accused by the police does not take place in a manner which involves unfair prejudice to the accused. Confessions obtained from accused persons contrary to the spirit of these Rules may be rejected as evidence by the judge presiding at the trial,<sup>204</sup> but Anglo-American law does not look on the mere circumstance that a confession was made to a police officer as a conclusive ground for ruling out the confession.

In accordance with the approach of English and American law confessions made to police officers do not require the application of a special test but are governed by the criteria relating to voluntariness. Thus, a confession is considered involuntary if it is made during an investigation which "by its nature, duration or other attendant circumstances excites

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200. Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition), para. 851

201. *ibid*

202. *McDermott v. R.* (1948) 76 NLR. 501

203. *R. v. Cook* (1948) 34 T. L. R. 515 (C. C. A.), *per* Darling, J.

204. *R. v. Voisin* (1918) 1 K. B. 531

hopes or fears, or so affects the mind of the suspect that his will crumbles".<sup>205</sup> Relevant factors in this connection are "the length of time of individual periods of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement."<sup>206</sup> The High Court of Australia has declared that confessions are involuntary if obtained by "prolonged and sustained pressure by police officers upon a prisoner in their hands until, through mental and physical exhaustion to which want of sleep and food sometimes contribute, he consents, in order to obtain relief, to make a confession of the crime."<sup>207</sup>

In England and in most Commonwealth jurisdictions, as well as in the United States of America, a confession made to a police officer is ruled out only if it does not satisfy the test of voluntariness or if its exclusion is considered desirable by the court on the footing of the "unfairness" rule.

In Sri Lanka, by contrast, if a confession has been made to a police officer, it is unnecessary to inquire whether it has been made voluntarily, for the confession is excluded absolutely in these circumstances.<sup>208</sup> The ground of exclusion is simply the relationship between the officer concerned and the accused.

A series of conflicting suggestions as to the rationale underlying this inflexible statutory bar emerges from the decided cases in Sri Lanka where judges have looked upon the exclusionary rule with favour.

(a) It has been suggested that an objective and dispassionate attitude cannot confidently be expected of police officers in Sri Lanka who "are not always proof against the temptation of deposing that the accused made some statement the effect of which is to strengthen the case for the prosecution or to clinch the charge against the accused."<sup>209</sup>

(b) The privilege against self-incrimination has been thought to lie at the root of the exclusionary principle. According to this view, it is of paramount importance to prevent the conviction of an accused person from being furthered by statements made by himself.<sup>210</sup>

205. Lord McDermott in an address to the Bentham Club (1968) 21 C. L. P. 10

206. *R. v. Priestley* (1965) 51 Cr. App. Rep. 1 at pp.1-2, per Sachs, J.

207. *Cornelius v. R.* (1936) 55 C. L. R. 235

208. *R. v. Sudahamma* (1924) 26 N. L. R. 220; *R. v. Packeer Tamby* (1931) 32 N.L.R. 262.

209. *R. v. Kalubanda* (1912) 15 N.L.R. 422 at p. 425, per Lascelles, C. J.

210. *R. v. Buddharakkita* (1961) 63 N.L.R. 43 at p. 47, per T. S. Fernando, J.

(c) Importance has been attached to the discouragement of abuse of authority by the police which could erode the fundamental rights of the citizen. The Supreme Court has asserted that "The risk is great that the police will accomplish behind their closed doors precisely what the demands of our legal order forbid."<sup>211</sup>

(d) The suggestion has been made that the likelihood of testimonial untrustworthiness militates against the admission of confessions made to police officers. "Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow and the law recognizes and provides against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying".<sup>212</sup>

In Sri Lanka where the Evidence Ordinance contains no definition of a "police officer", definitions in other statutes like the Police Ordinance<sup>213</sup> and the Criminal Procedure Code<sup>214</sup> have been called in aid. The consensus of judicial opinion in Sri Lanka is that a mudaliyar (an executive official) who holds an inquiry at the request of a Government Agent into a departmental petition, is a "police officer".<sup>215</sup> However, it has been held that a Police Magistrate who purports to perform the duties of a police officer without legal authority, cannot be considered a "police officer"<sup>216</sup>. The Sri Lankan cases indicate on the whole an elastic approach to the definition of a "police officer", in that the established practice of the courts has been to construe the section as applying to statements made to those who are authorized to exercise powers which constitute them police officers in all but in name—such persons, for instance, as police headmen who are directly authorized and required to concern themselves with the same range of crimes as that with which the police force themselves are concerned.<sup>217</sup>

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211. *R. v. Gnanaseeha* (1968) 73 N.L.R. 154 at p. 180

212. *R. v. Murugan Ramasamy* (1964) 66 N.L.R. 265 at p. 268 (P. C.), per Viscount Radcliffe.

213. No. 16 of 1865

214. No. 15 of 1898

215. *Nuge Kanny v. Pables Perera* (1908) 1 Tambiah Reports 25; cf. *Vidane Arachchi of Kalupe v. Appu Sinno* (1921) 22 N.L.R. 412.

216. *R. v. Sepala* (1937) 38 N.L.R. 285 cf. *Siva Subramaniam v. Kandan* (1907) 1 Cr App. Rep. 79; *Wilbert v. Vanden Driesen* (1960) 62 N. L. R. 381

217. *Rose v. Fernando* (1927) 29 N.L.R. 45 at p. 47 per Fisher C. J.

English law, instead of imposing a blanket exclusion of confessions made to police officers, endeavours by means of the Judges' Rules to regulate and control the interrogation of persons under suspicion by the police.<sup>218</sup>

Rule I permits police questioning of any person, whether a suspect or not, even if he is in custody, provided that he has not been charged with, or informed that he may be prosecuted for, the offence concerning which the questions are put.

Rule II requires a caution to be given as soon as a police officer has evidence which would afford reasonable grounds for suspecting that the person interrogated has committed an offence. By "evidence", in this context, is meant information which can be placed before a court.<sup>219</sup>

Rule III requires a further caution to be administered when that person is charged or informed that he may be prosecuted, and provides that it is only in exceptional circumstances that questions may be put thereafter. The "charge" contemplated by Rule III is the formal charge, and not the informal charge given on suspicion.<sup>220</sup>

Rule IV governs the taking down of statements, while Rule V is concerned with the case of two persons charged with the same offence. If the reply made by a prisoner to whom his co-accused's statement has been improperly read is intelligible without reference to the statement, it may be received in evidence against him as a confession, otherwise it will probably be excluded.<sup>221</sup> Rule VI declares that persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with the Rules.

It must be pointed out, however, that the total exclusion of confessions made to police officers may have a convincing practical justification, in the Sri Lankan context. Social attitudes and values have immediate relevance in this regard. The relationship between the police and the public, particularly in the rural areas of Sri Lanka, renders intelligible the absolute refusal of the law to receive in evidence confessions made to police officers.

218. See R. Cross, *Evidence* (4th edition London 1974) p. 491.

219. *R. v. Osborne and Virtue* (1973) 1 All E. R. 649;

220. *R. v. Brackenbury* (1965) 1 All E. R. 960; *R. v. Collier* (1965) 3 All E. R. 136.

221. *R. v. Gardner and Hancox* (1918) 11 Cr. App. Rep. 265; *R. v. Mills and Lemon* (1946) 2 All E. R. 776.

#### 4. Confessions Made While the Accused is in Police Custody

The law of Sri Lanka provides that "No confession made by any person while he is in the custody of a police officer, unless it be in the immediate presence of a magistrate, shall be proved as against such person."<sup>222</sup> English law embodies no comparable limitation.

The policy objectives underlying the limitation are clear. "It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears."<sup>223</sup> The basis of the statutory exclusion applicable in Sri Lanka may well be explained by adapting the words of the United States Supreme Court: "In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued - even if it is only repeated at intervals, never protracted to the point of physical exhaustion - inevitably suggests that the questioner has a right to, and expects, an answer."<sup>224</sup>

The phrase "in the custody of a police officer" has been interpreted widely in the case law. All circumstances in which the accused remains in the custody of the police while inquiries are made by them have been considered to fall within the purview of the statutory bar.<sup>225</sup>

The Sri Lanka courts have expressly declined to recognize, in this context, any distinction between lawful and unlawful police custody,<sup>226</sup> and insisted that the exclusionary principle governs both situations. Moreover, the concept of "police custody" does not necessarily connote the immediate presence of police officers, so long as the accused persons are aware that the place where they are detained is readily accessible to the police.<sup>227</sup> Indian decisions even refer to "the vitiating effect on a confes-

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222. Evidence Ordinance, section 26

223. *R. v. Johnston* (1864) Ir. C. L. 60 per Hayes, J.

224. *Culombe v. Connecticut* (1961) 367 U. S. 568, per Frankfurter, J.

225. *R. v. Packeer Tamby* (1941) 12 N.L.R. 262; cf. *Don v. Appuhamy* (1899) 1 Tambiah Repts. 72

226. *Poulier v. Abeygunawardena* (1940) 41 N. L. R. 347; *Iyer v. Galboda* (1942) 44 N. L. R. 94.

227. *R. v. Gnanaseeha* (1968) 73 NLR 154; *Iyer v. Galbada* (1942) 44 NLR 94.

sion to a magistrate of certain types of custody to which the accused persons are sent either during the time allowed for reflecting or after the confession has been recorded."<sup>228</sup>

According to these decisions, police custody is not permissible even in the immediate aftermath of the recording of a confession by a magistrate.

It is one thing to accept, as Anglo-American law does, that "statements obtained from prisoners contrary to the spirit of the (Judges') Rules may be rejected as evidence."<sup>229</sup> It is another to protect an accused person by forbidding the proof of a confession, even when made of his own free will, to a police officer or when in the custody of a police officer, except in the immediate presence of a magistrate. Sri Lankan and Indian law adopt the latter approach. The reason, probably, is that, even if in fact no improper pressure has been brought to bear on the mind of the accused, the likelihood of this contingency is too great to justify, as a matter of policy, acquiescence in the reception of a confession made in these circumstances.

English law does not favour a principle of inflexible exclusion of confessions made while the accused is in police custody. The courts of England have admitted in evidence statements made or letters written by an accused person in police custody to the prosecutor,<sup>230</sup> to outside friends,<sup>231</sup> to his wife,<sup>232</sup> or even to himself,<sup>233</sup> or confidences to a fellow prisoner overheard by the police.<sup>234</sup>

For purposes of comparison the provisions of South African law may be referred to briefly at this point. A distinction is made in South Africa between confessions made to a peace officer and confessions made when the accused is in the custody of a peace officer. The former are excluded absolutely, whatever the state of mind of the accused may have been at the time the confession was made, while the latter cannot be received in evidence only if the rule relating to voluntariness, postulated as a general test for the admissibility of confessions, has been contravened.<sup>235</sup> By con-

228. *Mat Bhanan v State of Pepsu* 1955 A.I.R. Pepsu 33; *Shibavasappa Thaiappa v State of Mysore* 1959 A.I.R. Mysore 47.

229. *R. v. Voisin* (1918) K. B. 531.

230. *R. v. Heal* (1905) 69 J. P. 224

231. *R. v. Robinson* (1917) 2 K. B. 108.

232. *Rumping v. D. P. P.* (1962) 3 W.L.R. 763.

233. *R. v. Simons* (1834) 6 C & P 540

235. *R. v. Gardner and Hancox* (1915) Cr. App. Rep. 265

235. South African Criminal Procedure Act, No. 51 of 1977, Section 217 (1).

trast, Sri Lankan law has the effect of removing both categories of confession from the ambit of the principle founded on voluntariness and of imposing a total prohibition on the use of both types of confessions *coram iudice*, without reference to the reasons which led the accused to make the confession in the particular case.

The position in Sri Lanka is that one statutory provision<sup>236</sup> bars all confessions to a police officer, whether made in police custody or outside it, while another<sup>237</sup> excludes confessions addressed to other persons than police officers, so long as the person making the confession is subject to the custody of a police officer. Only the first of these provisions finds an approximate parallel in South African law, while neither provision is part of English law.

The structure of the law would be logical if the criterion of voluntariness, however formulated, applies over the whole area of confessions. This is, substantially, the approach of the Anglo-American systems. However, when there are departures from this criterion in specific contexts, and the admissibility of confessions in particular circumstances is governed by different rules, the law may assume the appearance of a patchwork, since it may be difficult to draw together, on a uniform basis, the divergent formulae which determine admissibility. Thus, the distinction impliedly reflected in South African law between a confession made to a peace officer and a confession made while the accused is in the custody of a peace officer, seems unconvincing in terms of policy. It could well be argued that the voluntariness rule, if it is thought to confer inadequate protection on an accused person who has confessed to a peace officer, is equally inappropriate in the context of confessions made while the accused is in the custody of a peace officer. It would seem, logically, that the voluntariness rule should apply to both situations or to neither. The Sri Lanka statutory provisions are not open to criticism from this point of view, since they dispense with the voluntariness rule in both contexts. Nevertheless, from a policy standpoint, the position in Sri Lanka can perhaps be assailed on the ground that it entails excessive protection for the accused at the expense of effective law enforcement.

##### 5. The Doctrine of Confirmation by Subsequently Discovered Facts

The theory of confirmation of the substance of confessions by subsequently discovered facts is inextricably interlinked with acceptance of potential untrustworthiness as the rationale underlying the exclusion of confessions within limits demarcated by the law.

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236. Evidence Ordinance, section 25

237. Evidence Ordinance, section 26

It is a principle of English law that "If, in the course of an inadmissible confession, the party confessing states where stolen goods or a body may be found and they are found accordingly, this is evidence because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him."<sup>238</sup>

The element of discovery of the thing described, the *corpus delicti*, "though it provides no absolute guarantee of the truthfulness of the inadmissible confession, removes some of the risk that evidence may be manufactured".<sup>239</sup> This cannot be said, however, in regard to the mere pointing out by the accused of a place or object, if nothing is discovered as a result of such pointing out. No question of confirmation by the subsequent discovery of facts arises in these circumstances. It has been aptly observed that "If the inadmissible confession be not confirmed by the finding of the property, no proof either of the statements or acts can be received; for the influence which produces a groundless confession may equally produce groundless conduct."<sup>240</sup>

This approach, supported by a self-evident rationale, was adopted in an English case<sup>241</sup> where the accused was induced to confess that he had stolen some gowns and he pointed out to a constable the place where and the person to whom he had transferred them. It was held that the admission of evidence of these latter acts at the trial had been improper. The court declared: "The confession was excluded because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection".

In accordance with the rule statutorily formulated,<sup>242</sup> the courts of Sri Lanka have held that, where the *corpus delicti* is discovered in consequence of a confession made by one of the accused, and several other accused persons later make confessions to the police indicating the spot where the *corpus delicti* is concealed, no part of such confession is admissible, since the fact had already been discovered by the time the subsequent confessions are made.<sup>243</sup> The pointing out of an object by the accused is governed by the identical principle in Sri Lanka.

238. *R. v. Thurtell and Hunt* (1823) Notable British Trials, p. 145

239. *R. v. Tabetha* 1959 (2) S. A. 337 (A. D.) at p. 374, *per* Schreiner, J. A.

240. Phipson, *The Law of Evidence* (9th edition) p. 273

241. *R. v. Jenkins* (1822) Russ. and Ry. 492

242. Evidence Ordinance, section 27

243. *Punchi Banda v The State* (1973) 76 N. L. R. 293

In one case<sup>244</sup> where the Sri Lanka court was satisfied that the confession which led to the discovery of facts had been obtained from the accused by the use of compulsion, the Court of Criminal Appeal observed that "If a police officer forces an accused person, by the use of violence or threats of violence to make statements which are not his own, but the contents of which have been put into his mouth, those statements will not fall within the plain meaning of the word, "information" in section 27 of the Evidence Ordinance".<sup>245</sup> On this ground the confession was excluded *in toto*, although a material fact was discovered in consequence of it. To exclude a confession obtained by threats, the court was compelled in this case to resort to tortuous reasoning.

The relevant provision in Sri Lanka declares that "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."<sup>246</sup> The rationale underlying this provision is that "The reason for rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true"<sup>247</sup>. The vital limitation in the Sri Lanka provision is inherent in the words "as relates distinctly".

It is a necessary requirement that a clear nexus must be established between the information given by the accused and the subsequent discovery of a relevant fact. Where a police constable gave evidence at a trial that the accused had told him (i) that he had stolen a bicycle at the City Dispensary and (ii) that he had sold it to a carter, (i) was excluded on the ground that the information conveyed by these words had no direct bearing on the discovery of the stolen property.<sup>248</sup> Where a police officer in the course of his examination-in-chief, answered in the affirmative the question: "Did the accused tell you that articles that were subsequently recovered by you were in his custody and thereafter take you and point them out to you?", it was held that this evidence of the statement by the accused to the police officer was not admissible since the words "the property is in my custody" in the accused's statement were not directly relevant to the discovery of the stolen goods, nor could they be said to relate distinctly to their recovery.<sup>249</sup>

244. *R. v. Tennekone Mudiyanseilage Appuhamy* (1959) 60 N. L. R. 313

245. At p. 320

246. Evidence Ordinance, section 27

247. *R. v. Butcher* (1798) 1 Leach 265

248. *Justin Perera v. Inspector of Police, Slave Island* (1945) 46 N.L.R. 158

249. *R. v. Albert* (1960) 66 N. L. R. 543

On the other hand, where the accused told a police sergeant: "I can point out the place where I threw the katty", and then took the police to the spot and indicated it, the accused's statement was held admissible.<sup>250</sup> The required immediacy of the link between the accused's statement and the discovery of a fact was established in this case. Similarly, a statement by the accused in the following terms: "I hid the sword under some leaves close to the spot. I can point out the place to the police" was held to be admissible *in toto*.<sup>251</sup>

Analytically, five distinct approaches are possible to the central problem which arises in this area:-

- (a) neither the fact discovered nor any part of the confession constitutes admissible evidence;
- (b) what is admissible is the fact discovered, and nothing more;
- (c) the fact discovered may be proved together with the circumstance that its discovery was the result of a statement made by the accused;
- (d) the fact discovered may be proved, together with as much of the confession as relates strictly to it;
- (e) not merely the fact discovered but the entire confession is admissible.

Of these alternatives, position (d) is the result of statutory provisions applicable in Sri Lanka.

The effect of English law is equivocal.

Position (a) is supported by the decision of the Court of Criminal Appeal in *R. v. Barker*.<sup>252</sup> The accused was charged with taxation offences. A Ministerial statement from Hansard was read out to him and, as a result, he was in effect promised that if he made full disclosure of past frauds, no criminal proceedings would be instituted. The accused then produced fraudulent documents on the basis of which he was convicted. Tucker J., allowing his appeal, declared: "The court does not desire to question that there may be cases in which evidence can be given of facts the existence of which has come to the knowledge of the police as the result of an inadmissible confession. But in the present case the promise or inducement which

250. *R. v. Jinadasa* (1950) 51 N. L. R. 529

251. *R. v. Piyadasa* (1967) 72 N. L. R. 434

252. (1941) 2 K. B. 381

was implied in this extract from Hansard expressly related to the production of business books and records, and the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the persons to whom the promise or inducement is held out, or the threat made, those documents stand precisely on the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat."<sup>253</sup>

Although there is an obvious difference between a book containing fraudulent accounts and a confession of past fraudulent accounting,<sup>254</sup> the Court of Criminal Appeal appears to have treated the account books as a prepared confession rather than an independent fact.

Position (b) is consistent with the early cases of *R. v. Mosey*<sup>255</sup> and *R. v. Harvey*<sup>256</sup>. *R. v. Lockhart*<sup>257</sup> extended the doctrine to permit the reception of evidence the identity of which had been discovered through the confession.<sup>258</sup>

The view emerging from these cases is confirmed by the ruling in *R. v. Warickshall*<sup>259</sup>. The accused was charged with receiving stolen property. It was found hidden in her bed in consequence of her improperly induced confession. The evidence of the finding was admitted. Nares, B. (with Eyre, B. concurring) said: "This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner whether the confession from which it derives be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived."

In *R. v. Berriman*<sup>260</sup> Erle, J, following the decision in *R. v. Warickshall*, reasserted that, although facts discovered in consequence of inadmissible confessions may be received in evidence, no part of the confession is rendered admissible by the discovery of the facts to which it relates.

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253. At pages 384 — 385

254. R. Cross, *Evidence* (4th edition, London, 1974), p. 280

255. (1784) 1 Leach 265

256. (1800) 7 East P. C. 658

257. (1765) 1 Leach 386

258. Heydon, *op. cit.*, p. 224

259. (1783) 1 Leach 263.

260. (1854) 6 Cox C. C. 388

(c) At the beginning of the nineteenth century East<sup>261</sup> was able to cite two unreported cases – *R. v. Hodge* (1794) and *R. v. Grant* (1801) – in support of his view that it was proper to leave to the jury “the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner’s having stolen or put them there, which is to be collected or not from all the circumstances of the case.”

There is judicial authority in England in support of position (d).

In *R. v. Griffin*<sup>262</sup> the accused was improperly induced to confess and handed over a £5 Reading Bank note, saying that it was one of the notes stolen from the prosecutor. The accused could not identify the note except that its sum and drawee corresponded with those of one of the stolen notes. A majority of the judges held that it was right to admit the prisoner’s description of the note as well as the fact of delivery.

*R. v. Gould*<sup>263</sup> was a case where the accused was charged with burglary. He was improperly induced to confess and, as a result, a lantern was found by a policeman in a certain pond. Tindal, C. J., and Parke, B., were both of the opinion that the words used by the prisoner, with reference to the thing found, might be given in evidence. The policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock’s Fields. The other parts of the statement were not given in evidence.

It would appear that position (d), besides representing Sri Lanka law, is firmly entrenched in Canadian law.<sup>264</sup>

English authority for position (e) is slender. In *R. v. Garbett*<sup>265</sup> Martin, counsel for the prosecution, submitted that a statement made by a person is always evidence against him, except in two cases, the second being that of a statement made by a person under a charge of crime, where an inducement is held out to him by some person in authority. The submission was made that the latter is rejected on the ground that it may not be founded on truth and that, even in those cases, the confession of a theft is received if the property can be found in consequence. Lord Denman, C. J., expressed agreement with this submission by remarking: “Because it leads to the inference that the party was not accusing himself falsely.”

261. *Pleas of the Crown*, volume 2, p. 658.

262. (1809) Russ. & Ry. 151

263. (1840) 9 C & P. 364

264. *R. v. St. Lawrence* (1949) O. R. 215; *R. v. Haase* (1964) 50 W.W.R. 321; *R. v. Wray* (1970) 11 D. L. R. (3d) 673

265. (1847) 2 Car. & Kir. 474

The rationale underlying position (e) is forcefully expressed by Wigmore<sup>266</sup>: "Confirmation in material points produces ample persuasion of the trustworthiness of the whole. It can hardly be supposed that, at certain parts, the possible fiction stopped and the truth began, and that by a marvellous coincidence the truthful parts are exactly those which a subsequent search (more or less controlled by chance) happened to confirm". The argument against this principle is that an induced confession may contain both true and false statements, and the confirmation of the true does not confirm the false.<sup>267</sup>

Cross concludes that "The only statement that can confidently be made on the basis of the English authorities is that facts discovered in consequence of inadmissible confessions may certainly be proved in evidence if their relevance can be established without resorting to any part of the confession, and the cases conflict so far as the admissibility of the part of the confession showing the accused's knowledge of those facts is concerned".<sup>268</sup>

The eleventh report of the Criminal Law Revision Committee recommended an express provision in the draft Bill annexed to it that the fact that evidence of a confession is inadmissible shall not affect the admissibility of any facts discovered as a result of the confession.<sup>269</sup> However, the Committee was against providing for the admissibility of any part of the confession. The Committee expressed the view that, in practice, it is common for the witness reporting discovery to say that he made it "as a result of something said by the accused". The majority thought it proper to allow this, although a minority dissented on the ground that the jury should not be informed indirectly of something of which it is thought that the interests of justice require that they should not be informed directly.<sup>270</sup>

It is a feature of the law of Sri Lanka that the only permissible inference against the accused is that he had knowledge of the whereabouts of the *corpus delicti* or other object discovered. It has been emphasized that, in the absence of evidence connecting the accused with the crime, the pointing out of the *corpus delicti* is not sufficient to constitute a *prima facie* case against him. Before the accused can be convicted on this footing, it must be shown that the only inference from the pointing out is that the accused participated in the commission of the offence.

266. *Evidence*, volume III, pages 338 - 339

267. Heydon, *op. cit.*, p. 228

268. R. Cross, *op. cit.*, p. 280

269. Paragraph 68

270. Paragraph 69.

The courts of Sri Lanka in their exposition of the principles which the trial judge must make clear to the jury in this regard, have adopted a similar approach. When it is proved at the trial that the accused had admitted to the police some knowledge concerning a weapon which is proved to have been used in the commission of an offence, the jury might quite naturally form the impression that the accused must in addition have admitted that he had in fact used the weapon. For a court to form and act on such an impression would amount to violation of a mandatory prohibition imposed by statute.<sup>271</sup> Thus, the Court of Criminal Appeal has set aside a conviction on the ground that the jury might have been induced as the result of an incomplete or erroneous direction given to them to use the fact of the accused's knowledge of the whereabouts of a club as indicative of an admission by him that he dealt a blow on the deceased with the club.<sup>272</sup>

The distinction between knowledge and participation, although sound in theory, may often become blurred in the minds of the jury. However emphatically the trial judge may endeavour to explain to the jury the distinction between these concepts and to point out the potential dangers of its relegation, knowledge on the part of the accused of the whereabouts of the *corpus delicti* or the weapon used in committing the crime cannot but impress the jury as a strong incriminating circumstance which, if left unexplained, will ordinarily give rise to an adverse inference.

Two matters arise for consideration under the law of Sri Lanka: (i) the question of admissibility; (ii) the question of probative value. The first matter involves application of the doctrine of severance, in that the trial judge must determine which portions of the accused's statement are within the purview of the inclusionary rule. The second aspect concerns the effect of the statement received in evidence, the purposes for which it could be used and the inferences to which it may legitimately give rise. The issue of admissibility is logically antecedent to that of probative value.

It is submitted that the law of Sri Lanka is open to criticism in one respect.

The doctrine of confirmation of confessions by subsequently discovered facts is statutorily confined in Sri Lanka to circumstances in which the accused person supplying the information is "in the custody of a police officer."

271. Evidence Ordinance, section 25

272. *R. v. Etin Singho* (1965) 69 NLR. 353; cf. *R. v. Krishnapillai* (1968) 74 NLR. 438; *R. v. Heen Banda* (1969) 75 N.L.R. 54

In several decided cases it has been held that a statement by the accused in consequence of which an object was discovered, could not be admitted in evidence if the accused, at the time of making the statement, was not in the custody of a police officer.<sup>273</sup> The imposition of this requirement as a condition of total or partial admissibility of the confession represents an anomaly. The formulation of the inclusionary rule in Sri Lanka is defective, in that it does not permit proof of information which might reasonably be regarded as more reliable for the very reason that it is given by a person not in police custody.

Finally, it may be noted that the words "fact discovered" have been interpreted judicially in a wide sense in Sri Lanka. In *R. v Piyadasa*<sup>274</sup> T. S. Fernando, J., observed that "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced. The 'fact discovered' embraces the place from which the object is produced and the knowledge of the accused as to this."<sup>275</sup> It is essential, however, that the "fact discovered" should have a direct bearing on the charge against the accused.<sup>276</sup> Although the courts of Sri Lanka were inclined to hold at one time that a person came within the scope of the word 'fact' in this context,<sup>277</sup> this view has now been rightly discarded.<sup>278</sup>

## 6. The Scope of Exclusionary Rules in Respect of Confessions

Several aspects of the law may be considered in turn:

(a) In the context of exclusionary rules relating to confessions in Sri Lanka, the term 'confession' includes not only the actual terms of an admission acknowledging or suggesting guilt but any evidence which, if accepted, would lead to the inference that the accused made such an admission. A Sri Lanka court has stated as a ground for excluding evidence tendered by the prosecution, that "The police officer's evidence was to the effect that a statement made by the accused differed from one made to the Magistrate and leads to an inference that the accused had made a confession."<sup>279</sup> In another case<sup>280</sup> Crown Counsel elicited from a police officer the fact that the accused came to the police station and made

273. *R. v. Sugathapala* (1967) 69 N.L.R. 457; *R. v. Jayasinghe* (1969) 71 N.L.R. 574; *Nallathamby v Muthukrishnan* (1970) 74 N.L.R. 95

274. (1967) 72 N. L. R. 434

275. At page. 438

276. *Nambiar v Fernando* (1925) 27 N. L. R. 404 at p. 405

277. *R. v. Sudahamma* (1924) 26 N. L. R. 220 at p. 221

278. *R. v. Tennekone Mudiyanselage Appuhamy* (1959) 60 N. L. R. 313 at p. 316.

279. *R. v. Kalubanda* (1912) 15 N. L. R. 422

280. *R. v. Obiyas Appuhamy* (1912) 15 N. L. R. 32

a statement, in consequence of which he was arrested. This evidence was held to have been improperly received on the ground that it clearly suggested that the statement volunteered was a confession.<sup>281</sup> The principle has been laid down authoritatively, for Sri Lankan law, that "Evidence of police officers, or questions in cross-examination and/or statements by prosecuting counsel, which operate to inform the Court or create the impression that the accused had made a statement admitting that he was the doer of the act charged, is inadmissible."<sup>282</sup>

The rationale underlying this rule is clear. "Evidence tending to suggest that an accused person must have admitted to a police officer that he had committed the act charged, must be excluded on the ground that to inform the jury that a confession has been made is as much an evil as to inform them of the contents of the confession".<sup>283</sup> Once the jury are informed that a confession had been made, the effect on their minds could hardly be different if the police officer is allowed to give evidence of what the accused had actually said.

(b) Where a confession is excluded by statutory provisions, the question arises whether the confession is merely inadmissible at the instance of the prosecution or whether the accused himself is prevented from proving the confession for some purpose of his own.

In Sri Lanka the view has been taken that confessions debarred by statute are tainted and that the prohibition against their reception in evidence is absolute.<sup>284</sup> Accordingly, a confession excluded by statute is inadmissible in evidence, whether it is elicited from a prosecution witness in examination-in-chief or in cross-examination by the defence. The correct test to be applied concerns not the manner in which evidence of the confession is placed before the court but the effect of such evidence.<sup>285</sup> Moreover, the circumstance that no objection was taken to the reception of the confession in evidence, is immaterial.<sup>286</sup>

(c) If an accused person, in the course of making a confession, makes statements which are not strictly confessional in character, can the latter statements be severed validly from the former and be proved against the accused?

281. *R. v. Batcho* (1955) 57 N. L. R. 100

282. *R. v. Anandagoda* (1960) 62 N. L. R. 241 at p. 252

283. *R. v. Anandagoda* (1960) 62 N. L. R. 241 at pp 245-246

284. *R. v. Kiriwasthu* (1939) 40 N. L. R. 289 at p. 292

285. *Justin Fernando v. Inspector of Police, Slave Island* (1945) 46 N. L. R. 158

286. *R. v. Seyadu* (1951) 53 N. L. R. 251 at p. 252

The better view is that severance is permissible, provided that (i) the latter statements are otherwise relevant and admissible<sup>287</sup> and (ii) in the context in which the statements relied on were made, they are demonstrably separable from the confessional portions, so that their contents may be made known without revealing indirectly the confessional character of the remaining parts.<sup>288</sup> However, this test should be applied cautiously, and if the court is left in doubt as to whether the confessional and the non-confessional statements can be considered independent of one another, the exclusion of the non-confessional statements, too, should be obligatory. However, the view has once<sup>289</sup> been expressed by the Court of Criminal Appeal in Sri Lanka that the doctrine of severance cannot be resorted to in this context and that no portion of a statement in the course of which an accused makes a confession to a police officer can be proved against the accused.

In regard to self-serving statements contained in a confession, English law adopts the principle that "What a prisoner says is not evidence unless the prosecution chooses to make it so, by using it as part of its case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner as well as against him".<sup>290</sup> This principle is supported by judicial authority in the Commonwealth.<sup>291</sup>

(d) In Sri Lanka a confession which is ruled out by statutory provisions is inadmissible as proof against the person making it, whether as substantive evidence or in order to show that he has contradicted himself.<sup>292</sup> The position in England is no different.

By contrast, the Supreme Court of the United States has held that a confession, inadmissible in the prosecution's case in chief, could be used to impeach the credibility of the accused's testimony at the trial if its trustworthiness were adequate.<sup>293</sup>

It is submitted that the attitude of English and Sri Lankan law is to be preferred to the American approach. It is obviously unrealistic to expect a jury with a confession before them, no matter how emphatically

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287. *R. v. Vasu* (1941) 27 C. L. W. 16

288. *R. v. Seyadu* (1951) 53 N.L.R. 251 at p. 254

289. *R. v. Abadda* (1963) 66 N.L.R. 397

290. *R. v. Higgins* (1829) 3 C. & P. 603 at p. 604 per Parker, B.

291. *R. v. Hughes* (1943) 1 D.L.R. 1; *R. v. Harris* (1946) 3 D.L.R. 520; *Donaldson v The Police* (1963) N.Z.L.R. 750

292. *R. v. Kiriwastu* (1939) 40 N.L.R. 289

293. *Harris v. New York* 401 U. S. 222 (1971)

they are directed that the confession must not be taken as true, not to draw the commonplace inference from an admission of guilt that the person making the admission is in fact guilty.

## 7. Policy Objectives of the Law Governing Confessions

Several approaches are possible to the formulation of a rationale for the exclusion of confessions in circumstances where they are considered inadmissible in England and Sri Lanka.

(a) Where undue pressures are shown to have been brought to bear on the mind of the accused, the probability that the accused would make a confession designed to placate the person receiving it, irrespective of its truth, is so great that the testimonial untrustworthiness, actual or potential, of the confession necessitates its exclusion.

(b) The peculiar vulnerability of an accused person in police custody or under interrogation by police officers, especially where the accused is inhibited by poverty, lack of education or other social, cultural or psychological factors, makes desirable the exclusion of confessions in order to deprive the prosecution of an unfair advantage.

(c) The doctrine against self-incrimination, which must be treated as a paramount objective of policy, is inconsistent with the reception of confessions in evidence.

(d) The refusal to act on confessions in judicial proceedings has the effect of discouraging oppressive or unscrupulous practices on the part of the police.

The assumption underlying rationale (a) is that the sole objection to the reception of confessions in evidence is the risk that they may turn out to be false in substance.<sup>294</sup> In keeping with this approach it may be asserted that, so long as the court is satisfied that the confession is true, not only is there no valid reason why the confession should not be let in but the confession represents the best evidence of the accused's guilt. According to this view, the concern of the law should be to discriminate between true and untrue confessions and to ensure that no impediment is imposed on the admission of a confession, once its truth is apparent.

294. This assumption is made in several English cases. See, for example, *R. v. Thomas* (1836) 7 C. & P. 345 at p. 346; *R. v. Garner* (1848) 1 Den C. C. 329 at p. 331; *R. v. Scott* (1856) Dears and Bell 47 at p. 58; *R. v. Mansfield* (1881) 14 Cox. C. C. 639 at p. 640; *R. v. Ovenell* (1967) 1 Q. B. 17 at p. 23

The basis of rationale (b) was significantly stronger at the turn of the century, when the Evidence Ordinance of Sri Lanka was enacted, than it is today. The growth of the Welfare State, with the resulting improvement in the quality of life, has reduced inequalities in many spheres including education and the distribution of social and cultural benefits. Many lawyers and criminologists query whether it is not opportune now to re-examine the scope of the protection conferred on accused persons by the law of procedure and evidence and to ascertain whether equilibrium should not appropriately be restored by making concessions to the prosecution. There is a growing body of informed opinion that many of the traditional rules of relevancy—especially in contexts like similar fact evidence, evidence of character and the opinion of experts—deprive the jury, without adequate justification, of the opportunity of considering the entirety of the logically relevant evidence in a case.

This approach has been adopted by the New South Wales Law Reform Commission. This Commission in a recent report proposes rules which will allow the courts to receive a much wider range of evidence than is permissible under the existing law and will make unnecessary much of the interruption of witnesses which is a feature of trials at present. The basic approach of the Commission has been to let the court have as much reasonably reliable evidence as possible, but at the same time to preserve the opportunity of testing evidence by cross-examination wherever it is practicable to do so.

The doctrine against self-incrimination, referred to at paragraph (c) above, is looked upon as a feature of “adversary”, as opposed to “inquisitorial”, systems of criminal justice. The English and Sri Lanka systems exemplify the former approach. The Supreme Court of the United States of America has described the privilege against self-incrimination as “one of our nation’s most cherished principles.”<sup>295</sup> Echoing a similar view, a Sri Lankan judge<sup>296</sup> has observed: “To my mind, it is implicit in the scheme of our law that here, as in England, once proceedings have been initiated against an accused person, he is placed in a special category separating him and others in a like situation from the generality of mankind until the verdict has been pronounced. The precarious position in which he stands entitles him at the same time to protection in certain respects, and this is the basis of the special rule

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295. *Miranda v. Arizona* (1966) 384 U. S. 436, per Warren, C. J.

96. Gratiaen J.

whereby he cannot be compelled or legally required to contribute to the proof of his alleged guilt by giving or providing, even indirectly, evidence against himself.<sup>297</sup>

The policy objective set out at (d) above, has received emphasis in the decided cases. The courts have been vigilant to exclude confessions obtained by the police by unfair means. This policy has been adopted deliberately to control the use of improper methods by the police. A Sri Lankan court has stated: "The object of the law is to make sure that a confession is really voluntary. . . It is in great part due to the desire to prevent harassing and oppression by the police."<sup>298</sup>

The crucial issue in this area is the question whether truth alone should be the criterion governing the admissibility of confessions in criminal proceedings. The Criminal Law Revision Committee in England has recommended that the law should be based entirely on the criterion of reliability. Statutory provisions in Victoria and New Zealand are founded on the same premise. The Victorian Evidence Act of 1928 provides that "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made."<sup>299</sup> The New Zealand provision<sup>300</sup> is similar, except that the phrase "in fact likely" has been substituted for the words "really calculated". The statutory position in these jurisdictions is that the involuntary character of a confession of guilt is, *per se*, not sufficient to warrant its rejection in evidence.<sup>301</sup>

However, the effect of judicial interpretation in these jurisdictions has been to discard truth as the sole and absolute test in respect of the admissibility of confessions. In New Zealand it has been held that the statutory provision does not govern the whole area of confessions, the provision being applicable only to cases of threats or promises but not to cases involving other violent procedures.<sup>302</sup> The High Court of Australia, on appeal from the Supreme Court of Victoria, has expressly held that "When a confession is tendered in evidence, its voluntary character must,

297. *de Mel v. Haniffa* (1952) 53 N. L. R. 433 at p. 438

298. *Inspector of Police v. Kanapathypillai* (1941) 42 N. L. R. 368 at pp 369-370

299. Section 141

300. Evidence Amendment Act, 1950, section 3

301. *R. v. Brown* (1887) 13 V. L. R. 469; *R. v. Kelly* (1921) V. L. R. 489; *Cornelius v. R.* (1936) Argus L. R. 519

302. *R. v. Gardner* (1932) N. Z. L. R. 1948

apart from section 141 of the Evidence Act, 1928, appear before it is admissible."<sup>303</sup> The effect of this construction of the statutory provisions is that where, but for a particular promise or threat, a confession would be voluntary, it is necessary for the judge to determine whether the promise or threat was really likely to produce an untrue admission of guilt, while other forms of pressure might induce confessions to which the statutes would not apply and which would be inadmissible because they are involuntary.<sup>304</sup> The remarkable feature of the case law in both Victoria and New Zealand is that, despite statutes which explicitly provide for the likelihood of truth as the criterion of admissibility of confessions obtained by threats or promises, an exclusionary discretion has been asserted effectively by the courts. The discretion may be exercised on grounds which are entirely independent of the criterion of truth.

It is submitted that a legal system which poses the question whether the actual confession is reliable or not, as test of admissibility of a confession, is unsatisfactory. It will be necessary, in accordance with this criterion, to assess the probable effect of the inducement on the particular accused and to decide whether the confession which was eventually made could be regarded as true. The investigation required for this purpose will extend to such subjective factors as the antecedents, the temperament, the social and educational background and the emotional idiosyncrasies of the accused.

The approach of the Supreme Court of South Australia in a recent case<sup>305</sup> is of some interest. One of the matters considered by the court was the validity of the assertion that aborigines, when questioned by police officers have a natural - almost compelling - desire to answer all questions put to them even when they comprehend intellectually that they do not have to answer. The court stated that, in such a case, the self-generated wish or decision to answer questions and to make a confession could not render unfair an interview that had, *ex hypothesi*, been conducted without impropriety and in circumstances which would not otherwise render it unfair to admit the statements or answer. However, in the court's opinion, such a self-generated wish or decision, when it is shown to have existed, is one of the circumstances of the case which would be taken into account by the trial judge together with all other evidence properly placed before him, when deciding in the exercise

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303. *Cornelius v. R.* (1936) 55 Commonwealth L. R. 235

304. Z. Cowen and P. B. Carter, *Essays on the Law of Evidence* (Oxford 1936), pages 53-54

305. *R. v. Williams* (1978) 14 S. A. S. R. 1

of his discretion whether to permit or exclude its reception. Thus, in some parts of the Commonwealth, courts have shown themselves inclined, in appropriate circumstances, to take subjective factors into account in determining the voluntariness of confessions. However, adoption of the truth of the actual confession as the applicable test, in such a manner as to dispense with the use of an objective standard, does not represent a satisfying solution.

The formulation of the exclusionary rule in Uganda is as follows: "A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any inducement, threat or promise calculated in the opinion of the court to cause an untrue confession to be made."<sup>306</sup> The objection to this mode of formulation of the applicable rule is that it allows scope for the argument that, even if the allegations of the accused that he was beaten or threatened are shown to be true, the accused must also prove that the beatings or threats were intended to cause an untrue confession to be made.

This difficulty arose, in fact, in a recent Ugandan case.<sup>307</sup> The accused was charged with murder and the prosecution sought to produce a confession allegedly made by him to a Magistrate. At the time the statement was recorded the accused informed the Magistrate that he had not been forced to make the statement. At his trial the accused testified that before he was taken to the Magistrate he had been in custody for eight days during which he had been subject to interrogation and beatings. He alleged that the confession was untrue and that he made it for fear of his life. Counsel for the State submitted that, even if the allegations of the accused were true, this was not sufficient to exclude the confession, and that the accused must prove that the beatings and threats were intended to cause an untrue confession to be made. The court, rejecting this submission, stated that the proper interpretation of the provision was that, where a confession is shown to have been caused by any inducement, threat or promise – that is, if it appears to the court to have been involuntary – it is inadmissible. However, the fact that the meaning contended for by counsel for the State is suggested by the form of words used in the statutory provision militates against its suitability and justifies the absence of this method of formulation of the exclusionary principle from the law of England and Sri Lanka.

306. Evidence Act, Cap. 43, section 24 as amended by Decree No. 25 of 1971.

307. *Uganda v Doyi Wabwire Kyeyo* (1976) H. C. B. 212.

In constructing a rationale for exclusionary doctrines applicable to confessions, the proper question, it is submitted, is not whether the actual confession is unreliable but whether the circumstances are likely to produce an unreliable confession. Indeed, it is significant that the English Criminal Law Revision Committee, while opting for reliability as the sole criterion, recommended that a confession should be excluded if there was "oppressive treatment of the accused" or a "threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof."<sup>308</sup> A test spelt out in these terms has a fundamentally objective character.

Broadly, the statutory provisions in Sri Lanka are consistent with this approach. Of the three exclusionary rules in regard to confessions embodied in the Evidence Ordinance of Sri Lanka,<sup>309</sup> the first<sup>310</sup> has a direct bearing on the criterion of reliability. The object of this prohibition is to rule out confessions which are caused by a threat, inducement or promise. There is a high degree of probability that a confession made in these circumstances will not be true.

In Sri Lanka the question whether a confession has been caused by an inducement, threat or promise, is determined by reference to an objective standard. A confession made in response to an exhortation by a police officer to "tell the truth without fear; one need not be afraid to speak the truth"<sup>311</sup> or to "tell the truth and get out of it"<sup>312</sup> has been held to fall within the purview of the statutory prohibition. A similar conclusion was reached in a case<sup>313</sup> where an employer remarked to his servant that he would like to know before the following morning where the stolen bags of cement were.

Several conclusions in regard to aspects of causation can be derived from an analysis of the Sri Lankan and English case law:

- (i) The interval of time which has elapsed between the exhortation by the person in authority and the making of the confession by the accused is a relevant consideration. In a case<sup>314</sup> where the interval was five hours, the confession was held admissible. On the other

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308. 11th Report, clause 2 (2)

309. Evidence Ordinance, sections 24, 25 and 26

310. Evidence Ordinance, section 24

311. *R. v. Havadiya* (1920) 21 N. L. R. 499

312. *R. v. Punchi Banda* (1942) 43 N. L. R. 569

313. *Inspector of Police v. Kanapathypillai* (1941) 42 N. L. R. 368

314. *ibid*

hand, when the interval was only forty five minutes<sup>315</sup> and, *a fortiori*, where there was no interval at all,<sup>316</sup> the confession was excluded. The governing principle is that, if the effect of coercion or undue pressure had dissipated altogether when the accused confessed, no taint attaches to the confession.

A similar principle emerges from the English cases. Where the prosecutor's wife said to the prisoner: "If you do not tell, I will send for a constable in the morning to take you to the Magistrate", and the prisoner did not say anything, but next morning, on being arrested, made a confession on his way to the Magistrate, the confession was held admissible.<sup>317</sup> The reason was that the inducement - namely, that the constable would not be sent for and that the prisoner would not be taken to the Magistrate - ceased when those events took place. In another case<sup>318</sup> a Magistrate, having told a prisoner that, if the latter would confess, he would use his influence to obtain a pardon for him, afterwards received a letter from the Secretary of State refusing the pardon, which letter the Magistrate communicated to the prisoner, the confession subsequently made was held admissible.<sup>319</sup> These cases are explicable on the footing that the effect of the original inducement had dissipated. With these decisions may be contrasted a case<sup>320</sup> where the prosecutor's wife said to the prisoner: "You shall be forgiven if you confess." The prisoner was then taken before a Magistrate, but discharged without having confessed. Afterwards she was re-arrested, and the constable told her in the presence of her mistress: "You are not bound to say anything, but if you do, your mistress will hear you". The confession was held inadmissible on the ground that the original inducement might be considered to have been revived by the mistress not dissenting from the constable's remark.<sup>321</sup> In this type of situation the original inducement could well be considered to have a continuing influence on the mind of the accused.

(ii) The presence of police officers at the time the confession is made, is inconclusive. Where a police constable was present only as the driver of a vehicle, the voluntary nature of the confession was held not to be affected.<sup>322</sup> In another case<sup>323</sup> it was urged on behalf of the

315. *R. v. Francis Appiah* (1940) 42 N.I.R. 553

316. See the case cited at footnote 18, *supra*

317. *R. v. Richards* (1842) 5 C. & P. 221

318. *R. v. Clewes* (1830) 4 C. & P. 221

319. See also *R. v. Bate* (1871) 11 Cox 686

320. *R. v. Hewitt* (1842) 1 Car & M. 534

321. See also *R. v. Doherty* (1874) 13 Cox 23; *R. v. Rue* 34 L. T. 400

322. *R. v. Karaly Muttiah* (1940) 41 N.L.R. 172

323. *R. v. Arthur Perera* (1956) 57 N.L.R. 313

accused that he was virtually in the custody of the police at the time he made the confession, because police officers were present in the vicinity and were constantly using the telephone in a passage having access to the room in which the confession was recorded. Nevertheless, the confession was considered voluntary. The governing consideration in these circumstances is the court's assessment of the effect which the presence of police officers can be expected to have had on the confessor's mind.

- (iii) A confession cannot be regarded as involuntary merely because it has been elicited in answer to questions which were put to the accused in a leading form or which assume his guilt.<sup>324</sup> Conversely, the mere fact that the confession was not made in answer to questions does not exclude the possibility of its having been made as the result of a threat or an exhortation to confess.<sup>325</sup>

The English courts have held that questioning, whether by the police<sup>326</sup> or by private persons<sup>327</sup> will not, as such, render a confession made in answer inadmissible. However, prolonged cross-examination will exclude confessions made in order to bring the ordeal to an end.<sup>328</sup> A policeman's observation: "I need to take a statement from you" directed to an accused person is insufficient to exclude a resulting confession.<sup>329</sup>

- (iv) The law of Sri Lanka requires that the inducement, threat or promise should be sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making the confession he would gain an advantage or avoid any evil in regard to the proceedings against him.<sup>330</sup>

Both subjective and objective criteria are involved in this requirement. The subjective criterion is inherent in the requirement that the grounds should appear reasonable to the accused. An objective standard is reflected in the reference to the court's opinion. The court should be satisfied that the accused genuinely believed that, in consequence of making the confession, he would acquire a benefit or avert a peril which, respectively, would otherwise not be available to him or would be visited upon him.

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324. *R. v. Goonewardene* (1943) 44 N.L.R. 189

325. *R. v. Amaris Appoo* (1895) 1 N.L.R. 209

326. *R. v. Bass* (1953) 1 Q. B. 680

327. *R. v. Wild* (1835) 1 Moo. C. C. 452

328. *R. v. Winkel* 76 J. P. 191

329. *R. v. Joyce* (1958) 1 W. L. R. 140

330. Evidence Ordinance, section 24

The second and third exclusionary rules relating to confessions, contained in the Evidence Ordinance of Sri Lanka, do not depend on the actual unreliability of a confession, since a confession made to a police officer or made while the accused is in police custody may well be true. However, in these circumstances, the pressures, direct or insidious, operating on the accused to make an admission of guilt are substantial enough to justify doubts as to the unreliability of the confession. Moreover, the reception in evidence of confessions obtained in these circumstances is repugnant to the principle against self-incrimination and, in particular, is in direct conflict with the object of discouraging unfair police practices.

The law of Sri Lanka adopts the criterion of truth in the generality of circumstances, but a special rule operates in respect of confessions made to police officers or made while the accused is in police custody. In these situations the statutory provisions applicable in Sri Lanka contain an absolute principle of exclusion, irrespective of the reliability or otherwise of the confession.

In contrast with the law of Victoria and New Zealand, the law of England and Sri Lanka does not require the reception of all confessions the truth of which admits of no reasonable doubt. The assumption is valid in both jurisdictions that a confession which is in all probability true may be excluded justifiably for other reasons of policy, such as the doctrine against self-incrimination and the need to impose a deterrent against objectionable police methods of investigation. This attitude is defensible on the basis of pragmatic considerations.

However, neither in England nor in Sri Lanka is the law characterized by complete internal consistency. The doctrine of confirmation by subsequently discovered facts finds expression, in slightly varying forms, in the law of both jurisdictions. There can be no doubt that the foundation of this doctrine is related exclusively to the criterion of reliability, in that the relevant part of the confession is admitted in these circumstances for no other reason than that its dependability is demonstrable. However, the inclusionary principle recognized by the law of both jurisdictions in this context is fundamentally at variance with the doctrine against self-incrimination and the deterrent against unfair police methods—considerations which form significant elements of the rationale underlying the statutory prohibitions against the use of confessions in defined contexts in both jurisdictions.

The practical effect of this combination of incompatible principles is anomalous. Where a police officer obtains a confession from an accused person, the confession standing by itself is rigidly excluded in Sri Lanka. However, if the police officer shows greater perseverance and, as a result of systematic questioning, extracts from the accused information which leads to the discovery of a fact, the exclusionary principle no longer operates and the protection ordinarily available to the accused is denied. It is clear that the effectiveness of the safeguards enshrined in the prohibition is vitiated by the scope of this qualification.

The salient difference between the structural framework of English law and Sri Lankan law is that, in the former system, the test of voluntariness is capable of universal application to confessions in criminal proceedings while, under the latter system, absolute rules of exclusion govern specific categories of confessions – namely, confessions to police officers and confessions made in police custody – without reference to the criteria of voluntariness and spontaneity.

The inclusionary rule is based directly on the test of truth, in that discovery of a fact in consequence of a statement made by the accused is an indispensable requirement for admission of the relevant part of the confession. However, adoption of the inclusionary rule by the law of both England and Sri Lanka may be assailed convincingly on the basis that it is the product of a conflict of policy objectives which leaves the law in an unsatisfactory condition. A confession which falls within the ambit of the doctrine of confirmation by subsequently discovered facts becomes admissible simply because of the truth of the confession. But other aspects of the law in both countries clearly reflect the assumption that, in specific contexts, there are good reasons for excluding confessions, even though their truth is incontrovertible. The observation has been made recently by the House of Lords that “Any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions.”<sup>331</sup>

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331. *Wong Kam - Ming v. R.* (1979) 2 W. L. R. 81 at p. 90, *per* Lord Hailsham of St. Maryleburne.

The strength of the proof that the confession is true in substance, therefore, does not render any the less valid the reasons for excluding the confession, since these reasons are wholly unrelated to the truth or otherwise of the confession.

The only difference between the two systems in this regard is that, while the law of Sri Lanka in unequivocal terms treats as admissible that part of the confession which relates distinctly to the discovery of the facts, English law, although admitting evidence of the fact discovered in consequence of the confession, has not yet settled finally the question whether it is only the accused's knowledge of the whereabouts of the fact discovered that can be referred to in evidence, or whether those portions of the confession which have a direct bearing on the discovery of the fact fall within the ambit of the inclusionary rule.